Through the Looking Glass:

Alice and the Constitutional Foundations of the Public Domain

Yochai Benkler

The White Rabbit

Alice Randall, an African American woman, was ordered by a government official not to publish her criticism of the romanticization of the Old South, at least not in the words she wanted to use. The official was not one of the many in Congress and the Administration who share the romantic view of the Confederacy. It was a federal judge in Atlanta who told Randall that she could not write her critique in the words she wanted to use—a judge enforcing copyright law. Randall is the author of a book named *The Wind Done Gone*. In it, she tells a story that takes off from *Gone with the Wind* from the perspective of Scarlet O'Hara's mulatto half-sister. In 2001, more than fifty years after Margaret Mitchell died, years after the original copyright for the book would have expired under the law as it was when Mitchell wrote it, a federal district judge ordered Randall's publisher not to publish the book. The Court of Appeal then overturned the injunction as a prior restraint.

Off with His Head!

Dmitry Sklyarov is a Russian programmer facing the prospect of an American jail because he wrote software that lets people read books that they are not allowed to read. Adobe Systems got the government to prosecute Sklyarov, because he made it possible for people to read documents that Adobe had encrypted so that they could only be read with its eBook reader program. The Digital Millennium Copyright Act (DMCA) makes it a criminal offense to provide software that lets people read digitized books with equipment that is not licensed to decrypt the books by the person who encrypts them. The DMCA does not exempt people who write software that readers can use to read books that they are perfectly privileged to read. It does not matter that the person who wants to read the book owns a copy of it. It does not matter that the person who wants to quote from a book or a DVD wants to do so in a manner that is permitted under copyright law, say, under the fair use doctrine. It does not even matter if the encrypted materials are in the public domain—like Alice in Wonderland.

Adobe wanted to demonstrate how useful its eBook reader would be to publishers who wanted to distribute their books digitally. So it took a digital book it could get for cheap—*Alice in Wonderland*. The original text was in the public domain. It had already been digitized and

proofread by volunteers working as part of the Gutenberg Project.[1] All that Adobe needed to do was take this free text, wrap it in its digital code, and *presto*, a cheap and effective demonstration of how its technology could help copyright owners. The cover sheet of the closed edition of *Alice* is immensely instructive. It explains to the readers that they may not give, lend, quote, or print out a copy of this public domain work.

What, exactly, is your problem?

Edward Felten is a computer scientist at Princeton. As he was preparing to publish a paper on encryption, he received a threatening letter from the Recording Industry Association of America (RIAA), telling him that publication of the paper constituted a violation of the DMCA.

The music industry had spent substantial sums on developing encryption for digital music distribution. In order to test the system before it actually entrusted music with this wrapper, the industry issued a public challenge, inviting all cryptographers to try to break the code. Felten succeeded in doing so, but did not continue to test his solutions because the industry required that, in order to continue testing, he sign a nondisclosure agreement. Felten is an academic, not a businessperson. He works to make knowledge public, not to keep it secret. He refused to sign the nondisclosure agreement, and prepared to publish his findings. As he did so, he received the RIAA's threatening letter. In response, he asked a federal district court to declare that publication of his findings was not a violation of the DMCA. The RIAA suddenly realized that trying to silence academic publication of a criticism of the weakness of its approach to encryption was not the best litigation stance, and moved to dismiss the case on the understanding that it would never *dream* of bringing suit.

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This paper does three things. First, it outlines the general framework of the relationship between two constitutional provisions—Article I, Section 8 clause 8 and the first amendment—and congress's power to regulate the use of information and cultural resources through the institutional form of exclusive private rights. Second, I explain why it is appropriate, as a normative matter, to require close judicial scrutiny of congressional use of this particular form of regulation. Third, I identify six specific pressure points currently bearing on this framework.

I. General Framework

[1] The Gutenberg Project is an effort involving hundreds of volunteers who find books no longer covered by copyright, scan them and proofread them so as to make them freely available on the web.

Copyright law is defined by constant tensions between exclusive private rights on the one hand and the freedom to read and express oneself as one wishes on the other hand. As a matter of economics, copyright represents a tension between the advantages of market-based production of information and cultural goods on the one hand and the intrinsic limitations of property rights as institutional solutions to the public goods problem of information production on the other hand. As a matter of political morality copyright supports democracy by creating a grounding for some types of expression that are independent of government patronage, but in doing so imposes substantial risks of harm to democracy and individual autonomy.[2]

These tensions are mediated by two constitutional provisions: Article I, Section 8, Clause 8 of the Constitution (the "Exclusive Rights Clause"),[3] and the first amendment's speech clause. Because of physical and economic characteristics, information and culture are, absent law to the contrary, largely available for anyone to use as and when they please. For good reason, and within

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[2] The past decade or so has seen a growing literature critical of exclusive private rights along these dimensions. An incomplete and largely idiosyncratic list includes James Boyle, A Politics of Intellectual Property: Environmentalism For the Net? 47 Duke L.J. 87 (1997). Julie Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 Stan. L. Rev. 1372 (2000); Rosemary J. Coombe, Objects of Property, Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, 69 Tex. L. Rev. 1853, (1991); Niva Elkin-Koren, Cyberlaw and Social Change: A Democratic Approach To Copyright Law In Cyberspace, 14 Cardozo Arts & Ent. L.J. 215, (1996); William Fisher, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659 (1988); David Lange, Cyberspace and its (Dis)Contents: The Future of an Illusion http://webserver.law.yale.edu/censor/lange.htm; Lawrence Lessig, Code and Other Laws of Cyberspace (1999); Jessica Litman, Reforming Information Law in Copyright's Image, 22 U. of Dayton L. Rev. 587 (1997); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125 (1993); Eben Moglen, Anarchism Triumphant (1999) http://emoglen.law.columbia.edu/publications/anarchism.html; Pamela Samuelson, Is Information Property? 34 Communications of the ACM 15 (1991).

[3] aka "the Patents and Copyrights Clause" or the "Intellectual Property Clause." I think "the Exclusive Rights Clause" is better for two reasons, one trivial, one significant. The trivial point is that neither the historical terms-of-art patents and copyrights—well known at the time of the constitution's drafting—nor the anachronistic term "intellectual property" is used in the clause. The clause actually refers to granting "exclusive rights." There are two functional reasons for shifting our usage to the original term from either of the more common terms. First, it is broader than the technical terms—implying that the clause is intended to govern all exclusive rights in information, not only those that formally are called patents or copyrights. This is clearly the correct understanding of the scope of the limitations the clause places on Congress when it enacts exclusive rights in information. Second, it is more neutral about the desirability of the rights enacted than the term "intellectual property." As we stand at the beginning of the 21st century, "property" has come to be seen as almost universally a beneficial institutional device to manage physical resources. By calling the cluster of regulations of information production and exchange that give private parties exclusive rights to control information "property," we endow it with an inevitability and desirability that are not justified by either economic theory or empirical evidence. Better to use the descriptive term—exclusive rights—and subject any given set of exclusive rights to a type of set of information or cultural goods to neutral inquiry as to whether these particular rights are in fact beneficial.

the constitutional constraints imposed by the two provisions, Congress may deviate from this baseline. No one expressed this more poetically than Thomas Jefferson:

> That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.[4]

The role of the Constitution is to delimit the contours of the grant of exclusive rights, and to constrain Congress's power to regulate, in pursuit of "the will and convenience of society," the use information and cultural materials.

The Exclusive Rights Clause operates as a threshold filter on congressional attempts to create exclusive private rights in information. Uncharacteristically for Article I, much of its text is involved not in granting power, but in delimiting it. The preamble takes a specific stand on the theory underlying American exclusive rights in information. Congress is empowered to grant exclusive rights "To promote the Progress of Science and the useful Arts." Ours is a self-consciously utilitarian, not moral, theory of such rights, consistent with the sentiments expressed in Jefferson's letters and those more generally prevalent at the time,[5] and has so been interpreted by the Supreme Court, which has held that "the primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"[6]

Over a century of unanimous Supreme Court opinions has interpreted the textual framework of the Exclusive Rights Clause as imposing a set of threshold attributes that a congressional law creating exclusive private rights in information must have in order to fall within the grant of Article I, sec. 8, cl. 8.[7] The *Trademark Cases*[8] were the first instance in which the Court held that the

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[4] Letter to Isaac McPherson, quoted in Graham v. John Deere Co, 383 U.S. 1, 8 (1966).

[5] Walterscheid.

[6] "It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." Harper & Row, 471 U.S., at 589 (dissenting opinion). It is, rather, "the essence of copyright," ibid., and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S.340, 349-50 (1991).

[7] Trade-Mark Cases, 100 U.S. 82 (1879); Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S.340, 346-47 (1991); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230-31 (1964); Compco Corp. v. Day-Brite

clause imposes affirmative constraints—in that case, originality—on Congress's power to create exclusive rights. Most clearly, the Court outlined the content of these constraints in *Graham v. John Deere Co.*:[9]

> The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of . . . useful Arts." This is the standard expressed in the Constitution and it may not be ignored.[10]

This reading of the clause—that requires that an exclusive right at least plausibly encourage information production, and that restrains such rights from removing, or burdening free access to materials already in the public domain—is one that the Court has since reaffirmed, again, unanimously.[11]

Furthermore, this constraint is substantive, not formal. It applies whenever Congress attempts to enact exclusive rights in information, whether or not it formally invokes the Exclusive Rights Clause. While Congress may regulate information markets under the Commerce Clause, it may do so by creating exclusive private rights in information in a way that circumvents the substantive limitations placed on its power by the Exclusive Rights Clause. This limitation requires that regulations enacted under the commerce power be different in kind, not only in subject matter and degree, from the exclusive property-like rights that are the subject of the Exclusive Rights

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Lighting, Inc., 376 U.S. 234, 237-38 (1964). For discussions of the limitations imposed by Artile I, Section 8, Clause 8 of the Constitution see Malla Pollack, The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment, 17 Cardozo Arts & Ent. L.J. 47, 50-54 (1999); Malla Pollack, Unconstitutional Incontestability?: The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp., 18 Seattle U. L. Rev. 259, 260 (1995); Theodore H. Davis, Jr., Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection, 80 Minn. L. Rev. 595, 596 (1996); David L. Lange, The Intellectual Property Clause in Contemporary Trademark Law: An Appreciation of Two Recent Essays and Some Thoughts About Why We Ought to Care, 59 Law & Contemp. Probs. 213, 232 (1996); Julie Cohen, Copyright and the Jurisprudence of Self-Help, 13 Berkeley Tech. L.J. 1089, 1130-35 (1998).

[8] Trade-Mark Cases, 100 U.S. 82 (1879).

[9] 383 U.S. 1 (1966).

[10] Id., at 5-6.

[11] Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346-47 (1991); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989).

Clause.[12] While this does not mean that every technical aspect of the Exclusive Rights Clause—like the fixation requirement—constrains Congress when it acts under the Commerce Clause, plainly "the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power"[13]—to wit, Exclusive Rights Clause.

The first amendment operates as an overlay—a second level of analysis of laws that pass the initial threshold filter imposed by the Exclusive Rights Clause of Article I. This analysis is more context sensitive, and requires for any given law that the government justify its regulation of the use of information and cultural goods in terms that are largely understood to be the "intermediate" level of scrutiny applied in *Turner Broadcasting System*. As was the case with the must carry rules at issue in *Turner*, copyright or similar laws are usually benign in intent—their purpose is to enhance, rather than constrain speech. They are also usually content neutral. First, they mark for regulation information or cultural materials on the basis of the history of their origination—the fact that they were "authored." Second, the form of the regulation is usually a prohibition on using the protected materials in a pre-stated variety of ways, absent permission of an identified party (the right holder). I say usually, because one of the current pressures on this general framework comes from the anti-device provision of the DMCA—under which a number of current cases, including the *Sklyarov*, *Felten*, and *DeCSS* cases, are being decided. That provision, as applied to software programmers, may better be described as taking the form of a content-based prohibition of using a particular professional language—code—to describe acts that the government deems particularly harmful—namely, decryption of specific kinds of encryption, those intended to protect copyrighted materials. For the moment I will put this problem aside. It is a thorny one, and I will return to it in the third part of this paper.

In order to pass muster under the *Turner* standard, the government must show that the statute (1) serves an important government interest (2) in a manner no more restrictive than necessary.[14] To fulfill the first prong of the test, it must be shown "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[15] The second prong requires that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests'".[16] This does not mean that in every case the specific use by the user, and the specific exclusive right claimed must

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[12] This difference in kind is nowhere more clearly articulated than in the differentiation provided by the Court between what kind of laws regulate commerce, and what kind of laws are in effect exclusive private rights. *Bonito Boats*, 489 U.S. at 157-59.

[13] United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (the Court there treated the fixation requirement as not central to the Exclusive Rights Clause, and hence held that the anti-bootlegging statute at issue there, which did not comply with the fixation requirement but was enacted under the Commerce Clause, was valid. Its decision implied that were another, central requirement of the Exclusive Rights Clause, like originality, implicated, the outcome would have been different).

[14] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

[15] *Id*., at 664.

[16] *Id*., at 662.

be considered afresh. This much we learned from *Harper & Row*.[17] But it also does not mean that the contours of copyright law—the exclusive rights, the various detailed political deals between stakeholders, are categorically exempt from first amendment review, as recently held by the Court of Appeal for the District of Columbia in *Eldred v. Reno*.[18] That position is untenable. All one need do is imagine Congress amending the Copyright Act so that the definition of "a work" will include the sentence, "except that nothing shall be deemed a work of authorship if the author is at the time of authorship, or was within the preceding 10 years, a Republican member of Congress." (And if the viewpoint bias makes the analogy too easy, imagine the same court of appeal confronted with a copyright law that adds to Section 107 "Any use of a work is categorically a fair use if the copyright in the work is held, directly or indirectly, by any person who holds the copyrights in more than 10% of the works in the same market as the work used."[19]) The Court in *Harper & Row* refused to create a special first amendment defense in copyright, "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use. . . ."[20] Nothing in that opinion suggests that if Congress were to abolish the idea expression distinction, or severely constrain "the latitude for scholarship and comment traditionally afforded by fair use," that its decision to do so would be exempt from first amendment review.

