ARTICLE

FREE AS THE AIR TO COMMON USE: FIRST AMENDMENT CONSTRAINTS ON ENCLOSURE OF THE PUBLIC DOMAIN

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Our society increasingly perceives information as an owned commodity. Professor Benkler demonstrates that laws born of this conception are removing uses of information from the public domain and placing them in an enclosed domain where they are subject to an owner's exclusive control. Professor Benkler argues that the enclosure movement poses a risk to the diversity of information sources in our information environment and abridges the freedom of speech. He then examines three laws at the center of this movement: the Digital Millennium Copyright Act, the proposed Article 2B of the Uniform Commercial Code, and the Collections of Information Antipiracy Act. Each member of this trio, Professor Benkler concludes, presents troubling challenges to First Amendment principles.

> The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.[1]

INTRODUCTION

We are in the midst of an enclosure movement in our information environment.[2] In other words, our society is making a series of deci-

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[1] International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[2] David Lange first identified this trend toward greater "propertization" of information and recognized that copyright protection means enclosure of the public domain. See

sions that will subject more of the ways in which each of us uses information to someone else's exclusive control.

How one evaluates this expansion of property rights depends on one's conceptual baseline about how information should be controlled.[3] The quotation that opens this essay, taken from one of Justice Brandeis's many dissents from the *Lochner* majority, states the conceptual baseline prevailing in his time: "The general rule of law," he wrote, is that once information is communicated to others it becomes "free as the air to common use."[4] Departures from that baseline must be specifically justified. Lord Macaulay's depiction of copyright as "a tax on readers for the purpose of giving a bounty to writers"[5] was the pithiest statement of this conception. In the seven decades since Justice Brandeis's dissent, we have seen a shift in prevailing assumptions about copyrights, patents, and related laws. Increasingly, they have come under the umbrella of "intellectual property." That semantic umbrella has infused these laws with the conceptual attitudes we have toward property in physical things. We expect things to be owned and exclusively controlled by someone. We think that protecting private property is good policy, good political theory, and just.[6] Looking at copyright from this perspective, it is not Macaulay's "tax on readers" but instead is the presumptive right of authors. Derogation from it, like the fair use exception to copyright, is in turn "a subsidy to users."[7]

David Lange, Recognizing the Public Domain, 44 Law & Contemp. Probs. 147, 147, 150 (1981). Nonetheless, the expansion of property rights in information products has been the subject of cautionary critique at least since Benjamin Kaplan, Unhurried View of Copyright (1967); see also Stephen Breyer, The Uneasy Case for Copyright, 84 Harv. L. Rev. 281 (1970). The trend, particularly parts of it relevant to the digital environment, has since been the subject of extensive critique. See James Boyle, Shamans, Software, and Spleens (1996); Jessica Litman, The Public Domain, 39 Emory L.J. 965 (1990); Pamela Samuelson, The Copyright Grab, Wired, Jan. 1996, at 134.

[3] See Jeremy Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property, 68 Chi.-Kent L. Rev. 841, 859-62 (1993) (discussing competing baselines of liberty and duty).

[4] *International News Serv.*, 248 U.S. at 250 (Brandeis, J. dissenting).

[5] Lord Macaulay, Copyright (Speech in the House of Commons 1841), in 8 Essays by Lord Macaulay 195, 201 (Lady Trevelyan ed., 1879). The practical expression of this conceptual foundation was that copyright law was considered regulatory, rather than proprietary, during the first century or so of its operation in the United States. See L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 Vand. L. Rev. 1, 52 (1987).

[6] See Waldron, supra note 3, at 844-45.

[7] Robert P. Merges, The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce, 12 Berkeley Tech. L.J. 115, 134-35 (1997); accord Jane C. Ginsburg, Authors and Users in Copyright, 45 J. Copyright Soc'y U.S.A. 1, 15 (1997) (arguing that fair use is a discount enjoyed by some classes of users and thus becomes kind of "redistribution" of value of copyright to those users); Jane C. Ginsburg, Copyright, Common Law, and *Sui Generis* Protection of Databases in the United States

Expecting information to be owned, and to be controlled by its owner, blinds us to the cost that this property system imposes on our freedom to speak. Consider Dennis Erlich, a member of the Church of Scientology for fourteen years. After leaving the Church, Erlich vocally criticized Scientology and considered "it part of his calling to foster critical debate about Scientology through humorous and critical writings."[8] As part of his campaign, Erlich posted to an internet newsgroup documents containing the Scientologists' religious teachings, interspersed with criticism. The Church of Scientology sued for copyright infringement. The court issued a temporary restraining order (TRO) and a seizure order. In a later opinion, the court provided this description of what followed:

> On February 13, 1995, in execution of the writ of seizure, local police officers entered Erlich's home to conduct the seizure. The officers were accompanied by several [Scientology] representatives, who aided in the search and seizure of documents related to Erlich's alleged copyright infringement and misappropriation of trade secrets. Erlich alleges that [Scientology] officials in fact directed the seizure, which took approximately seven hours. Erlich alleges that plaintiffs seized books, working papers, and personal papers. After locating Erlich's computers, plaintiffs allegedly seized computer disks and copied portions of Erlich's hard disk drive onto floppy disks and then erased the originals from the hard drive.[9]

When it considered whether to replace the TRO with a preliminary injunction, the court ordered the plaintiffs to return some of the materials they had seized.[10] But it rejected Erlich's First Amendment argument that following the TRO with a preliminary injunction would amount to an unconstitutional prior restraint. Once the court satisfied itself that the church likely would prevail on copyright law principles, it presumed irreparable harm (the common practice in copyright)[11] and brushed off Erlich's First Amendment claims.[12]

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and Abroad, 66 U. Cin. L. Rev. 151, 169 (1997) (viewing fair use as subsidy from copyright owner in favor of uses with public benefits); Jane C. Ginsburg, Libraries Without Walls? Speculation on Literary Property in the Library of the Future, 42 Representations 53, 63-64 (1993) (discussing applicability of "public benefit" rationale for fair use with regard to works made available through digital libraries).

[8] Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 923 F. Supp. 1231, 1239 (N.D. Ca. 1995).

[9] Id. at 1240.

[10] See id. at 1266.

[11] See id. at 1257.

[12] See id. at 1257-58. This common feature of copyright infringement cases has recently been the subject of extensive criticism in Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. (forthcoming 1999).

Or consider those two bastions of the press, the *Washington Post* and the *Los Angeles Times*, suing a web service called Free Republic. Free Republic includes a forum where right-wing conservatives share news clippings and exchange opinions on line.[13] Users who read articles they think deserve comment cut and paste them onto the forum. They then post a comment, and other users participate in a threaded discussion of the article. In October, 1998, the *Washington Post* and the *Los Angeles Times* decided that public discourse may be a good thing, but not when it is involved using *their* stories. So they brought a copyright action to prevent the users of Free Republic from posting the papers' stories to their political forum.[14] It is hard to imagine two large newspapers asking the government to shut down a discussion group where people share clippings of their news stories and engage in political debate over them, but the case boils down to just that. If there is a cost to the language of property that has come to dominate our view of information, it is the myopia exemplified by this suit.

To revive our ability to see the costs to our polity of making too much information subject to too broad a set of property rights, I offer in this Article a contemporary defense of Justice Brandeis's conceptual baseline. Copyright and related laws regulate society's information production and exchange process. They tell some people how they can use information, and other people how they cannot. And they do so to implement policies intended to increase the efficient production and exchange of information. They are, in this sense, analytically indistinct from media and communications regulation. To replace Justice Brandeis's "general rule of law," I propose we turn to the constitutional analysis developed for media regulation, in order to set the boundaries within which Congress and the courts must operate when creating and applying property rights in information products. This approach would begin with the assumption that government will not, in the first instance, prevent anyone from reading or using this part or that of the information environment. Information will, in this sense, be "free as the air to common use." Departures from this baseline must be limited to those instances where government has the kind of good reasons that would justify any other regulation of information production and exchange: necessity, reason, and a scope that is no broader than necessary.[15]

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[13] See Free Republic Forum (visited Mar. 4, 1999) <http://www.freerepublic.com/forum/latest.htm>.

[14] See Pam Mendels, Newspaper Suit Raises Fair Use Issues, CyberTimes—The New York Times on the Web (Oct. 2, 1998) <http://www.nytimes.com/library/tech/98/10/cyber/articles/02papers.html>.

[15] See infra Part II.E.