The *contours* of copyright law, the shape of the prohibitions, must be justifiable, under the *Turner* standard, as a proper regulation of the use of the information or cultural materials at stake. This test is not only applicable to changes in the law, but also to existing rights as they are applied to categories of cases. Whether or not in principle sampling for a few seconds or using part of a poster for a number of seconds in a television show is or is not a fair use, at least when a category of cases is being developed in caselaw, requires an analysis of whether fair use law, thus interpreted, would cohere with the first amendment.

II. Political Theory of the Constitutional Limitations on Exclusive Rights in Information

Why, one might ask, is it justified to have such extensive judicial review of the creation and definition of exclusive rights in information? At some level, the answer is provided by the stories at the beginning of this paper. Alice Randall's freedom to shatter a cultural icon that she sees as profoundly offensive, in the words and means she deems most effective, is no less compelling than Paul Cohen's right to criticize the draft using his particular locution. Dmitry Sklyarov's physical freedom is at stake, taken so that no one develops software that allows users and courts, rather than vendors, to decide when reading, quotation, and sharing of knowledge is privileged and fair and when it is not. These freedoms, as is Edward Felten's freedom to publish an academic paper, are

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[17] Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539 (1985).
[18] 239 F.3d 372 (2001).
[19] Compare the holding of another panel of the same court, within weeks of *Eldred*, in Time Warner Entertainment Co., L.P. v. FCC, 240 F3d. 1126 (2001), of which more will be said below.
[20] 471 U.S. at 560.

all central to our perceptions of freedom of expression. They are all crisp instances of the pressure that exclusive rights in information place on the freedom to read and express oneself as one deems best. The next few pages explain more abstractly how one might understand the implications of exclusive private rights in information on democracy and autonomy—values at the core not only of American constitutional protection of freedom of expression, but of expressive freedom in modern liberal democracies more generally.

A. Democracy

Democracy is a concept with many conceptions. It would be irresponsible to argue that there is one well-defined set of policies that "best serves democracy." Nonetheless, it is possible to outline the general direction in which strong or weak exclusive rights are likely to lead information production and exchange. From this one can develop a sense of whether one's conception of democracy leads to a preference for stronger or weaker protection on the basis that it serves, or disserves, democracy.

The most important effect of exclusive rights—in terms of democracy—is that they make institutional conditions for some approaches to organizing information production more conducive than to other approaches.[21] Individuals with a commercial focus to their work, and, more significantly, commercial organizations that build their business model around selling information and culture as finished goods, benefit from strong protection. Strong intellectual property rights are particularly helpful to organizations that own large inventories of existing information and cultural goods and integrate new production with inventory management. Strong intellectual property rights are particularly harmful to organizations and individuals who produce information without intending to sell their output as a good. This includes non-profit organizations like universities, various public interest organizations, or the government, as well as individuals who communicate with each other either as "amateurs" or as professionals driven by internal motivations, not by a profit motive. Less obviously, it also includes commercial organizations and individual professionals that operate on a service model, built on free access to information around which the service is rendered, rather than on a sale of information products model.

The conflict we see today over the scope of the public domain and the extent of exclusive private rights in information is a battle over the shape of the institutional ecology in which two very different modes of information production are competing. The first mode is the increasingly industrial model of production one sees in mass mediated culture. Disney, AOL Time-Warner, Viacom, and News Corporation are some of the most visible examples. These are increasingly large organizations, controlling ever-larger inventories, and integrating new production with reutilization and recycling of inventory, aiming to capture ever-larger audiences both nationally and

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[21] For a full statement see Benkler, Intellectual Property and the Organization of Information Production, *forthcoming Int'l Rev. L & Ec. 2002*, http://www.law.nyu.edu/benklery/IP&Organization.pdf

internationally. Less well known, and quite poorly understood, is the emergence on the Net of nonproprietary production as an increasingly important source of information and cultural materials. What has happened over the past decade on the Net is that the reach and scope of nonproprietary information production by nonprofit actors or by individuals—both amateur and professional—has expanded dramatically.

At a simple level, the Net has made it possible for traditional non-profit social organizations to extend their reach and scope. The factors of production that in the past were the greatest constraints on non-profit production were the capital cost of production and the cost of communication, or distribution. The declining costs of making and distributing a high quality video, or of collecting information and publishing reports are examples. These changes mean that information production on the public radio model, as well as production by other non-profit groups, can become increasingly salient in the information environment. This possibility must be central to our evaluation of the implications of strong rights to democracy.

More obscure, but potentially much more radical, is the emergence of nonproprietary peer production of information and culture. This model of production is increasingly recognized in the area of software development, thanks to the success of open source development projects like GNU/Linux or Apache. Less widely appreciated is that this highly decentralized model of non-proprietary peer production is expanding into other areas of information and culture more generally.[22] Tens of thousands of volunteers are mapping Mars craters faster than images of the planet's surface are produced. Almost forty thousand volunteers participate in creating the open directory project, the most comprehensive and highest quality human-judgment based directory of the Web. Thousands of peer reviewers and posters make contributions and write comments on Slashdot, one of the most sophisticated peer-produced news sites. Through groups like these, of individuals who come together to create and make sense of their information environment, peer-production has emerged as a serious antithesis to the industrial production model that dominated 20th century mass media.

When we think, therefore, of how strong we want copyright or other exclusive rights to information to be, in terms of democratic theory, the most important question to ask is what does democratic theory have to tell us about the choice between commercial proprietary production, increasingly organized in large enterprises, whose products are sold as finished goods, and nonproprietary production, both peer-production and professional production on a traditional model in the nonprofit sector.

The strongest democratic justifications of strong copyright serve what Baker has described as the elitist conception of democracy[23] and a version of republican conceptions of democracy.

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[22] For an inspired statement see Moglen, Anarchism Triumphant, http://www.firstmonday.dk/issues/issue4_8/moglen/. For a pedestrian economic explanation see Benkler, Coase's Penguin, or Linux and the Nature of the Firm (unpub ms 2001).

[23] C. Edwin Baker, The Media that Citizens Need, 147 U. Penn. L. Rev. 317 (1998).

Strong protection is least attractive when measured by its effect on liberal conceptions of democracy—whether one holds some version of a pluralist conception, or a liberal, rather than republican, discourse-centered conception of democracy.[24] Again, it is unlikely that conceptions of democracy can be described in pure one dimensional terms, but one's position on democracy and exclusive private rights in information ought be informed by the extent to which one considers one or another of these ideal-type conceptions of democracy as playing a greater role in one's understanding of how democracy is best conceived.

The baseline argument from democracy in favor of strong rights is that dependence on government largesse or patronage tends to require authors, media, and others to be solicitous to those who pay the piper. What exclusive rights do is create a basis in the market for expression, so that a class of professional writers and creators can be sustained not based on the decisions of government officials or patrons of the arts, but on the popular support of any non-trivial segment of the consumer market for information and cultural products. Copyright also provides incentives for creators to write more, and thereby enrich the information universe within which a democracy functions.[25]

There are two weaknesses to this argument. First, markets for media products and information are rife with market failures that mean that they will not actually reflect the political views of the constituency.[26] Second, strong exclusive rights tend to commercialize, concentrate, and, to an extent, homogenize the information produced.[27] They aid information-as-goods vendors by raising the costs of, and potentially squelching, noncommercial discourse.

The argument for the importance of market-based production must therefore not only prefer market-based production to government-sponsored production, perhaps an easy choice for some (though, comparing network television news and magazines, whether national or local, to public television and radio should make one less than sanguine even about this claim), but also prefer market-based production to peer-production and independent nonprofit production. This requires the argument to take on a more explicitly elitist conception of democracy. "True" democracy—the participatory debate of all with all—is a chimera. Large companies, government officials, and other repeat players largely dominate the polity. The role of copyright is to create and sustain a large, powerful, well funded watchdog in this system, capable of being sufficiently independent thanks to the market that it can participate in this democracy of titans as an equal, criticizing the excesses of

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[24] This latter is a conception Baker called "complex democracy." One might think of it as vaguely Habermasian, in the sense that it is discourse-centered but fundamentally liberal—centered on the participating agents—rather than communitarian, or republican, centered on claims of the collectivity to independent weight in political morality.

[25] See Neil Netanel, Copyright and A Democratic Civil Society, 106 Yale L.J. 283, (1996); Paul Goldstein, Copyright's Highway, From Gutenberg to the Celestial Jukebox (1994).

[26] C. Edwin Baker, Giving the Audience What It Wants, 58 Ohio St. L.J. 311 (1997).

[27] Benkler, IP & the Organization of Information Production, *supra*.

both government and the corporate world.[28] This conception has a good pedigree in the press clause focus on the fourth estate, and is not implausible if it accurately describes the polity. elitist argument has two primary weaknesses. First, it is unattractive to anyone who holds a more substantive, less cynical conception of democracy. If democracy means something more than an oligarchy of large market actors interacting with government bureaucrats, watched by a large commercial press, with occasional elections for the masses to select from among the elites who will run the government, then this argument in favor of strong rights is insufficient to justify a preference for strong exclusive rights in information. Second, the argument fails to consider the rise of peer production of information thanks to the economies created by low-cost computers and fast, ubiquitous network connections. The capacity of constituents to talk to each other as opposed to receiving the wisdom of those anointed by the television networks is profoundly important if one sees democracy as being about active engagement in discourse, rather than about passive selection from an exogenously-defined slate of candidates, much like the selection of cereal in the supermarket. One need only run a search request on Google and then follow the variety of individuals and organization making information available that responds to the request, whether for free or for a fee, to see that a conception that focuses purely on large scale industrial production of information is too heavily committed to the 20th century model production by a few corporations transmitting to millions of passive consumers. Even without resorting to a more aspiring conception of democracy, it is not at all clear that thousands or millions of networked peers will not do as good a job as, if not better than, a few hundred professional reporters or commentators can do. An efficient system that allows individuals to report what they see, to blow the whistle, and to collect and comment on information globally, supplemented by a combination of publicly funded and advertising-supported (rather than property-based) professional media may well be superior to a more concentrated and commercial system, occupied by a small number of media companies whose business model is based on sale of access to their products.

This, however, brings up a second line of defense of concentrated commercial production, one that is rooted in a particular, nation-state focused version of a "republican" conception of democracy, which values polity-wide common discourse towards reaching a conception of *the* common good as the primary modality of democracy. This is only a somewhat unfair (because oversimplified) description of Cass Sunstein's primary complaint in *Republic.com*.[29] Sunstein warns us of the dangers of having too widely distributed an information production system, one where every person can find whatever information he or she wants, and filter out everything else. This, the argument goes, leads to a loss of common culture, and with it a loss of the possibility of a common discourse necessary for a polity to function well. Moreover, Sunstein argues, individuals who talk only to like minded people tend to reach more extreme positions and to block out counter arguments, rendering the possibility of a politics of deliberation on the common good harder to achieve.

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[28] Neil W. Netanel, Market Hierarchy and Copyright in our System of Free Expression, 53 Vanderbilt L. Rev. 1879 (2000).

[29] Cass Sunstein, Republic.com (2001).

The aspect of the argument most relevant to the comparison of widely distributed information production versus concentrated commercial production is the claim that what he calls "general interest intermediaries" form the common experiences and knowledge necessary for engaged discourse. This argument has a number of limitations, both internal to "republican" conceptions and as a function of the limitations of that conception as a description of what one would consider valuable in a democracy.

Internally, there are two important limitations to the argument based on maintaining a common culture and discourse. First, it assumes that the relevant political community is the same community whose contours are defined by the media market. Largely, this assumes national media outlets and that the most relevant polity is the nation state. It is not implausible, however, that within republican conceptions it is not the state that is the most important unit, but the engaged polity. If, for example, the city rather than the nation is the level at which engaged politics can occur, then some republican theorists would locate power where the political action is, rather than attempt to structure engagement so that it fits some other stated level of governance.[30] More generally, if the Net permits engaged politics in civic groups, interest groups, communities of interest, rather than national boundaries, then supporting that engagement at the "local" level should be a concern of republican democracy. In some sense, the attempts to make ICANN into a representative, open, deliberative Internet governance forum is the kind of thing one might imagine developing out of such a republican view of the discourse actually occurring on the Net. It is not at all clear that a commitment to engaged politics requires burdening local discourses so as to secure the revenue streams of national media giants, on which one relies to sustain nation-wide common discourse.

This leads to the second internal criticism of this particular republican defense of strong copyright. Relying on a set of actors to play a particularly large role in defining the common agenda and culture is only acceptable if these actors are "virtuous" in the republican sense—that is actually setting the agenda and the common culture with reference to the common good. The concentration one gets from exclusive-rights based commercial producers is unlikely to do so for two reasons.

First, Sunstein's conception of the relationships of individuals to the information production and exchange system is too passive, too limited in its view of individuals as consumers in the market. What his picture does not consider is a diversity of views and inputs available to individuals not because someone decided to sell them something in a finely sliced market segment (the segmentation he sees as occurring and embodied in Negroponte's trope, the Daily Me), but because they themselves participated in developing and expressing a viewpoint. That is precisely the type of productive relationship to the information flow in one's polity that peer-production facilitates while proprietary production squelches. It is in these yeoman speakers that republican democracy thrives.