Applying this baseline to our law of copyright, we would recognize that the First Amendment requires a robust public domain. First, analytically, property rights in information mean that the government has prohibited certain uses or communications of information to all people but one, the owner. The public domain, conversely, is the range of uses privileged to all.[16] A society with no public domain is a society in which people are free to speak, in Berlin's sense of freedom as "negative liberty,"[17] only insofar as they own the intellectual components of their communication. Otherwise, they are under a legally enforceable obligation not to speak except with the permission of someone else. If they want to speak without such permission, a court may prevent them from speaking or punish them for having spoken. Enclosure therefore conflicts with the First Amendment injunction that government not prevent people from using information or communicating it. Second, the Supreme Court has long stated that it is central to our democratic processes that we secure "the widest possible dissemination of information *from diverse and antagonistic sources*."[18] Later in this essay I explain why, as a matter of positive prediction, copyright and similar laws tend to concentrate information production. I suggest that if this is so, then property rights in information are doubly suspect from a First Amendment perspective. First, they require the state to prevent people from speaking in order to increase information production in society. Second, the mechanism of property rights tends to favor a certain kind of increased production—production by a relatively small number of large commercial organizations. This, in turn, conflicts with the First Amendment commitment to attain a diverse, decentralized "marketplace of ideas."

Part I defines the public domain, the enclosed domain, and the regulatory act of enclosure. Part II describes the constraints that concentration of information production and exchange can place on free speech. It describes a series of Supreme Court media regulation cases that has identified a risk to First Amendment values distinct from the

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[16] As will become clear, I use the term "public domain" in an atypically broad sense. The term more commonly denotes information or works that are not protected. It does not usually refer to privileged uses of protected information. Rather than defend this breadth here, bear with me for a few more pages, and I will seek to defend this definitional scope in Part I.

[17] See Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 122-31 (1968).

[18] Associated Press v. United States, 326 U.S. 1, 20 (1945) (emphasis added); accord Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) [hereinafter *Turner II*]; Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663-64 (1994) [hereinafter *Turner I*]; Buckley v. Valeo, 424 U.S. 1, 49 (1976); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Citizen Publ'g Co. v. United States, 394 U.S. 131, 139-40 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

more commonly perceived risk from government action. That risk is that a few nongovernmental organizations will exercise too much control over our information environment, and reduce the robustness and diversity of exchange in our marketplace of ideas. It is a risk that the Court has at times found weighty enough to justify government action intended to alleviate the censorial effects of media concentration. Part III explains why enclosure of the public domain constitutes a government action that abridges the freedom of speech. It suggests that a person's copyright claims can conflict with the First Amendment no less than a person's claims to reputational integrity.[19] To the extent we are concerned that government neither prevent nor punish speech, we must be concerned about changes in law that commit government to prevent more uses and communications of information. Part IV explains why enclosure may pose a risk to the diversity of information sources in our information environment. I explain why enclosure, as a predictive matter, likely will concentrate the information production function in society.[20] A world dominated by Disney, News Corp., and Time Warner appears to be the expected and rational response to excessive enclosure of the public domain. If my descriptive model is right, then enclosure—or the continued and extensive enforcement of property rights in information—will harm, not help, the availability of information from "diverse and antagonistic sources."[21]

In the last Part, I look at three laws currently at the heart of the enclosure movement's legislative agenda. First, I look at the anticircumvention provision of the Digital Millennium Copyright Act.[22] This provision prohibits anyone from getting around technological locks that control access to information distributed in digital form. The most problematic feature of these devices is that they can prevent access to information whether or not the information's producer has a legal right to control it. So, for example, the Scientology church might be able to scramble the documents Erlich posted, or the *Washington Post* could encrypt its stories to prevent the users of Free Republic from viewing them. The law makes it an independent violation to get

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[19] See *Red Lion*, 395 U.S. at 367; *Sullivan*, 376 U.S. at 266.

[20] See Yochai Benkler, Intellectual Property and the Organization of Information Production (Jan. 1999) (available at <http://www.law.nyu.edu/benklery/lpec.pdf>) (unpublished manuscript, on file with the *New York University Law Review*) [hereinafter Benkler, Intellectual Property]; Yochai Benkler, A Political Economy of the Public Domain, in Intellectual Products: Novel Claims to Protection and Their Boundaries (Innovation Law and Policy conference, La Pietra, Italy, June 25-27, 1998) (on file with the *New York University Law Review*) [hereinafter Benkler, Political Economy].

[21] *Associated Press*, 326 U.S. 1, 20 (1945).