Second, a common culture is only good for a democracy (within the republican conception) if it is made of materials conducive to making individuals informed and engaged citizens. It is crucial

[30] Gerald Frug, The City As a Legal Concept, 93 Harv. L. Rev. 1059 (1980).

first to see what the large speakers are saying before one can tell whether they help or harm discourse. There are two distinct types of concern in this category. First there is what one might call the Berlusconi effect. The owners of large media that occupy center-stage in creating the common culture can capture a disproportionate share of political power, undermining, rather than serving, democracy. Whether this effect is worth the creation of "common culture" is questionable, unless one has a particularly naïve view of the benign nature of media barons. Programs like the Jerry Springer Show or Baywatch, or even the cheap network television news capture the second type of answer. Market actors are supported by advertising and direct revenues. To gain these, they will offer materials that the most people, on a national and international level, will buy. There is no particular reason to think that this fare will be particularly conducive to an engaged polity; quite the contrary. Moreover, an information good is particularly valuable *as a good* requiring property protection if it is not ephemeral. Programming that is most valuable to democratic discourse—ephemeral news, analysis of current affairs—is the type of information that least benefits from exclusive rights even when produced commercially.

Widely distributed and noncommercial production strategies—those best characterized by the emerging properties of peer production on the Net—are particularly attractive from the perspective of liberal conceptions of democracy. This includes both pluralist conceptions and discourse-focused substantive conceptions that root the value of discourse in individuals rather than an independent valuation of "the common good". By "pluralist" I mean conceptions that accept as given the possibility that some people's interests will be fundamentally and irreconcilably opposed, and aim at a polity that will allow people to express their interests, fight over them politically, and implement them in law subject to constraints that allow the losers in the political process sufficient freedom from coercion to remain committed to the democratic polity rather than trying to resist it.[31] Liberal (as opposed to republican or communitarian) discourse oriented conceptions of democracy fall largely in a cluster that can also be termed vaguely Habermasian. The idea here is that democracy entails engaged discourse by individuals, and draws the legitimacy of its sovereignty from maintaining appropriate conditions to allow people to engage in discourse that is fair and open. It differs from the pluralist conception in that it assumes the possibility of the emergence of common values through dialogue among participants, and sees such discourse, rather than the clearance of pre-defined conflicting values in peaceful co-existence, as the core of democracy. Both these conceptions, however, value the possibility of discourse not only, or even primarily, on a society-wide basis, but also importantly in smaller settings, even among like-minded people, working to clarify and develop a full conception of the values they hold, as well as the ability to express these views well. The capacity of individuals in small and large groups to come together to discuss their interests is central to a well functioning democracy under both these liberal conceptions. And the capacity of non-proprietary production or service-based provision of the platforms over which individuals and groups "meet" to engage in dialogue and collective self-definition becomes central to the democratic enterprise. It, rather than the generation of a "common culture" to be received

[31] Most obviously, this refers to John Rawls, Political Liberalism (1993).

by individuals, becomes the most important mode of information production. An important caveat here is that if, as Sunstein claims, individuals become more polarized and less willing to listen and engage in discourse when they talk to like minded people, then this conception of discourse-centered democracy, not only the nationwide republican version, will be undermined by discourse occurring solely at the level of small groups.

The point of this discussion is not, of course, to offer an exhaustive democratic theory of communications. The point is to outline the considerations and concerns regarding democracy that can be seen as involved in decisions about stronger or weaker exclusive private rights. The point here is that to the extent one values active, engaged individual participation in defining and expressing political values in a polity as central to the democratic enterprise, one should prefer to strengthen peer-based models of information production and exchange, even if this requires policies that weaken proprietary production based on a sale of goods model.

B. Autonomy

Autonomy too is a concept admitting of many conceptions, some quite vigorously opposed to others. In the main, conceptions of autonomy can be divided into two camps, formal, or as Fallon described them, ascriptive, and substantive, or descriptive.[32] "Ascriptive" refers to those conceptions that view autonomy as a characteristic and capacity ascribed to human subjects as an assumption of liberal law making. As Post puts it, the nature of "structures of social authority" will depend on whether they treat the object of regulation as individuals who are autonomous or not.[33] "From the point of view of the designer of the structure, therefore, the presence of absence of autonomy functions as an axiomatic and foundational principle."[34] Those who adhere to an ascriptive conception assume the presence of autonomy as a foundational principle, not as a proper subject for institutional manipulation. Therefore it is also "formal" in that it operates as an analytic constraint on law making, rather than substantive, or concerned with identifying and affecting the actual condition of autonomy of individuals. Substantive, or descriptive conceptions of autonomy, locate individual autonomy within the actual constraints, both internal and external, that real human beings live with. They see autonomy as a capacity and a condition admitting of degree, which is partly a function of, rather than an assumption underlying, institutional structures. It functions not as a formal analytic constraint on policymaking, but as a substantive goal to be attained by policy. In this framework, achieving, preserving, and improving the autonomy of actual individuals is a proper, for some the primary, object of liberal institutional design.

Elsewhere I have attempted to offer a specific set of practical guidelines for autonomy-loving institutional design in the area of information policy that is neutral as among these competing

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[32] Richard H. Fallon, Two Senses of Autonomy, 46 Stan. L. Rev. 875 (1994)

[33] Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109, 1131 (1993).

[34] *Id*..

conceptions.[35] While, I derive the policy guidelines from a substantive conception of autonomy, the operative design principles are two that cannot offend even those who hold a purely ascriptive or formal conception of autonomy.

First, law or policy that systematically and drastically reduces the information available to large numbers of, or defined classes of, individuals in a society, undermines autonomy. "Reduces" has both a quantitative and a qualitative dimension. The quantitative dimension is largely irrelevant in a modern liberal state, and is more relevant to describe totalitarian efforts to control people's lives by severely restricting information flows to them. The qualitative dimension is still very much relevant even in the most liberal of democracies, and involves the availability of information about non-mainstream or critical life options. The idea here is that in order for an individual to be autonomous, she must play a substantial role in defining her life plan. Where the range of options for how her life could go is largely congruent with the range of behaviors followed by everyone else in the mainstream of her society, the opportunity to make that life her own, as opposed to simply the life she leads as part of a herd, is diminished. It is the presence of knowledge about, and opportunity for, unconventional life choices that an individual can make any life plan, including the most conventional, her autonomously selected own.

Second, law that systematically gives one person or class of people control over the information flows that make up the information environment within which others live is a law that suffers an autonomy deficit. To the extent that a law increases the opportunities for one person to manipulate the information flows to another so as to make that other hue more closely to a life plan set by the manipulator, to that extent the law is violating the autonomy of the person whose information is so manipulated.

The central characteristic of both these design principles is that they are decidedly agnostic about whether the immediate source of constraint on an individual's autonomy is a government agent or not. The primary focus here is on the relative role an individual plays in defining and pursuing his own life plan, irrespective of the source of constraint. Whether the manipulator is the state or not, or whether it is state law or corporate policy that restricts information about the range of available life options is irrelevant from the perspective of autonomy. Some of the most fruitful discussions of autonomy have, for example, occurred with regard to the physician-patient relationship, where the government is nowhere to be seen. This is because autonomy is a distinctly personal and humanistic value.[36] It relates to a capacity or condition of an individual*qua* individual, not as a citizen of a state or constituent of a community. It is affected by all constraints placed on that individual, not purely, or always most importantly, those placed by the state. The state-centered focus of legal analysis enters, in an evaluation of autonomy, only at the level of selecting for inquiry from among the many potential actions that affect autonomy. A legal or constitutional (as opposed to general moral)

[35] Siren Songs and Amish Children: Autonomy, Information, and Law, 76 NYU L. Rev. 23 (2001).

[36] By humanistic I mean to emphasize that it is a value that places the human being at the center of moral gravity, rather than any external supraindividual being—like god or community.

inquiry into autonomy is concerned with *laws* that affect the relative role individuals have in selecting and pursuing a life plan. But whether those laws directly restrict autonomy, or indirectly do so by, for example, placing one non-government person in the position to control the life of another, is irrelevant to the question of whether those laws restrict autonomy.

The practical implication of all this is that there is an area of overlap between the concerns of democracy—at least a wide range of liberal versions of democracy—and those of autonomy. A widely dispersed system of information production, which produces a wide range of diverse information about and representations of how life can be, serves autonomy in the first dimension just as it serves robust democratic discourse. Furthermore, large-scale commercial media that occupy most of the channels of communication to and from an individual, and control most of the cultural raw materials from which expression is made, have substantial power to shape the information flows to, and the perception and valuation of alternative life choices by, many individuals. An Internet-like system of news and cultural production, operating with weak property rights, dissipates this power, and structures the interaction of individuals with the information flows around them in a less externally controlled pattern.

There are, in addition, aspects of autonomy that are directly tied to the emergence of peer-production, but these are more closely associated with a substantive, or descriptive (rather than formal or ascriptive), conception of autonomy. The emergence of peer-production as an economic—and ultimately social—transformation represents, most importantly, a change in the menu of options for being productive in the information economy. In the atoms economy we settled more or less on two modes of making production decisions. The first was the market. The second was hierarchy (whether in managerial firms or government-owned enterprise). Coase's *Nature of the Firm* taught us that markets best coordinated some economic activities, while managers better organized others. The result was that most individuals lived their productive life as part of corporate organizations, with relatively limited control over how, what, or when they produced, and these organizations, in turn, interacted with each other through a combination of markets and hierarchy. Consumption was strictly separated from production for most people, and was largely devoted to receipt of finished goods, not to creative utilization of materials to shape one's own environment. What is emerging in the information economy is a model of peer-production—where individuals communicate with each other about what projects are worthwhile pursuing, who might want to take them up, and share their products in an economy of gifts, reputation, and relationally-based rewards. Consumption and production are integrated, not separated, so that each individual is a "user," rather than either purely a "producer" or a "consumer".

From the perspective of "autonomy" this means that there are two enormously important chunks of life during which individuals can play a larger role in defining how their time is spent. On the production side, this is a dimension of autonomy that occupied much of the "third way" literature that emerged in the 1980s, from Piore and Sable's *Second Industrial Divide* to Unger's *False Necessity*. It is mirrored on the consumption side by the shift to "user" from consumer. Because

this is an attribute of autonomy that is not necessarily shared across conceptions of autonomy, I have not included it as a core consideration in thinking about autonomy and information policy for purposes of analyzing the liberal constitutional constraints on the creation of exclusive private rights in information and cultural materials. But as background, for those who do believe that autonomy is affected by how much of one's day and what range of activities are more or less under the control of the individual, peer production should be a valued—from the perspective of autonomy—social and economic phenomenon; a phenomenon whose facilitation should be the object of policymakers concerned with autonomy.

There are two important concerns regarding the claim that autonomy is served by weak exclusive rights that lead to decentralized information production.

First, there is the information overload complaint. Wide distribution of the capacity to produce information leads to the generation of a tremendous amount of information of varying degrees of quality. An agent who constantly needs to sift through mounds of data just to make sense of the world is left exhausted and incapable of making a decision, rather than empowered to control his own life.

There are two reasons why the concern with information overload does not suggest a retreat from the limited design principles I propose. First, the fact that information overload is more of a potential problem with a widely distributed information production system than with a concentrated one does not mean that a concentrated one will be better from the perspective of autonomy. If the "filter" that reduces the amount of information available to an individual is perfectly aligned with the interests of the individual in being autonomous, that might be the case. But deviations from this ideal state take us towards the situation where the filter controls the life of the recipient. The more we see the mechanism of reducing the amount of information and its organization through a relevance and accreditation algorithm as controlled by a third party with an agenda of its own, the more the price paid for reducing information by concentrating the information production function becomes unacceptable. Second, there are increasingly sophisticated mechanisms to allow individuals to reduce the amount of information they receive to a manageable level without abdicating control of one's life to Berlusconi or Murdoch. There are technical mechanisms that can be customized and sent out to describe to an individual the information environment according to parameters the individual sets. (These are some of the same mechanisms that Sunstein decries as harming the public sphere.) Furthermore, relevance and accreditation themselves are being produced on a peer-production model, as one sees in a wide range of sites, like the Open Directory Project, Slashdot, (some aspects of) Google, Everything2.com and many others. As these mechanisms for common, non-proprietary production of the relevance and accreditation function improve, these functions will be available to individuals to manage the universe of diverse information available to them without subjecting themselves to the power of others to the point of surrendering their autonomy.

Second, specifically with regard to exclusive private rights in information, there is an argument that autonomy, or some conception of individual freedom, actually supports, rather than

criticizes, exclusive private rights. This is largely the argument underlying European moral rights. Perhaps, goes this argument, there is some "cost" in terms of autonomy from the creation of exclusive rights to control information and cultural materials, but there are also strong autonomy-based claims to such exclusive rights. This article is *mine* in the deep moral sense that it is an external reflection of my intellectual will, and that it in some sense is an externalization of my persona, my identity. It is much more *me* than many physical things that belong to me, and, at least on a Hegelian conception of property, I have a very strong claim to exclusive control over it as the embodiment of my will, the creation of my personality.[37]

Initially, it should be understood that such an argument can be based only a substantive, or descriptive conception of autonomy, not on a formal, or ascriptive conception of autonomy. Under a formal conception, law treats individuals as having the capacity for autonomy independent of, or prior to, law, and designs law accordingly. Autonomy under this conception cannot be a function of the law that gives exclusive rights. People are autonomous whether or not you grant them such exclusive rights. And there is nothing about formal recognition of individuals' capacity for autonomy that requires that law prohibit some people from reading, viewing, or reworking cultural materials that they, as a practical matter, can read, view, or rework, so that other people can successfully pursue their plans to make money from selling permission to read, view, or rework.[38] An autonomy based argument in favor of exclusive rights must therefore rely on some substantive conception of autonomy, one that sees autonomy as in some important measure a function of, and dependant on the legal framework within which individuals live, rather than as an axiomatic presupposition to its design. This is not to say that such an argument is improper, in particular given that aspects of my own argument rely on a substantive conception of autonomy. But it does weaken the appeal of this argument as a criticism of autonomy-oriented policy design principles that are intentionally limited to those that can be defended on grounds neutral as between these two basic conceptions of autonomy.

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[37] For the most complete statement of the Hegelian property theory underlying intellectual property see Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287 (1988).

[38] This description does not undermine the acceptability of my design principles to a formal conception of autonomy. The formal conception will not accept law designed to enhance or facilitate autonomy of persons. Indeed, it does not acknowledge the coherence of such an enterprise. But a formal conception has no objections to a legal design principle that constrains law from being shaped so as to limit the information flows to already autonomous individuals, in a way that either limits the options they see too much, or that gives the controller of information flows power to manipulate the autonomous subject by selectively revealing and concealing information. A substantive conception of autonomy would treat such laws as "reducing" the autonomy of the agent, while a formal conception might treat them as "violating" the agent's autonomy. The congruence between these conceptions in their treatment of the policy design principles is not analytical, but practical. I am not claiming to have found a philosophers' stone. Only that analysis of specific policy proposals can adopt as a self-constraining device a focus on finding policies that are "autonomy loving" under either conceptions. The reason to do so is that those policies are an area of practical agreement among autonomy lovers, and can be adopted to enhance autonomy without a need to solve more or less immutable disputes about the nature of human agency.

Substantively, there are two types of answers to the argument from the moral claims of the author. The first, to which I will return, is that this argument is irrelevant whenever the owner of the copyright is a corporation. Works for hire, complex multi-participant works like films movies studios produce, works otherwise assigned to corporations are no longer the expression of autonomy, but, indeed, represent an alienation of the connection between the author and the work. It is precisely for this reason that countries with strong moral rights traditions do not recognize work for hire or alienation of the moral rights (as opposed to the commercial exploitation rights). Treating corporations as legal persons may be a very useful legal construct for organizing human production, but that does not make corporations into agents with independent moral claims. Since for many cases the claimant is a corporate owner of rights, not an individual author, the moral claims in favor of exclusive rights are weak.

The second answer is that autonomy does not support the actual exclusive rights we have—which are almost completely focused on commodification and alienation—but, if at all, it supports rights that we do not recognize in the United States—inalienable rights to attribution and control over integrity of the work. The Hegelian defense of intellectual property is based on a notion that individual will expresses itself and embodies the person in things. The strongest rights derived from this notion are rights to be associated with the expression, and rights to maintain its integrity in the form in which a person has expressed their personality in it. The former requirement—attribution—has to do with the sense that the value of the thing as an expression of self is in its being an expression of a particular self—its author—and not a fungible expression of human creativity as a general category. The latter requirement—integrity—has to do with respect for the thing as a unique expression of self, and requires that the individual be able to control that expression, because its alteration, and in particular its alteration inconsistent with the will of the author, alienates the expression from the person and undermines the capacity of the person to be expressed and embodied in the intellectual creation. This is why European "moral rights" include rights of attribution and integrity that resist removal of the actual author from future control over his or her work. In the United States, quite to the contrary, such practices as work for hire and relinquishment of authorial control are perfectly legal. American exclusive rights are focused on enabling and facilitating the alienation and economic exploitation of covered works, not on giving authors inalienable rights to attribution and control over the integrity of the work. The moment of alienation is the weakest point of the Hegelian defense of property. At that point one person parts with the thing that previously embodied his will, handing it over to the property of another, who acquires it as part of her plans to embody *her* will in the thing. Continued control after alienation would subject the latter to the will of the former. Hegelian intellectual property theory then has to fall back on some instrumental explanation to sustain support for alienability of the commodity aspects of the work, while requiring inalienability of the moral claims.[39]

[39] Hughes, *supra*, 346-50.

Commodification and alienation of my work—the treatment of it as a thing alienable from me and exchangeable for money through a market[40]—is an act of separation of the thing from what is uniquely mine, and its instantiation in a fungible commodity. That is not to say that it is morally wrong of me to alienate my work. But when I do so I am treating those aspects of the work that I am selling as a commodity, whose fungible remuneration is useful to me, but is not an expression of me. Certainly, when the entire right is alienated, as when an author sells all rights to the work to the publisher, what has happened is alienation, not embodiment. And where copies are sold, and the right protecting the market in copies is a prohibition on selling copies, each copy is a thing that does not embody the self, and which is instead a thing through which the reader is attempting to embody him or herself. Hughes argued in favor of treating the right to control copying as nonetheless a personality-based right, by claiming that by paying me money readers are recognizing my personality, while those who do not pay for copies no more recognize the personality embodied in the work than a trespasser recognizes the property of the land owner.[41]

But a company that invests some of its excess cash in buying art based on professional advice as to what will appreciate in value is not "recognizing the personality of the artist," while the fans passing bootleg tapes are expressing a complete association between the artistic expression and the artist, and are expressing adoration of the artist's personality as embodied in the art. To hold otherwise is to be a "fetishist of little green paper."[42] Failure to pay for the commodity or for its utilization largely in the form in which it was commoditized is, at most, an interference with the artists' success in commoditizing her work. If commoditizing her work is her life plan, then they are interferences with her *well being* as an autonomous agent, constituted by her success in pursuing her autonomously chosen life plan.[43] But they are not interferences with the thing as an expression of her personality and are not interferences with her autonomy—her capacity to express herself in the world through the manipulation of ideas and symbolic representations. On the contrary, it is when one interjects a right to commoditize against someone else who uses materials one authored as part of the materials with which they choose to express *their* autonomous view of the world, that autonomy is offended.

A perfect example of this is open source licensing or free software licenses like GNU GPL—which secure to the original author rights of attribution and integrity,[44] and eschew commercial exploitation rights in a form that prevents downstream users from taking and using what prior authors wrote as part of their own new expression. An open source license is an implementation of the autonomy of the authors that largely preserves the expressive autonomy of users. It is autonomy enhancing on both sides of the license. In this such licenses are directly

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[40] I rely here on Radin's definition from Margaret Jane Radin, Contested Commodities 118-119 (1990).
[41] Hughes, at 349.
[42] Dworkin, A Matter of Principle 246 (1988). (Is Wealth a Value?).
[43] Raz defines the well being of an autonomous agent in terms of successful pursuit of an autonomously chosen life. Joseph Raz, The Morality of Freedom 390-95 (1986).
[44] Most expressly this is seen in the Open Source Definition, Version 1.8 Section 4, http://www.opensource.org/docs/definition_plain.html; see also GNU GPL Section 2(a).

inverse to more traditional licenses, which serve the commercial exploitation interests of the original authors (but not their personality interests) while restricting the expressive autonomy of users.

Take also the *Wind Done Gone* case. There, the *Sun Trust Bank* sued Houghton Mifflin, the publishers of Alice Randall's book, to prevent its publication. The book told a story that was a clear take-off from *Gone with the Wind*. To begin with, if the *Sun Trust Bank* were the owner of the copyright, standing in its own shoes because it had hired Margaret Mitchell and owned the copyright, it would have commercial, but no moral claims in the book. Second, assuming the *Sun Trust Bank* was simply asserting Mitchell's rights—as it should be seen as administrator of the Mitchell estate—we must look at the claims as though they were made by Mitchell. Imagine that a negotiation had happened between Alice Randall and the bank, in which the bank said—you must pay us 25% of the revenues of the book, and you must not include any direct or implicit reference to interracial sex.[45]

It is intuitively simple to see that the claim for payment is one for commercial exploitation of the work. It may be perfectly sensible for the author to demand it. It may be perfectly sensible, on a utilitarian calculus, for society to pass a law to require Randall to pay what the bank asks, or forego use of the story. But it is not a violation of Mitchell's autonomy to refuse to pay. On the other hand, if the romantic view of the Old South was a central component of Mitchell's view of the world, and its expression in *Gone with the Wind* is an expression of this central aspect of her self, then use of precisely that book, through a critical prism, to expose the ubiquity of interracial sex in the Old South is something that goes to the integrity of Mitchell's work as an expression of her self. Here we see the autonomy claims of Mitchell pitted against those of Randall, who claims that retelling *this* story, given the central role it plays American culture in masking what she perceives to be a central truth in her experience as an African American woman, and the central role it played in her childhood in defining her alienation from American society, is central to *her* autonomy. It also very directly pits Mitchell's autonomy against the democratic commitment to airing of the widest range of views expressed in the terms that their speakers find most effective to convey their message. And it is precisely this transformative utilization to subvert and mock the very message of the original author that is the quintessential case of permitted fair use in American copyright law.

C. The Court As An Institutional Counterbalance

The preceding two subparts presented substantive reasons to support the robust system of constitutional constraints that Article I and the first amendment impose on the creation and definition of exclusive private rights in information. The core claim in these two sections is that both

[45] David D. Kirkpatrick, A Writer's Tough Lesson in Birthin' a Parody, NYT April 26, 2001 E1.

democracy and autonomy are served better by an information production and exchange system built around a robust public domain than one built around extensive regulation of the use of information and cultural materials through the creation and enforcement of exclusive private rights. The current subpart deals with an institutional reason, rather than a substantive reason, to introduce close judicial scrutiny of legislation that expands exclusive private rights at the expense of the public domain.

The basic point to understand is that there is a systematic imbalance in our legislative process for the creation of exclusive private rights in information in favor of expansion and deepening of exclusive rights at the expense of the public domain. The reason is that the benefits of such rights are clearly seen by, and expressed by, well defined interest holders that exist at the time of the legislation, while most of the social costs—both economic and social-political-moral—are diffuse and likely to be experienced in the future, by parties not yet born, or at least not yet aware of the fact that they will be affected by the extension of rights. For example, the Estate of Margaret Mitchell knew well that an extension of copyright, negotiated in the 1960s, and then the 1970s, and then again the 1990s, would increase revenues to the estate by postponing the date at which the book falls into the public domain. But Alice Randall was too young in the 1960s or 1970 to participate in the debate, and was unlikely to have focused on the effect on her book of the Sony Bono Copyright Term Extension Act of 1998, when it was being debated. Similarly, it is unlikely that Ed Felten in his worst nightmares could have imagined that his academic paper on the weaknesses of the Secure Digital Music Initiative would subject him to civil suit, and, if Dmitry Sklyarov's experience is a predictor, perhaps even criminal liability. But the recording industry was at the table with a very clear sense that the Digital Millennium Copyright Act would enable it to sell encrypted music in a more tightly controlled fashion when it was lobbying for the Act.

The opposite is never the case. It is never the case that the diffuse and future users will band together to expand fair use, and do so in a way that copyright owners will be unaware of, and will be too diffuse to offer substantial opposition in the legislative process. In this sense, the legislative process has a systematic bias in one direction—more extensive exclusive private rights at the expense of the public domain. This, in turn, justifies a constitutional framework such as the one the Supreme Court has developed over the past century, whereby courts must provide a filter to limit Congress's power to expand rights. Both the threshold inquiry of Article I, and the *Turner* standard for first amendment review have the feature that they treat *expansion* of rights as the thing to subject to constitutional scrutiny. Expansion of the public domain, or elimination of exclusive rights, does not require the same scrutiny, because it removes constraints on the use of cultural materials and information, and makes more modes of expression available. If you will, it deregulates, rather than regulates, the use of cultural and information materials. The justification of this one-way ratchet is precisely the systematic imbalance in the other lawmaking branch—the legislature. Because too extensive a definition of rights is economically inefficient and harms both democracy and autonomy it is the role of courts to serve as a backstop against this political economy to prevent the systematic and excessive expansion of exclusive rights.

To the extent that the role of courts in reviewing legislation is justified because courts can act as a moderating force to politics, it is more justified in application to intellectual property rights than to media regulation—a parallel area of regulation of information production and exchange where courts have taken a very active role. When the broadcast and cable industries are battling over must carry rules, each industry is well represented in Congress, and all the potentially regulated parties are at the table. The outcome of the process may sometimes be the result of power plays and successful capture of an agency or a legislature, but often they may also be negotiated deals, later challenged by actors in the negotiation trying to make their deal sweeter. Laws regulating large players whose interests are well defined and understood at the time of the regulation—like broadcast, cable, or telephone regulation—are substantially less in need of judicial review from the institutional perspective. Copyright and similar exclusive rights, on the other hand, are precisely the opposite. It is here that judges must be attentive to prevent legislatures from selling the store in the absence of the primary parties likely to bear the brunt of the regulation.

III Pressure points—the state of play today

Up to this point we have done two things. First is to set out in doctrinal terms the constitutional framework within which Congress can regulate the use of information and cultural materials through the creation and definition of exclusive private rights in these materials. Article I operates as a threshold constraint, requiring that to create such rights Congress must be able to show that the exclusive control it grants can plausibly increase information and cultural production, that the rights be given only to those who add original contributions, and that the rights not prevent use of materials in the public domain. The first amendment then adds an overlay of more context sensitive analysis that requires Congress to show that any given right meets, at least, the *Turner* standard of intermediate scrutiny. Second, Part II explains why such a robust system of judicial review is normatively required. My argument was that both democracy and autonomy are served by a system with a robust public domain, and harmed by excessive regulation of the use of information, knowledge, and cultural materials through the creation of exclusive rights. Moreover, the political economy of legislation is such that legislation will systematically tend to create exclusive rights beyond what is most economically efficient, as well as beyond what gives proper consideration to the implications of these rights for democracy and autonomy.

This part briefly outlines six particularly salient pressure points on this constitutional framework.