[22] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (to be codified at scattered sections of 17 U.S.C.).

around these locks, even when the person who is trying to get around the locks is privileged to use the information; if a court found the Free Republic clippings to be privileged under copyright law, using decryption software to circumvent a digital lock that the newspapers place on their stories still would subject the Free Republicans to civil and criminal sanctions under the Digital Millennium Copyright Act.

The second law I discuss is the proposed U.C.C. Article 2B provision on mass market licenses.[23] That law enforces contractual provisions pertaining to information even if they give the owners of the information product much broader rights than does copyright law. Imagine that the first page of the *Washington Post* web site required you to click on a button at the bottom of a box that read: "I agree that I will not tell any person the facts reported on this site, provided that I may tell any person that there is an interesting story on this site and may provide any person the exact title and/or URL of a story." Article 2B would validate such mass market contracts, even though the facts embodied in a work are not covered by copyright. And again, the state would enforce such a contract against the Free Republicans even if their clippings and commentary were found privileged under copyright law.

Finally, I briefly discuss the proposed Collections of Information Antipiracy Act,[24] which would make it illegal to use the information content of databases, and thereby provides protection to unoriginal facts that are not protected by copyright law. The hearing record of the Act provides a useful reference point to identify why the more rigorous standard required of a law that conflicts with First Amendment rights would require the government to come up with much better reasons for a law than Congress currently appears to consider sufficient.

I
What Is the Public Domain?

Information is "in the public domain" to the extent that no person has a right to exclude anyone else from using the specified information in a particular way. In other words, information is in the public domain if all users are equally privileged to use it.

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[23] See U.C.C. § 2B-208 (ALI Council Draft, Dec. 1998) (official draft available at <http://www.law.upenn.edu/library/ulc/ucc2b/2bALId98.htm>).

[24] H.R. 2652, 105th Cong. (1998). The bill was passed by the House of Representatives on May 19, 1998, but was not considered by the Senate before the 105th Congress adjourned *sine die*. Representative Coble has reintroduced the bill in the 106th Congress. See H.R. 354, 106th Cong. (1999).

As a term of art, "the public domain" traditionally has referred to a large part of what I propose here as a working definition of the term. Jessica Litman, who has traced the development and contours of the public domain construct more closely than anyone else, defined it as "a commons that includes those aspects of copyrighted works which copyright does not protect."[25] In other words, the public domain comprised not all *uses* of information privileged to the user, but only those uses privileged because there was something about *the information used* that was deemed unprotectible in principle.[26] The term provided a general category to describe the limits on protectibility set by copyright statutes as they evolved over time,[27] and by the series of judicial decisions that systematically refused to protect certain aspects of works.[28] This definition does not include instances where the law refuses an owner of copyright a remedy, even though the work and the aspect of it used are protectible in principle. The most important category of this type of privilege is the fair use doctrine.

The difference between unprotectible works or aspects of works and privileged uses of works that are protectible in principle is important to an internal analysis of copyright law. For example, the fair use doctrine is an affirmative defense,[29] while the plaintiff has the burden to show that the work is original or that the elements copied are not a "stock scene."[30] The same lines of differentiation are less useful, however, in analyzing how copyright law or other property-like rights in information operate as institutional devices in a social or economic context.

In analyzing the social implications of a set of rules, the most relevant question is how the rules constrain behavior. In analyzing copyright or related property rights in information, what matters is how the rules affect people's baseline assumptions about what they may and may not do with information. The particular weakness of the traditional definition of the public domain is that it evokes an intuition about the baseline, while not in fact completely describing it. When

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[25] Litman, supra note 2, at 968.

[26] See id. at 975-77.

[27] Litman enumerates these unprotectible materials in her article. They included, for example, materials produced before protection was available, or materials whose copyright period had expired. For a long time they also included the works of foreign nationals, as well as works that failed to comply with very specific formal requirements. See id.

[28] These include the refusal to protect facts or ideas, as well as doctrines such as *scenes a faire*. See id. at 987.

[29] See 17 U.S.C. § 107 (1994) (outlining factors for determining whether use of work in any particular case is fair use).