A. That's not what the law says at all

The description I gave of the law was declarative—as though it were an uncontroversial view of the constitutional framework that constrains Congress from regulating information and cultural production too much. It is not. It is a decidedly contested view, though I think it is the best reading of the Supreme Court's precedent. But it is also true that the Supreme Court has largely be en more solicitous of user privileges and less enamored with "intellectual property" than the lower courts, and not all these courts have accepted the spirit of the constitutional framework delimited by the Supreme Court's jurisprudence in this area. Most completely and starkly this rejection of the view that either Article I or the first amendment substantially constrain Congress is seen in *Eldred v. Reno*.

In 1998 Congress extended the term of copyright protection from life of the author plus 50 years to life of the author plus 70, and from 75 to 95 years the term of protection for works initially owned by a corporation. The extension was retroactively applied to existing works. Eric Eldred is a retired programmer who scans books out of print and produces online editions for free distribution. He challenged the Term Extension Act because it prohibited him from scanning and making available works that would have fallen into the public domain but for the extension. The DC Circuit rejected his claims that the Act violated the "limited times" constraint imposed by the Exclusive Rights Clause and the first amendment. The argument with regard to Article I was that the preamble provides no constraint on the power of Congress, and that when it creates the limited

monopolies it is empowered to create under Article I, Congress is subject to rationality review. The Court seemed little bothered by the fact that its holding directly contradicts the Supreme Court: "At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." Art. I, § 8, cl. 8. . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."[46] The Circuit Court brushed away the specific requirement that copyright be for "limited times" with the claim that "limited times" included very long, but not perpetual, grants, as well as retroactive extensions of time. It's argument with regard to the first amendment was the implausible claim that laws that Congress calls "copyright" are categorically exempt from first amendment scrutiny.

The Term Extension Act of 1998—though not the decision in *Eldred v. Reno*—provides an excellent ground for explaining how the two constitutional constraints should interact. First, there is the retroactive application aspect of the Act. According to *Graham v. John Deere*, Congress can only create exclusive rights if the new rights could plausibly stimulate creation, and if they do not take something out of the public domain. The retroactive extension of the term of protection for works that have already been created fails both tests. First, *retroactive* extension cannot plausibly promote the progress of science and useful arts.[47] It cannot create incentives. Mitchell will not rewrite *Gone with the Wind* in 1998 no matter how many more years of copyright protection the book receives. And new books will not be written because old books are retroactively protected for a longer period than was promised their authors when they wrote them. In order for any future action to be affected by retroactive extension, a current author would have to think that a project would not justify itself under the present term of copyright, but would nonetheless be worth the effort if copyright were extended to an additional given term, discounted by the probability that copyright will in fact be extended in the future to that necessary length. The implausibility of this argument can readily be captured by conjuring up the image of a movie studio executive pitching a project to investors by saying—"we won't make money within the 75 years that copyright law currently gives us, but Congress has traditionally extended rights over time, and if Congress extends copyright to 95 years, we'll make a killing on this one!"

Second, once a work is created, there are aspects of it that are enclosed, and aspects of it that are in the public domain. When Margaret Mitchell wrote *Gone with the Wind* in 1936, the longest term of protection possible for the book was 56 years. In 1936, then, the state of the world was that the enclosed domain included the book *Gone with the Wind* for 56 years. The public domain included the book *Gone with the Wind* in the year 1992. This is not a word game. It is an economically accurate description of the state of the resource called *Gone with the Wind* as perceived at the time of its creation by rational economic actors. If someone were to value the rights to make a movie from the book, they would have to price the license necessary. Imagine that the

[46] Graham v. John Deere, 383 U.S. 1, 5-6 (1966).

[47] See, *e.g.*, Landes & Posner, An Economic Analysis of Copyright Law, 17 J. L. Stud. 325, 362 (1988).

price is *p*. Whether it is worth paying that price is partly a function of the cost of waiting for the expiration of the copyright, which is *p* discounted to present value from the date of expiration to the date of use. That calculus is likely to have little effect on a decision made in 1938, but likely to have tremendous effect on a decision made in 1991. *Gone with the Wind* is "in the public domain"—on a deferred basis—at the moment of its creation. The precise value of its being there depends on the time left for expiration. To extend the term of copyright for *Gone with the Wind* after it has been created is to remove from its public domain aspect from the public domain.

Where, as in the case of retroactive term extension, Congress passes a law that removes material from the public domain with no plausible claim to increase incentives for creation, the law must fail under the limitations of the Exclusive Rights Clause. The *Eldred* court's failure to discipline its rationality review by focusing on the specific elements required by Article I, Section 8 cl. 8 resulted in practically no review at all.

But what of the prospective application of the Act? Extending protection from 75 to 95 years for works that do not yet exist takes nothing out of the public domain. The story of the movie executive is slightly different. Here the pitch must be "we won't make money within the first 75 years, but just you wait for years 76-95!" It is possible that this aspect too will not pass even the threshold test of promoting progress.[48] But even if it does, it should not pass the *Turner* test. The extension substantially burdens present expressive interests—those of people like Eldred who wish to use old materials expressively. It furthers the government's legitimate goal of giving sufficient incentives to authors, if at all, only very weakly, and certainly there is no evidence, empirical or theoretical, that would suggest that a less restrictive means—like life of the author plus fifty, or for that matter 56 or 28 years, is insufficient.

On this background, the decision of the D.C. Circuit in *Eldred v. Reno* represents a lack of understanding of the constitutional dimensions of copyright law and of the role of the judiciary in making sure that the use of information and cultural materials by everyone is no more regulated than necessary. It misses the important role courts have to play as an institutional counterbalance to a systematically imbalanced and overprotective legislative process. It entirely misses the regulatory aspects of exclusive private rights, and the necessity of a significant level of judicial first amendment scrutiny to protect against over-regulation of access to, and use of, the cultural and information environment by individuals. In this latter respect the D.C. Circuit is in the company of the Ninth Circuit in the *Napster* case. The Eleventh Circuit, on the other hand, clearly was applying some mode of first amendment analysis to the *Wind Done Gone* case (though we do not know which until they issue an opinion), and the Second Circuit appears poised to decide the *DeCSS* case on a

[48] Both Stephen G. Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281,323-28 (1970), and Landes & Posner, *supra*, express substantial doubts about the marginal impact of terms lengths so distant into the future.

Turner or even strict scrutiny analysis (whether or not under that standard it finds the DMCA unconstitutional.)[49]

Needless to say, how these cases are resolved, ultimately in the Supreme Court (whether in these cases or future cases), will determine whether there is some, much, or no effective judicial scrutiny of congressional regulation of information and cultural production that takes the form of exclusive private rights.

B. Neo-Lochnerism and the Moral Inversion of the First Amendment

(This is a very pompous title to a very short section, but at least it conveys more or less most of what I have to say about this particular tension in first amendment law.)

For over a century lawyers have been treating corporations as legal "persons." With habit, this useful legal fiction has taken on a natural aura, as though GM and Joe's Trucking were just like individuals for all purposes. This habit was not particularly important from a first amendment perspective as long as free speech law was largely occupied with working out—as we were throughout the first two-thirds of the 20th century—the relationship of the first amendment to direct censorship. As the information economy and society has moved to center stage, the first amendment is increasingly used to impose judicial review on all regulation of this sphere of social and economic life.

Starting with cases like *Bellotti*,[50] which protected a corporation's right to speak on matters of public concern as part of public discourse, and continuing with cases like *Central Hudson*,[51] which began to protect corporate speech aimed for commercial purposes, first amendment jurisprudence has gradually shifted to treating corporate speakers engaged in any form of information production and exchange as though they were no different than individual speakers engaged in political discourse or personal expression. This is an exaggerated characterization of the law in this area, but for this brief diagnostic discussion I will not defend it, but rather use it to identify a potential source of instability in first amendment law.

The trend towards judicial review of regulation of how corporations make money from information production, exchange, and carriage as though it were a law aimed at individual rights, not economic regulation, has a particularly alarming trajectory in an information economy. Ironically, it was then-Justice Rehnquist who blamed the Court in *Central Hudson* of returning to the *Lochner* era. Ironically, because Chief Justice Rehnquist recently joined an opinion of the Court prohibiting government from requiring mushroom growers to contribute to a general fund to support advertising

[49] This assessment is based on the oral argument and the court's order for supplemental briefs.
[50] First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).
[51] Central Hudson Gas & Electric Corp. v. Pub. Serv. Commission of NY, 447 U.S. 557 (1980).

of mushrooms, a decision that Justice Breyer responded to with the words, "I do not believe the first amendment seeks to limit the government's economic regulatory choices in this way—any more than does the Due Process Clause," citing *Lochner* as a criticism of the Court's direction in first amendment law for the first time since Justice Rehnquist's use two decades earlier.[52] The video dialtone cases were a stark example of the implications of this trend in an economy where information production, dissemination, and carriage are central.[53] In the early 1990s the FCC sought to allow telephone carriers into the video delivery market. But in permitting the telephone carriers to carry video, the FCC required that they do so as common carriers. Just as they are required to carry telephone and data on a nondiscriminatory basis, so too the FCC's video dialtone order required them to carry video signals on a nondiscriminatory basis. The courts of appeal treated this imposition as a violation of the telephone companies' editorial rights—the rights to determine what information they would carry over their systems. This, in turn, led these courts to take a very close look at the economic rationale of the common carriage requirement—which was based on the FCC's experience with the telephone carriers as providers of competitive services dependent on their platform. Rejecting the economic rationale offered by the FCC, the courts overturned the video dialtone order as violating the first amendment. That the regulated entity was a large corporation; and that the purpose of the regulation was to increase the diversity of video programming available to viewers was not sufficient to sustain the carriage requirement. The Supreme Court eventually vacated the case as moot, because the passage of the Telecommunications Act of 1996 disposed of the video dialtone model. But the problem persists.[54]

Perhaps the most extreme version of this use of the first amendment is *Time Warner* v. *FCC*.[55] In this case, the D.C. Circuit invalidated the FCC's limits on vertical and horizontal integration of cable carriers. The FCC was focused on making sure there is a sufficient number of outlets to assure that any programmer that is not owned by a cable operator has access to 40% of the viewers in the total U.S. market. The agency decided that to do so one needed to make sure that there were at least three competitors in the United States, reasoning that two competitors could collaborate, and if together they controlled more than 60% of the viewers they would be able prevent programmers unaffiliated with them from surviving. The FCC therefore capped the total number of viewers any single cable operator could offer cable services to at 30%. To the court, there was no question that this cap on the number of subscribers to whom any cable operator could sell was a violation of the cable company's first amendment rights. All that was left for it to do was to supplant the FCC's economic judgment as to whether there was a high probability of collusion between two giant competitors to shut out unaffiliated programmers (yes) with its own (no). This rendered the FCC's regulation unconstitutional under the *Turner* standard, because the regulation was not narrowly tailored.

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[52] United States Dep't of Agriculture v. United Foods, Inc., 121 S.Ct. 2334 (2001).
[53] Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994).
[54] *E.g.*, Comcast Cable of Broward County., Inc. v. Broward County, 124 F. Supp. 2d 685 (2000).
[55] Time Warner Entertainment Co., L.P. v. FCC, 240 F3d. 1126 (2001).

Now, one might think that this represents a general rise in courts' solicitude of first amendment claims against government regulation. But, as we saw, in *Eldred v. Reno*, decided within weeks of *TWE v. FCC*, another panel of the same court reached a diametrically opposed result. By holding that copyright was categorically exempt from first amendment review, the court upheld a regulation sustained by an economic rationale that is laughable by the standards of *TWE v. FCC*. The stark difference between the two cases—the first that reverses a plausible, if unpersuasive to the judges, economic theory regarding concentration and collusion, and the second affirming an impossible economic theory about the effects of retroactive extension of an already ridiculously-long copyright protection period—is instructive.

Clearly, one aspect of this dissonance is the fact that copyright is counted in the "private rights" box, while horizontal ownership rules are counted in the "public regulation" box. This is a pressure point that I will discuss in the next subsection. But there is also a deeper problem of moral inversion that is represented by these cases, and that one sees in other copyright cases as well. In the *Free Republic* case, for example, the court saw the newspapers as the first amendment rights bearers, while the individual users who would cut and paste stories as a basis for their political commentary and discourse with their fellow forum participants represented a lesser interest. That the clash was between political discourse on one hand, and the right to charge for online access to archival materials already fully remunerated through advertising played no role in the court's consideration there. The criminalization of noncommercial use and exchange of digitized materials that one sees with the introduction of the NET Act and the DMCA similarly fails to appreciate the chilling effect on real people—like Ed Felten—of a criminal prosecution against Dmitry Sklyarov, where the interest on the other side of the equation is protection of a business model of a recording company or a movie studio.

This trend in first amendment law of the information economy—towards protecting corporations broadly, even at the expense of very real and immediate constraints on the expressive autonomy and democratic speech of individuals—is unstable because it represents a moral inversion of the first amendment. The first amendment is not a technical rule of law—government shall not make any law regulating information flows regardless their source or nature. It is a constitutional provision central to the functioning of our democracy and the security of our individual autonomy as human beings.

Our democracy does not treat corporations as citizens. They do not vote. They cannot be elected. Their contributions to political discourse are valued instrumentally, not intrinsically. Their claims to speech rights are derivative from the fact that sometimes they are the best vehicles to bring useful information to the attention of a democratic polity.[56] But that is all. This may entail quite

[56] This is the crux of Baker's focus on treating the rights of corporations as always based in what he sees as the more instrumental press clause, and not in the speech clause that he largely reserves for protection of liberty interests in expressive autonomy. C. Edwin Baker, Human Liberty and Freedom of Speech (1989).

substantial rights on the part of corporations, in particular news media. But in the clash between instrumental reasons to protect corporate speech and instrumental reasons to restrict it, say, in order to permit others to enrich democratic discourse over the telephone company's network, the calculus is ultimately instrumental and subject to fairly flexible balancing. This could be a systematic justification for the new balancing approach that Justice Breyer seems to be developing in this area, and for which he has already received support from Justices O'Connor and Ginsburg in some cases.[57]

Our democracy does not, indeed cannot in any coherent fashion, treat corporations as the bearers of moral claims to autonomy. In some fashion or another, claims to autonomy are based in some dignitary interest, or some respect for rational beings or will. They are, in any event, entirely unavailable as intrinsic claims for corporations or other corporate bodies.[58] Organizations or corporations can serve or defeat autonomy. Their regulation may serve or defeat autonomy. When it does, such as, for example, when a regulation requires a corporation to prevent users from receiving information they wish to use, or from disseminating expressions individual users wish to disseminate (say, because they are smut), the organizations may have a first amendment claim that is autonomy based. But it is autonomy-based only derivatively, not directly. And, as with the case of regulation that may instrumentally limit speech in ways that limit or enhance democracy, so too may regulation do so in ways that limit or enhance autonomy of individuals.

In any event, when the person regulated is a human being, a citizen of a democracy, a direct claimant from autonomy, that person's claims are translated into an intrinsic first amendment claim against instrumental regulation. Corporations' claims under the same constitutional provision are weaker, pitting one instrumental claim against another. Particularly when the government is aiming to regulate corporations instrumentally *to serve the real parties in interest*—the constituents and individuals—to enhance speech and increase diversity in discourse—the first amendment largely devolves into assessing instrumental approaches to serving the same intrinsic claims. In some sense, the corporations' first amendment claims in these cases pit a rule-utilitarian instrumental approach (it on the whole serves this desideratum to follow this rule), while the regulation tries to serve the good more directly.

The instability comes from the flow of cases that do exactly the opposite. Exclusive private rights in information, as they are increasingly applied to constrain individual use of information and cultural resources, are a form of regulation of individual expressive freedom. Very often the beneficiary of this regulation is a corporation. These forms of regulation are subject to light, in some cases to no, first amendment scrutiny. On the other hand, rules intended to give individuals greater access to information or greater access to avenues of expression, and do so by limiting the business

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[57] See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225-28 (1997), Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 400-03 (2000) U.S. Dep't of Agriculture v. United Foods, Inc., 121 S.Ct. 2334, 2346-48 (2001).

[58] See Meir Dan Cohen, Rights, Persons, and Organizations, A Legal Theory for Bureacratic Society 55-119 (1986).

practices or the opportunities of corporations to manage their businesses in the manner most conducive to their commercial interests, are routinely struck down.

The result is a pincer movement on individual expressive autonomy and on democratic discourse by and among the actual constituents of democracy. The first amendment is interpreted to permit government to restrict access to and use of information and cultural materials by individuals, but prohibits government from aiding corporations similarly to restrict individuals. The result is a world in which both government and corporations can restrict individuals, and public corrective action to increase individual freedom is constrained. Partly this inversion is sustained by characterizing "copyright"-like laws as private ordering or "property," and media access rules as "public law" or "regulation." This is a topic of the next subsection. Partly it relies on a workmanlike attention to doctrinal moves to the exclusion of principle. But these strategies cannot be stable in the long run. The moral inversion of the first amendment puts too much pressure on the particular form of first amendment law that has developed for the information economy.

C. Private Ordering

Another challenge likely to play an important role in framing the constitutional understanding of exclusive rights in information and culture is that the regulations in question are usually conceptualized as property or contract rights, rather than direct command and control regulations. As such, they partake of the aura of "private action," which is not generally (*Shelley v. Kramer* aside) seen as government action subject to constitutional review. At the simplest level, the operation of this construct is seen in the sentence of the D.C. Circuit in *Eldred*, "plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others."[59] The conflict is conceptualized as involving two private parties, one that owns a work, the other that wants to use it, and the first amendment has no traction.

The simple fact that the last person triggering a prohibition on a particular use is not a government actor does not render the prohibition immune to first amendment scrutiny. Much depends on the source of power that enables the prohibition. Imagine that Congress created and auctioned off rights to prohibit Republicans from appearing on television, sold them to private parties, and then courts were asked to enforce the prohibitions by the individuals. Whether a particular Republican would or would not be allowed on TV would not be a government decision, but a decision by the private license owner. But the source of prohibition would be a law that discriminates against speech based on viewpoint, and would be struck almost without question. Nonetheless, the privatization of the decision confounds the issues. Sufficiently so that in a not-too-dissimilar case—*Denver Area Educational Telecommunications Consortium*—the Court did in fact uphold a law that requires cable operators to carry any programming on a nondiscriminatory basis, except smut that Congress disapproved of, which cable operators were permitted to refuse

[59] 239 F.3d at 376.

to carry. The private party control was not dispositive for the plurality, though it was for Justices Thomas, Rhenquist, and Scalia, but it did weigh in favor of finding constitutionality.

But clearly there are cases where a private person can rely on, for example, property rights, to prevent someone from speaking, and that person can do so on viewpoint based or any other grounds. Indeed, that is what we think of as the "normal" case, with exceptions like the company town in *Marsh v. Alabama*. How are exclusive private rights in information—like copyright—different from a private homeowner's request of a guest not to annoy everyone with praise for the Taliban? The point to see is that understanding copyright within the framework of first amendment law does not require us to think about whether a copyright owner is more like a company town or a mall. In those cases, the owner of physical property used a law that was neither directed at speech, nor used control over speech to achieve its goal, to exclude a speaker. The speaker, in reliance on the first amendment, demanded an exception to the general property law. The court either accepted or rejected this claim. The relationship of the first amendment to copyright is entirely different. Users are not confronted with an *inability* to speak, print, or play music without access to resources—like streets, parks, or transmitters—governed by a general law like property. They have under their control the means to do so. They are confronted with a legal rule—the law of copyright—that *prohibits* them from speaking, printing, or playing music in ways that they otherwise could, in the public interest. The law of copyright is the only thing that stands between the user and the user's capacity to speak as she pleases. It is a public law, enacted by the legislature, to benefit public interests, that takes the form of telling lots of people that they are prohibited from printing certain words that they want to print. It may be a perfectly justifiable law, but to say that a person has no "cognizable first amendment interest" in not being forbidden by law from printing something he or she wishes to print, and can as a practical matter print, is implausible.

This answer depends, however, on the theory one has regarding the source of exclusive private rights in information. If one takes some form of natural rights approach—along the Lockean or Hegelian lines—then the source of the property right is pre-legal, and law is simply enforcing pre-political rights, whose contours therefore are not themselves reviewable "government action." The source of the prohibition that the owner places on the user is, then, not a itself a reviewable law, though obviously when the Sheriff comes to enforce the prohibition there is a government action, just as in *Shelley v. Kramer*, and perhaps the fit between the natural right and an overly broad positive implementation may be reviewable in favor of the users.

But if one sees—as American tradition has, and as the Supreme Court repeatedly has stated—exclusive private rights *in information* as positive law, rooted in a utilitarian calculus, then the law creating the right is itself irreducibly the "law" that Congress has made abridging the freedom of speech. The meaning of an exclusive private right in information is that Congress has identified a person who, for reasons of social welfare, receives a right to prevent others from saying certain words. Just like the person with the right to prevent Republicans from talking on TV. The

viewpoint neutrality of copyright goes to the likelihood that the law will be upheld, not to the presence of a "cognizable first amendment interest." This does not mean that every copyright infringement case now has a case-specific first amendment review component. It does, however, mean that where the law of exclusive private rights draws the boundaries of the right, these boundaries must be subject to first amendment scrutiny.

While this issue is important—as *Eldred* indicates—in the copyright context, the primary locus for its likely mischief is in confounding the constitutional analysis of institutional mechanisms explicitly intended to facilitate "private ordering" of access to and use of information and cultural materials, rather than to embed public policy choices. In particular, this refers to the Uniform Computer Information Transactions Act (UCITA), whose most controversial feature is the validation of mass-market licenses.

Consider a term appended to the news reports of a technology news service: "Information contained in this CNET News.com report may not be republished or redistributed without the prior written authority of CNET, Inc." Under copyright law, the *information contained* in a report, as distinguished from the expressive form that it takes, is not the property of the reporter. There may be a very limited "hot news" exception to this general rule,[60] but certainly nothing that would encompass the broad claim of right expressed in CNET's terms.

Most courts prior to the passage of UCITA did not enforce such terms.[61] Some courts did so by relying on state contract law, finding an absence of sufficient consent,[62] or an unenforceable contract of adhesion.[63] Others relied on preemption, stating that to the extent state contract law purported to enforce a contract that prohibited fair use or material in the public domain—like the raw information contained in a report—it was preempted by federal copyright law that chose to leave this material in the public domain, freely usable by all.[64] While the Seventh Circuit held otherwise,[65] this was the majority position prior to UCITA. UCITA obviates the state contract law bases of refusing to enforce such contracts.

A state's enactment of UCITA does not trigger *direct* constitutional review under Article I, though it might under the first amendment. In *Bonito Boats* the Court specifically stated that the limitations imposed on Congress by Article I, Section 8, Clause 8 did not directly apply to the

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[60] International News Service v. Associated Press, 248 U.S. 215 (1918); National Basketball Association v. Motorola, 105 F.3d 841 (2d Cir. 1997).

[61] Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239, 1248-53 (1995).

[62] Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991).

[63] Vault Corp. v. Quaid Software Ltd., 655 F. Supp. 750, 761 (E.D. La. 1987), aff'd, 847 F.2d 255 (5th Cir. 1988).

[64] Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988).

[65] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

states.[66] But the Court also held that states could not create rights that were functionally equivalent to rights created by federal statute—like patent law—but did not serve the core policy goals of the federal law in retaining access to the information to which exclusive rights are granted. The correct analysis of UCITA, insofar as Article I is concerned, is to consider whether its blanket validation of mass-market licenses, including those that prohibit users from making uses preserved for them by the Copyright Act, is preempted by that Act, or conflicts with the requirements of Article I *as implemented in the Copyright Act*. In the case of UCITA, for example, validation of a clickwrap license that prohibits copying of public domain materials covered by the contract would be a simple example of state law enforcement of a term in a mass-market contract that could be considered a violation of Article I as implemented through the Copyright Act. The Copyright Act implements access to public domain materials in a variety of ways.[67] It does so in many cases as a direct implementation of the constitutional mandate of Article I not to create rights in public domain materials. When UCITA is enforced to circumvent these privileges, it does so in violation of the constitutionally embedded federal policy just as surely as Florida's boat hull design considered in *Bonito Boats* violated federal patent policy.

Moreove r, enforcement of mass-market shrinkwrap licenses to prohibit users from using information in ways that they are permitted to under copyright law is generally a suppression of speech that must be reviewed under *Turner*. That its basis is law regarding contracts about speech no more insulates it from first amendment review than the private law basis of defamation law insulates it from complying with a federally imposed, constitutional baseline. The law of contract itself recognizes the irreducible public role in defining the conditions of enforceability, when it refuses to enforce contracts that are against public policy. Just as the exclusive rights themselves are reviewable, because they seek to achieve a public purpose by prohibiting certain expressive acts, so too contracts about permitted and prohibited expression or reading call upon the state to prohibit certain speech in pursuit of public policy. When law decided whether to enforce contracts for gambling, or prostitution, or assassinations, it is a public decision, aimed at public goals, with implications for the enforcement of a *legal* form of interpersonal agreements. Similarly, when law decides to enforce agreements about whether one person will say certain things or read certain things is a public decision, implemented through public law, about the legal form of such an interpersonal decision. That public decision is subject to review under the first amendment. Again, not every contract is subject to *de novo* review, but categories of policy decisions—such as whether or not to enforce mass-market licenses that prohibit uses of information otherwise privileged by copyright law—are.

The "public" character of the license is even less problematic when the "contract" is not a negotiat ed agreement between equal parties, but a mass-market license that is in effect a privately selected, but publicly enforced, regulation of how certain information is used by wide ranges of the population. When Congress has created a particular set of rules regulating access to information

[66] 489 U.S. 141, 165 (1989).

[67] Jessica Litman, The Public Domain, 39 Emory L.J. 965 (1990).

or cultural materials it has determined that the goal of promoting incentives for creativity is adequately served by the means it adopted. Indeed, given the political economy of congressional legislation on this, at any given moment the federally enacted baseline is likely to be more protective than optimal. This baseline, the federal law of copyright, always stands as a less restrictive alternative for attaining that goal than whatever term a mass-market vendor who relies on exclusive rights that are designed to give it some market power will add to that baseline. The result is that a state law and court order that prohibit a person from using information as the user would like to, and is permitted to under the Copyright Act, is an overly restrictive regulation of that use, for which a less restrictive alternative is readily available in the form of the federal baseline.

D. Regulating the Logical Layer: Code and the Constitution

Imagine a critic of Hollywood culture—say, a feminist film critic or a fundamentalist preacher—preparing a presentation about the ills he or she sees in this culture. The most effective means of explaining and communicating this criticism would be a presentation laced with illustrations from actual films. The Copyright Act itself generally permits such quotations from video. The Digital Millennium Copyright Act (DMCA), however, has created a framework that operates at the logical, or software layer, that in effect prohibits these quotations.