[30] Beal v. Paramount Pictures Corp., 20 F.3d 454, 459 (11th Cir. 1994) (defining stock scenes as those that "naturally flow from a common theme").

one calls certain information "in the public domain," one means that it is information whose use, absent special reasons to think otherwise, is permissible to anyone. When information is properly subject to copyright, the assumption (again absent specific facts to the contrary) is that its use is not similarly allowed to anyone but the owner and his or her licensees. The limited, term-of-art "public domain" does not include some important instances that, as a descriptive matter, are assumed generally to be permissible. For example, the traditional definition of public domain would treat short quotes for purposes of critical review as a fair use—hence as an affirmative defense—and not as a use in the public domain. It would be odd, however, to describe our system of copyright law as one in which users assume that they may not include a brief quotation in a critical review of its source. I venture that the opposite is true: Such use generally is considered permissible, absent peculiar facts to the contrary.

This does not mean that whenever anyone is under a legal duty not to use certain information in a particular way, that information is no longer in the public domain. Nor does it mean that whenever someone is permitted under law to use information, that material *is* in the public domain. I might win an injunction obligating you not to blare *Romeo and Juliet* through a loudspeaker placed outside my window, but the recital of *Romeo and Juliet* remains a use in the public domain. Conversely, I might successfully defend a copyright infringement suit because of special circumstances that permit me to assert a copyright misuse defense.[31] Nonetheless, a similar use of similar information would remain, at baseline, impermissible.

The functional definition therefore would be:

> The *public domain* is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged.

Conversely,

> The *enclosed domain* is the range of uses of information as to which someone has an exclusive right, and that no other person may make absent individualized facts that indicate permission from the holder of the right, or otherwise privilege the specific use under the stated facts.

These definitions add to the legal rules traditionally thought of as the public domain, the range of privileged uses that are "easy cases."

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[31] See Practice Management Info. Corp. v. American Med. Ass'n, 121 F.3d 516, 520-21 (9th Cir. 1997) (holding that defendant misused its copyright because terms under which defendant agreed to license reference work gave defendant substantial and unfair advantage over its competitors); Lasercomb America, Inc. v. Reynolds, 911 F.2d 960, 976-77 (4th Cir. 1990) (holding that misuse of copyright was valid defense to infringement action).

Uses of information commonly perceived as permissible absent special circumstances, such as a brief quotation in a critical review or lending a book to a friend, fall within the functional definition of the public domain. Uses that are privileged because of highly particularized facts would not fall within that definition.

These definitions also underscore an attribute of copyright and similar proprietary protection central to this Article's analysis. Stating that a use or communication of information is in the public domain or the enclosed domain describes an expectation about how government will behave toward a particular use of information. To say that a person has a *right* is to say that he can get a court to tell the government to force someone else to act, or not to act, in a certain way. To say that a person is *privileged* to do something is to say that she can do that thing, and that no one can get a court to enlist the government against her. To say that someone has an exclusive right to certain uses of certain information means that the government has committed itself to prevent anyone else from making those uses of that information without the right holder's permission.[32] This expectation about government behavior defines the constraints imposed by the presence or absence of a right on the range of actions available to the constrained agent.

The core difference between the public domain and the enclosed domain is that anyone is privileged to use information in ways that are in the public domain, and absent individualized reasons, government will not prevent those uses. The opposite is true of the enclosed domain. There, government will prevent all uses of information unless there is an individualized reason not to prevent a particular use.

Given these symmetric definitions, "enclosure" means a change in law that requires government, upon the request of a person designated as a right holder, to prevent some uses or communications of information that were privileged to all prior to the change. An "enclosure" moves some uses and communications previously in the public domain into the enclosed domain.

Parts III and IV will explain why, when understood in these terms, the public domain is not "a subsidy to users."[33] Rather, it is a constitutionally required element of our information law. Conversely, enclosure and privatization of information raise serious constitutional

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[32] The inevitability of the state in the definition of rights is a central theme of Legal Realism. One particularly accessible expression of this concept is Corbin's explanation of Hohfeldian terminology as the ability of one private disputant or another to wake the giant—the state—or to put it back to sleep. See Arthur L. Corbin, Jural Relations and Their Classification, 30 Yale L.J. 226, 226-29 (1921).

[33] See supra note 7 and accompanying text.

objections. But first, Part II will explain the constitutional concern with privately concentrated power over information.