The DMCA prohibits anyone from circumventing a technical measure that controls access to a work. It also prohibits anyone from making or distributing utilities that would help users circumvent protection measures. Neither provision, at least as currently interpreted, is subject to the fair use exception, and the quotations by the feminist critic or the fundamentalist preacher would not likely fall under any exception to the DMCA. If producers of cultural products encrypt them, as the film industry has done with DVDs and new videocassettes, it becomes illegal under the DMCA to perform the functions at the logical layer that are necessary to quote from them.[68] A bill is apparently now contemplated to force manufacturers of both the physical and logical layers of the information environment—the hard drives, computers, screens etc, as well as software—similarly to design their wares to enforce the licensing practices of the copyright industry.[69]

Some technical protection may be necessary to preserve the viability of a commodified, copyright-based business model in cultural production. A pervasive re-building of both the physical and logical layers of our infrastructure to control the way individuals interact with the cultural environment they occupy, however, undermines both individual expressive freedom and the richness of political discourse. In particular, these provisions make cultural resources less available and more expensive for the noncommodified sector—like the feminist film critic or the fundamentalist preacher—threatening to impoverish an increasingly important dimension of social discourse.

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[68] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 294, 324 (S.D.N.Y. 2000).

[69] Security Systems Standards and Certification Act, see draft http://cryptome.org/sssca.htm.

Three cases are currently being considered, testing the constitutionality of the DMCA's anti-device provision. These are *Reimerdes*, *Felten*, and *Sklyarov*. *Reimerdes* is the case currently most likely to result in a substantial first amendment decision, one way or the other, soon. *Sklyarov* I will discuss in the context of criminalization. *Felten* is almost too easy, presenting the real-world example of what would otherwise be considered a "parade of horribles"-type argument.

Reimerdes involves a suit by the eight Hollywood studios against a hacker magazine, 2600, seeking an injunction prohibiting 2600 from making available, or linking to other sites that make available, a program called DeCSS. DeCSS is a computer program that circumvents the copy protection scheme used to control access to DVDs, named CSS. CSS prevents copying or any use of DVDs unauthorized by the vendor. DeCSS was written by a fifteen year-old Norwegian called Jon Johanson, who claims (though the district court discounted his claim) to have written it as part of an effort to create a DVD player for Linux based machines. 2600 posted a copy of DeCSS on its site, together with a story about it. The industry obtained an injunction against 2600 prohibiting not only the posting DeCSS, but also its linking to other sites that post the program. The court rejected the defendant's arguments, both those that sought to interpret the DMCA to include a fair use exception, and constitutional arguments that claimed that if the DMCA's anti-device provision indeed prohibited DeCSS, then the DMCA was unconstitutional.

The Court of Appeal was presented with both an Article I argument and two types of first amendment arguments against the DMCA. The Article I argument ran largely as follows.[70] The limitations placed by Article I on Congress's power to grant exclusive private rights in information require, among other things, that a law not remove materials from the public domain and that it provide protection only for limited times. Encryption, however, allows a vendor to encrypt not only copyrighted materials, but also public domain materials never owned by the copyright owner, as well as materials whose term of protection has expired. A law that prohibits the existence of circumvention devices, even those usable to reach public domain materials, is a law that excludes these materials from the public domain, or indefinitely extends the term of protection, in violation of the constricts of Article I. And it is law, rather than technology or private action that is excluding access from the materials, because counter-technology—circumvention devices like DeCSS—is perfectly capable of enabling users to use the public domain materials. It is the law prohibiting these devices that is causing the exclusion. And a law giving exclusive private rights to control access to information or cultural materials may not, according to Article I, include a right to exclude from public domain materials or to exclude from copyrighted materials interminably. If the court does not accept this argument, or some similar limitation on what Congress can achieve indirectly through regulating the logical layer of the information environment, then regulations like the DMCA can as a practical matter obviate the Article I protections of the public domain.

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[70] Brief of Amici IP Law Professors, (Julie Cohen) http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_lawprofs_amicus.html.

There were two first amendment arguments—one for strict scrutiny, the other for intermediate, or *Turner* level scrutiny.

The argument for *Turner* level review followed roughly the lines described in Part I here. Accepting that the purpose of encouraging commercial proprietary production of information through creating exclusive rights is an important government interest, the question is whether the specific law burdens speech too much. The internal limitations in copyright law—like the fair use exception or the privileged use of public domain materials—are constitutive mediating devices to permit copyright law to comply with the constraints of the first amendment. The anti-device provision of the DMCA in effect eliminates these mediating devices by giving vendors of digitized materials perfect, rather than limited control over materials they encrypt. The effective elimination of access to video materials for purposes of quotation, or to materials no longer covered by copyright, or to materials otherwise in the public domain imposes too heavy a burden on the speech of users, particularly in the presence of less restrictive alternatives. Such less restrictive alternatives include imposing liability on infringing uses of circumvention, for example. Or they could take the form of a requirement that access-protection devices permit statutorily defined fair uses, or that copy protection mechanisms permit first-generation copying, but not second generation copying.[71]

Given the presence of less restrictive alternatives that Congress had actually used in similar circumstances, the DMCA imposed too great a burden, and should be found to violate the first amendment. The district court below had held that the *Turner* standard was in fact applicable, but that the harms to fair users were too remote and speculative to justify finding the act unconstitutional on its face, and that the specific defendants were not fair users and could not therefore claim to invalidate the act as applied. The court of appeal has not yet issued its ruling as of this writing, but in argument the panel appeared to accept that *Turner*, at least, is the appropriate standard, and seemed particularly interested in the availability of less restrictive alternatives.

But most of the main brief, most of the district court's opinion, and most of the questions posed by the court of appeals' request for supplemental briefs after argument were focused on the possibility that the DMCA's anti-device provision should be subject to strict, not to intermediate scrutiny. The most direct version of the argument in favor of strict scrutiny is that code in any form—whether we call it source code or object code—is speech all the way down. All forms of software are humanly meaningful communications (the district court found as a fact that object code too could be understood by well-trained humans). The fact that ever-smarter machines can understand more and more human speech does not make that human speech any less worthy of protection. A day will soon come when a computer can understand instructions written by one human being in plain English to teach others how to do something. The fact that machines, as well

[71] See Brief of Amici Curiae ACLU et al., http://www.aclu.org/court/corley.pdf, Brief of Amici Benkler & Lessig, http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html, EFF Supplemental Letter Brief, http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html.

as human beings, understand these words should have no effect on the right of the one person to teach others how to perform a function. In this case, if a computer engineer had written in simple English how one might go about circumventing copy protection, he would be no less privileged to do so under the first amendment than would a radical critic be privileged to explain how to overthrow the government. Unless there is a clear and present danger to a compelling government interest, the first amendment requires that we allow the speech to continue, and constrain prohibition to acts that harm the common weal. The court of appeal signaled its acceptance of, at least, the plausibility of this argument by asking specifically in its order requesting supplemental briefs whether the DMCA would pass the clear and present danger test of *Brandenburg v. Ohio*.[72]

A slightly modified version of this argument is that at the very least computer code, in any form, is the professional language of computer engineers and scientists. What the DMCA is saying is that there are certain topics of conversation that computer professionals cannot discuss in their preferred language, because using that language is harmful to government interests. The topic covered by the DMCA is "how to circumvent certain types of encryption." If, instead of copyright and computer code, the law had said—one may not speak in Russian about overthrowing the U.S. government or in Arabic about Jihad—the need for strict scrutiny would have been obvious. Nothing in either the change of language or the change of topic requires a different outcome. It is still the case that there is an identifiable group of people for whom use of a particular language is particularly helpful, and it is still the case that there is a particular topic that the government believes is more dangerously spoken about in that language than in others. That governmental judgment needs to be subjected to strict scrutiny. Perhaps a court today will decide that under the *Brandenburg* test prohibiting the sale of flight manuals in Arabic is justified. But doing so would require a court to go through that strict test, not some lesser test.

The difficulty, from the perspective of first amendment doctrine, posed by either of these arguments is that the result, potentially, is that no regulation of computer programming can be undertaken unless it complies with the strict scrutiny standard. That is not, in principle, an implausible result. Journalists generally cannot be regulated in terms of the words they used, except under strict scrutiny. Why couldn't the same be true of computer programmers?

The most important potential concern with this outcome is that a communication to a machine intended to cause it to perform a function is not a communication that interests the first amendment. No one would suggest that it is unconstitutional to regulate human-urinal communication achieved through an infrared port, or communication between a human and a remote-control car. The complicating fact with code is that *the same* words can be uttered, and some or even many human beings will understand them as meaningful human communications, while some machines will understand them as instructions. The difficulty is how to regulate utterances

[72] Brandenburg v. Ohio, 395 U.S. 444 (1969).

intended to "push buttons" without burdening human communications. This might mean that executing a program must be distinguished from communicating it in human readable form capable of being either read by a human or run by a machine. It might mean that distribution with the intent of running, as opposed to with the intent of communicating, should be more readily regulable. The obvious difficulty, once one presents the distinction in these terms, is the potential chilling effect on human communication. This is exemplified most clearly by David Touretsky's superb website, devoted to prodding the boundaries of this precise problem.[73] Touretsky presents various forms of describing DeCSS, some more readily machine-readable than others. He presents it, for example, in plain English and in Haiku form, as well as in a computer language for which a compiler has not yet been written—such that a machine could in principle read it, but the computer translation mechanism does not yet exist, and in English alongside a translator from English to code.

This kind of richly detailed argument is provocative. But it does not necessarily imply that therefore software can never be regulated except under conditions that would permit the regulation of a news report. Journalists cannot have an effect on the world through their writing, except through the acts of human readers learning their words and opinions. Regulating the words of journalists is therefore regulating directly that human interaction that lies at the core of both the democracy and the autonomy concerns of the first amendment. Computer scientists writing code can have an effect in the world even if no human being ever reads their work. It seems plausible that the state should be able to regulate those aspects of code distribution that are intended to operate without operating on the human cognition.

Touretsky's argument is therefore in large measure a very well presented, finely detailed slippery slope argument. It suggests that some cases will be easier, and others harder. Liability for sending an executable file of a virus, intended to function on the computer of a user without communicating to the user, should be relatively straightforward to understand in first amendment terms as not implicating expressive values. Liability for publishing an academic paper that includes instructions for how to attain a certain result in computing should be treated as implicating first amendment interests of the highest order. The presence of formal representations normally used in the discipline, which are machine readable and sufficient to be automatically compiled into running code, should not change this characterization. This is why the *Felten* case is so compelling, and why the recording industry is trying so hard to run away from the field in it. In between there are hard cases that need to be resolved based on the extent to which a regulation burdens speech among computer professionals. A law that prohibits distribution of source code (as defined functionally in the GNU GPL to be the form most usable by programmers)[74] should be treated as directly burdening speech. If it treats code about different human actions differently because government treats communication in this form about this subject as more dangerous to its interests,

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[73] http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/index.html. In principle, the logic of linking liability in the DeCSS case could treat this footnote as an act of trafficking, though this is unlikely.

[74] GNU GPL Section 3 (The source code for a work means the preferred form of the work for making modifications to it.)

as the DMCA antidevice provision does, it should be seen as content-based speech regulation. A law that prohibits only the distribution of executable files already compiled for a known set of machines, should be seen as incidentally affecting speech, and subject to *O'Brien* review. I do not pretend that this cursory discussion resolves this issue. Here I only raise this difficult question, and suggest my own intuitions about this thorny question (they are, I know, quite unwelcome among many who care deeply about defending the public domain against the enclosure movement).

E. Criminalization

The DMCA and regulation of the logical layer is also where the story of Dmitry Sklyarov enters and looms large.[75] Encryption of information and cultural materials is intimately involved in the denial of permission to read, view, or quote the encrypted materials. A legal prohibition on decryption—on taking practical steps that would allow one to read, view, or quote the information or cultural materials regardless the prohibition—therefore directly implicates first amendment considerations in ways described in the preceding section. To impose in this delicate area criminal sanctions is to force innovators and readers to adopt wide margins around the contours of the law. And it is precisely this high risk of criminal liability, and its chilling effect on protected activities, that requires courts to be especially wary of criminal provisions that burden speech. It is one thing for Alice Randall or Edward Felten (or 2 Live Crew) to test the bounds of the law when the consequences might be an injunction preventing publication, or even a damage award. It is quite another to ask them to continue to enrich our speech environment at the risk of spending years in federal prison.

Beginning with the No Electronic Theft Act (NET Act) and later incorporated into the DMCA, criminal copyright has recently become much more expansive than it was until a few years ago. Prior to passage of the NET Act, only commercial pirates—those that slavishly made thousands or millions of copies of video or audiocassettes and sold them for profit—would have qualified as criminal violators of copyright. With its passage, criminal liability has been expanded to cover private copying and free sharing of copyrighted materials whose cumulative nominal price (irrespective of actual displaced demand) is quite low. As criminal copyright law is currently written, many of the over 70 million Napster users are felons. It is one thing when the recording industry labels tens of millions of individuals in a society "pirates" in a rhetorical effort to conform social norms to their business model. It is quite another when the state brands them felons and fines or imprisons them.

Jessica Litman has offered the most plausible explanation of this phenomenon.[76] As the network makes low-cost production and exchange of information and culture easier, the large-scale commercial producers are faced with a new source of competition—volunteers, people who

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[75] See *supra*, prologue, under the title, *Off with his Head!.*

[76] Jessica Litman, Electronic Commerce and Free Speech, 1 J. Ethics and Information Technology 213 (1999).

provide information and culture for free. As the universe of people who can threaten the industry has grown to encompass more or less the entire universe of potential customers, the plausibility of using civil actions to force individuals to buy rather than share information decreases. Suing all of one's customers is not a sustainable business model. In the interest of maintaining the business model that relies on control over information goods and their sale as products, the copyright industry has instead enlisted criminal enforcement by the state to prevent the emergence of such a system of free exchange. In the Sklyarov case, this is presented by the fact that it was Adobe that instigated the prosecution. That Adobe later conveniently receded in the face of outrage of many of its customers does not change the fundamental fact that it instigated precisely the chain of events it wished to occur—criminal enforcement without direct involvement by the vendor.