II
Constitutional Limits on Policies That Concentrate Information Production and Exchange: The Case of Media Regulation

A. Background

In his concurrence in *Whitney v. California*,[34] Justice Brandeis explained the First Amendment's normative content as follows:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[35]

For textual ("Congress shall make no law") and historical reasons, the government has always been seen as the primary menace to one's capacity "to think as you will and to speak as you think." From the Comstock Act of 1873[36] to the Communications Decency Act of 1996,[37] from the Espionage Act of 1917[38] to prohibitions on flag desecration,[39] Congress or the states have attempted to prevent people from saying things that legislators found objectionable. Judges, ini-

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[34] 274 U.S. 357 (1927).

[35] Id. at 375 (Brandeis, J., concurring).

[36] 18 U.S.C. § 1461 (1994). On the role of the Comstock Act in initiating the first concentrated defenses of free speech, see David M. Rabban, The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History, 45 Stan. L. Rev. 47, 55-59 (1992).

[37] Telecommunications Act of 1996 § 502, 47 U.S.C. §§ 223(a)-(e) (Supp. 1998) (prohibiting obscene or harassing use of telecommunications facilities under federal law). The Communications Decency Act was held unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997).

[38] 18 U.S.C. § 2388 (1994). See Abrams v. United States, 250 U.S. 616, 624 (1919) (upholding prosecution under Espionage Act). But see id. at 624-31 (Holmes, J., dissenting); Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (Hand, J.) (enjoining prosecution under act), rev'd, 246 F. 24 (2d Cir. 1917).

[39] See, e.g., Texas v. Johnson, 491 U.S. 397 (1989).

tially rarely and often in dissent, but later with the force of reigning doctrine, generally have told legislatures that they cannot prevent or punish such communications.[40]

But here and there in the canon of First Amendment cases we have seen an increasing tendency to recognize that government is not the sole menace to the capacity of individuals to be "free to develop their faculties,"[41] or free to think as they will and speak as they think. At the most basic level, individuals can attempt directly to silence each other. When they do so by relying on state-enforced rights, even those that might be considered very personal, such as rights to reputational integrity, the fear for freedom of speech looms large enough to raise a First Amendment concern. That is the lesson of *New York Times v. Sullivan*.[42] It is this concern that guides my assessment, in Part III, of enforcement of copyright and other extended property rights in information.

There is another way, less familiar outside the framework of media regulation, in which government action can threaten one's "freedom to think as you will and to speak as you think."[43] Government policy can cause our information environment to be highly concentrated. When this happens, even when the concentration is in the hands of commercial, nongovernmental actors, there are adverse effects on the free flow of information from diverse sources in society. A series of cases and academic commentary has steadily developed an understanding of how government is constitutionally prohibited from diminishing the diversity of voices in our marketplace of ideas by allowing a few powerful commercial organizations to monopolize the marketplace. The following section outlines this line of cases from *Associated Press v. United States*,[44] through *Red Lion Broadcasting Co. v. FCC*[45] to the cable regulation cases of the 1990s.[46] I suggest that these cases have adopted, in large part, the view that a concentrated information environment menaces First Amendment values. Sometimes, that menace was sufficient to justify government regulation aimed at diversifying and decentralizing information production. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[47] the Court went so far as to suggest that a law that unnecessa-

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[40] See, e.g., id. at 418-20.

[41] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[42] 376 U.S. 254, 266 (1964).

[43] *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

[44] 326 U.S. 1 (1945).

[45] 395 U.S. 367 (1969).

[46] See, e.g., *Turner II*, 520 U.S. 180 (1997); *Turner I*, 512 U.S. 622 (1994).

[47] 518 U.S. 727 (1996) [hereinafter *Denver Area*].

rily enhanced the censorial power of private cable operators was invalid for that reason.[48] Following a discussion of the cases, I outline the normative arguments that support this understanding of the First Amendment.

B. Decentralization: The Cases

1. Beginnings

Justice Black's opinion for the Court in *Associated Press* provided the first—and probably still the best-articulated—expression of the concern that private power over the information environment menaces First Amendment values. The government argued that the AP violated antitrust laws by excluding nonmember newspapers from the information it collected and by using anticompetitive criteria to deny membership.[49] The AP claimed in defense, among other things, that forcing its members to grant competitors access to their news abridged the freedom of the press. In response, Justice Black wrote:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. *That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society*. Surely *a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom*. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests*.[50]

The concern expressed in this passage is goal-oriented, not process-oriented. This "freedom of the press" is not about government inaction. It is about attaining a society in which all are free to publish. It is not only about wide dissemination of information, but also about the importance of having "diverse and antagonistic sources" for that information. Wide distribution of diversely produced information can be threatened not only by government, but also by nongovernmental organizations "if they impose restraints upon that constitutionally guaranteed freedom."[51] The government is not disabled, under such