The changes in law coupled with the current Justice Department's focus on enforcement of intellectual property rights[77] have lead to a substantial increase in the shadow of criminal enforcement in this area. The potential stakes of using information and cultural materials have risen, requiring that users seek a license and pay for use in many more instances than they would have only a few years ago. It is still, as of this writing, a serious constitutional question whether a law, like the DMCA, that prohibits Dmitry Sklyarov from writing code that has substantial noninfringing uses—like letting users read public domain materials like Alice in Wonderland or quote from ebooks without permission—is a valid exercise of Congress's power under Article I or is consistent with the first amendment. But asking programmers to write the software that will make these privileged uses available, so that legal challenges can determine the constitutionality of that prohibition is difficult when the price of a mistake is prison.

The Supreme Court has expressed particular concern with the chilling effect of criminal, as opposed to civil, enforcement of policy. In *Reno v. ACLU* the Court specifically stated that "the severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images,"[78] distinguishing it from the civil measures used to effectuate similar child-protection goals in *Denver Area.* Similarly, the *Pacifica* court's approval of the FCC's administrative action specifically noted as one consideration that the sanction imposed was not criminal.[79]

The thoughtful critical essay that David Touretsky has published includes materials that could be interpreted as circumvention devices, and providing them could be interpreted as trafficking. The problem with the expansive criminalization of copyright is that Touretsky must be a braver man to bring his criticism to the public than he would if the sole remedy was civil—say, and injunction

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[77] See DOJ Intellectual Property Policy and Programs, http://www.usdoj.gov/criminal/cybercrime/ippolicy.htm.
[78] 521 U.S. 844, 872 (1997).
[79] FCC v. Pacifica Foundation, 438 U.S. 726, 747 (1978).

requiring him to remove his page following time-wasting and costly litigation. Some brave critics will continue. Others will be chilled. Discourse will be impoverished.

Given the tremendous expansion of rights in the past few years, and the serious arguments that these expansions have deleterious implications for free speech and are unjustified as a matter of economic theory, the heightened criminalization of copyright should present one of the first and most immediate targets for judicial review. The Sklyarov case presents an excellent opportunity for the judiciary to exercise its moderating power.

F. Raw information and information about information

In 1991, in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, the Supreme Court held that raw facts in a compilation, or database, were not covered by the Copyright Act, and could not be so protected consistent with the constraints imposed by the intellectual property clause.[80] The Court held that the creative element of the compilation—its organization or selectivity, for example, if creative—could be protected under copyright law,[81] but that the facts compiled could not. Copying data from an existing compilation was therefore not "piracy;" it was not unfair or unjust; it was purposefully privileged in order to advance the goals of intellectual property—the advancement of progress and creative uses of the data.[82]

The years since the Court decided *Feist* have seen repeated efforts by the larger players in the database publishing industry to pass legislation that would, as a practical matter, overturn *Feist* and create exclusive private rights in the raw data in compilations. Because the Court rooted its *Feist* decision in a robust interpretation of the exclusive rights clause, efforts to protect database providers eventually settled on an unfair competition law, based in the Commerce Clause, free and clear of the inconvenient weight of *Feist*. In fact, however, the primary law that has repeatedly been introduced walks, talks, and looks like a property right. If some version of this law ultimately passes, it will present an important focal point for defining the constitutional status of raw data, both under the Exclusive Rights Clause and *Feist*, and under the first amendment.

Even if the congressional law can be stopped, other avenues have more recently opened to appropriate raw data. In particular, some litigants have turned to state law remedies to protect their data indirectly, by developing a trespass-to-server form of action. The primary instance of this trend is *eBay v. Bidder's Edge*, a suit by the leading auction site against an aggregator site. Aggregators collect information about what is being auctioned in multiple locations, and make them available in

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[80] 499 U.S. at 349-50.

[81] 17 U.S.C. § 103.

[82] *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349-50 (1991)

one place so that a user can search eBay, Yahoo, and other multiple auction sites simultaneously. The eventual bidding itself is done on whatever site the item's owner chooses to make his or her item available, under whatever terms are imposed by that site. The court in *eBay v. Bidder's Edge* held that the automated information collection process—of running a computer program that continuously requests information from the server about what is listed on it, called a spider or a bot—was a trespass to chattels.[83] The injunction led to Bidder's Edge closing its doors before the Ninth Circuit had an opportunity to review the decision.[84]

The result of a common law decision of the *eBay v. Bidder's Edge* variety is to create a common law exclusive private right in information by the back door. While in principle the information is still free of property rights, reading it mechanically—an absolute necessity given the volume of the information and its storage on magnetic media accessible only by mechanical means—can be prohibited as trespass. The practical result would be equivalent to some aspects of a federal exclusive private right in raw data, but without the mitigating attributes of any exceptions that would be directly introduced into legislation. To prevent such an eventuality, if these cases cannot be resisted on state common law grounds, they must be challenged either on preemption grounds—based on the copyright law—or on first amendment grounds, on the model of *New York Times v. Sullivan*.[85] The preemption model could be similar to the model followed by the Second Circuit in *NBA v. Motorola*,[86] which restricted state misappropriation claims to narrow bounds delimited by federal policy embedded in the copyright act. Perhaps requiring actual proof that the bots have stopped service, or threaten the very existence of the service—a requirement imposed, *mutatis mutandis* in *NBA v. Motorola*—would be sustainable under a first amendment or preemption analysis.

Beyond raw data and the various ways of controlling it, a central question that will have to be addressed is the status of legal control of information about information—like linking, or other statements people make about the availability and valence of some described information.

Linking—the mutual pointing of many documents to each other—is the very core idea of the World Wide Web. In a variety of cases, parties have attempted to use law to control the linking practices of others, largely to retain control over the information about which the challenged link provides information. What is common to these cases is that they aim to create an exclusive private right to give people information about where they can find information. The linking aspect of *Reimerdes* raises this exclusive right directly, as an interpretation of the anti-device provision of the DMCA.

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[83] eBay, Inc. v. Bidder's Edge, Inc., 2000 U.S. Dist. LEXIS 13326.
[84] Peg Brickley, Now-Defunct Bidder's Edge Settles Online Dispute, Corporate Legal Times, July, 2001.
[85] New York Times v. Sullivan, 376 US 254, 266 (1964).
[86] National Basketball Association v. Motorola, 105 F.3d 841 (2d Cir. 1997).

In *Reimerdes* the movie industry sought and received an injunction prohibiting the defendants from linking from their site to places on the Web where users could access DeCSS. In this aspect of the case, the court prohibited the defendants from telling others where they could find this software by linking to sites that made a copy available. The principle was that a link is just a way of providing software, and whether giving it on a disk or providing a link to an online distribution point, making the prohibited software available to users is a violation of the prohibition on trafficking in circumvention devices. This the district court perceived as easy in a case where the link directly began a downloading process, and was easily not the case if a general-purpose publication, like a newspaper, linked to a broad site that discussed many issues, and included a link to a copy of the program. The court described as harder cases instances in which there was some material on the end of a link, but not a lot other than the prohibited circumvention software, or where the person linking had intended to facilitate circumvention by linking. The court therefore set out a sliding scale of likelihood of finding liability, depending on the intent of the linking and the extent to which a link was close to, or removed from, being as a practical matter a download button.[87]

The difficulty with the approach that the district court in *Reimerdes* took is that linking is simply a statement about where information can be found. Prohibiting people from telling other people where information can be found, leaving those others free to use that information as they please is very difficult to square with the first amendment. A list of links is not fundamentally different from a newspaper listing of all the bookstores in town where obscene pornography can be found—as the government's lawyer conceded during the argument on appeal. The "intent" factor that the district court used to mitigate this effect—intent to distribute prohibited materials—would have allowed imposition of liability against a rag that intended to help its readers get obscene pornography, but would have exempted a conservative newspaper that published the list as part of a campaign to boycott the stores. The general-purpose publication versus dedicated distribution site factor would have meant that maybe if the rag had enough other content it wouldn't be liable, but a person handing out handbills with the same exact list would be liable. The degree of *ex post* judicial judgment as to intent and purpose of the publication would chill speech. Perhaps, under a clear and present danger analysis, some links can indeed be prohibited. A link that, without warning the person clicking begins to download a virus is a fairly obvious example, because it operates without the intervention of human cognition. It plays a purely functional, not communicative role. But linking to a site that has such a link, particularly with some statement—you can find this virus here—is already a matter of informing another, not of causing harm.

A more subtle regulation of linking occurs when parties seek to prohibit others from linking to them or to control how they link to them. The quintessential case involved a service that Microsoft offered—sidewalk.com—that provided access to, among other things, information on events in various cities. If a user wanted a ticket to the event, the sidewalk site linked that user

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[87] *Reimerdes* at 340-41.

directly to a page on ticketmaster.com where the user could buy a ticket. Ticketmaster objected to this practice, preferring instead that sidewalk.com link to its home page, so as to expose the users to all the advertising and services Ticketmaster provided to the users, rather than solely to the specific service sought by the user referred by sidewalk.com. The case settled, and another similar case, Ticketmaster Corp. v. Tickets.com, Inc.,[88] was resolved in an unpublished opinion that focused on other aspects of the case.

At stake in these linking cases is who will control the context in which certain information is presented. If deep linking is prohibited, Ticketmaster will control the context—the other movies or events available to be seen, their relative prominence, reviews, etc. The right to control linking then becomes a right to shape the meaning and relevance of one's statements for others. And if the choice between Ticketmaster and Microsoft as controllers of the context of information may seem of little normative consequence, it is important to recognize that the right to control linking could easily apply to a local library, or church, or a neighbor.

The general point is this. On the Net there are a variety of ways in which some people can provide information about information elsewhere on the Web. In doing so, they loosen the control of someone else—be it the government, a third party interested in limiting access to the information described, or the person offering the information described—over the described information. In a series of instances we have seen attempts by people with control over certain information to limit the ability of others to loosen that control by providing information about the controlled information. These are not cases in which a person without access to information is seeking affirmative access. These are cases where someone is seeking the aid of law to control what others say to each other about information that person wishes to keep controlled. Understood in these terms, the restrictive nature of these moves in terms of free speech becomes clear, and the need to subject them to first amendment scrutiny too becomes clear.

Conclusion

Exclusive private rights in information exist in tension with individual freedom to read and express oneself. This tension is mediated by constitutional constraints placed on Congress when it enacts such rights, constraints that in practice some lower courts have relaxed.

The constraints are justified because exclusive private rights in information that are too strong entail substantial costs in terms of democracy and autonomy. For both values, the driving mechanism is that strong exclusive rights increase the importance of large-scale commercial producers of commodified information, at the expense nonprofit information production and the emergence of nonproprietary peer production as core elements of our information production system. For democracy, that means that more of the information available and the channels of

[88] 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000).

communi cation are funneled through a small number of large commercial media companies, at the expense of opportunities for a more diverse universe of content and loci of discourse. For autonomy, it means that we will have a system with substantially less information of critical and fringe possibilities, and greater opportunities for some players—the owners of media and "content"—to structure the information environment of consumers. It also means that opportunities for enhancing personal autonomy in both the productive and consumption aspects of individuals' lives—opportunities made possible by the emergence of peer production—will be more limited

The constraints are also justified because the political economy of legislation in this field has a systematic bias towards ever-stronger exclusive rights. The beneficiaries of the rights see private and present gains from strengthening rights. Those who bear the costs are diffuse, and usually the costs are to be incurred in the future, sometimes by generations not yet born or at least not yet able to foresee the effects on them. This leads to a systematic overstatement of the benefits and understatement of the costs of rights.

At present, a number of pressure points are likely to play a central role in defining the relationship between the constitution and the institution of exclusive private rights in information. First, the framework I suggest is controversial, and whether or not it will end up reflecting the law will largely be determined in a number of cases currently in the courts. Second, the way the first amendment plays in this debate will be heavily affected by how first amendment law resolves an internal tension in how that law has responded to the rise of the information economy. The first amendment's gradual extension of rights to corporations, and of the status of speech to what are essentially the commercial operations of firms in the information economy, pushes towards a new-Lochnerism for the information economy. The simultaneous failure to protect individuals from commercial overreaching that impoverishes and controls individuals' information environment introduces a moral inversion in first amendment law in this area. The first amendment has come to protect as central rights that can only be justified instrumentally, often at the expense of individuals who are the real bearers of intrinsic claims to freedom of speech and expression. Third, this is an area in which the form of many of the regulations has the look and feel of private ordering, a characteristic that tends to confound first amendment law in this area. Nonetheless, the design of exclusive private rights should be treated as any other law whose operative characteristic is the prohibi tion of speech. Fourth, how we resolve the first amendment status of the regulation of code will be immensely important because it will determine how the logical layer of the information environment is made to comply with, or resist, enclosure of the public domain. The increasing sophistication of computers and the ease of translation from human to machine languages complicates this problem significantly. Fifth, heightened criminalization is a trend that raises the stakes of the constitutional debate, and presents one of the most important targets for immediate resolution. Sixth, a variety of mechanisms being developed to give some people power to control information that other people give about information are an area where the first amendment has an

important role to play in stemming the expanding range of rights to control information that are intended to sustain the business model of selling information as goods.

What is up for grabs in these debates is the way that information and culture is produced in the pervasively networked society. How information is produced and used, who is engaged in information production and exchange, with what motives, and with what degree of control over what others see and speak in society will have significant implications for democracy and freedom. The constitution cannot be silent or neutral in these questions. It places its thumb on the scales of freedom on the side of a robust democratic discourse, of diversity of antagonistic voices, and of individual expressive autonomy.