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[48] See infra notes 132-46 and accompanying text (discussing *Denver Area*).
[49] See *Associated Press*, 326 U.S. at 10-13.
[50] Id. at 20 (emphases added).
[51] Id.

circumstances, from regulating the nongovernmental organization. Indeed, the paragraph opens with the assertion that: "The First Amendment, far from providing an argument against application of the Sherman Act, *here provides powerful reasons* to the contrary."[52] Application of the Sherman Act against the newswire monopoly affirmatively serves the First Amendment.

The *Associated Press* court had a relatively easy job. There, the claim was that the AP's practices would have been illegal in any market, not just the information market. Deconcentration of markets other than the information market may be wise policy, but courts have never considered it constitutionally mandated. It was only later, in the context of media regulation (in particular electronic mass media), that the Court began to act on the concern regarding overconcentration of the marketplace of ideas by a small group of powerful commercial organizations.

2. Access Rights

Red Lion Broadcasting Co. v. FCC[53] is sometimes perceived in media regulation scholarship as a discredited case that permitted the FCC to impose a fairness doctrine that the Commission itself later abandoned as unconstitutional.[54] This perception is due to the increasing acceptance of the economic critique of the notion, so important in that case, that spectrum scarcity requires licensing and content regulation, rather than auctioning and market regulation. While the spectrum scarcity rationale indeed today seems little more than fable, the perception that *Red Lion* is therefore defunct flies in the face of the revealed behavior of broadcasters, their regulators, and the judges who oversee the regulators from the seat of First Amendment review. The Court, though conscious of the critique of *Red Lion* and its scarcity rationale,[55] continues to rely on *Red Lion* as good law.[56] The

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[52] Id. (emphasis added).

[53] 395 U.S. 367 (1969).

[54] See, e.g., Thomas G. Krattenmaker, Telecommunications Law & Policy 156 (2d ed. 1998) (noting that while "the Supreme Court has not abandoned *Red Lion*, the FCC has abandoned the fairness doctrine and challenged most of the justifications asserted in the *Red Lion* opinion"). See generally F.C.C. Report, Fairness Doctrine (1984) (announcing decision not to rely on *Red Lion* reasoning).

[55] See *Turner I*, 512 U.S. 622, 638 (1994) (recognizing "increasing criticism" of scarcity rationale); FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984) (same).

[56] See Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (citing with approval precedent relying on scarcity rationale to uphold extensive government regulation of broadcast media); *Turner II*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring) (treating *Red Lion*, together with *Associated Press* and *New York Times v. Sullivan*, as source for relationship between broad access to information and democratic values); *Turner I*, 512 U.S. at 637 (citing *Red Lion* and stating that "[i]t is true that our cases have permitted more intrusive

FCC, for its part, quite recently passed a series of regulations requiring broadcasters to show children's television programs,[57] pursuant to a 1990 congressional act directing such action.[58] Broadcasters bear the Commission's occasional fines for having too little children's television or too many commercials without challenging the constitutionality of the Commission's action.[59] A similar requirement imposed on newspaper publishers (say, to have a kids' insert in newspapers with circulation of over 10,000 copies) could not conceivably survive constitutional scrutiny. But in broadcasting, such a requirement barely raises an eyebrow as the twentieth century draws to a close.

It is possible that broadcast regulation continues as it does out of sheer inertia. Given the strong interests of broadcasters to resist content regulation, however, and given the robust critique of categorical differentiation between broadcasters and newspapers, something else appears to be working to shore up the regulatory approach of *Red Lion*. I suggest that that "something else" is a much more fundamental point about speech in a mass-mediated society first articulated in *Red Lion*.[60] That point is the recognition both of the importance of diversity of voices to First Amendment values, and of the threat that concentration of information production and exchange in a mass-mediated information environment poses to that diversity. Whether the concentrated power that diminishes the capacity of diverse voices to be heard ends up in the hands of government agencies or of nongovernmental organizations is much less important. This insight has retained its plausibility in broadcast, and indeed has been extended to cable regulation in the *Turner* litigation and in *Denver Area*. Seen in this light, *Red Lion* continues to be living precedent for the proposition:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, *rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee*. . . . It is the right of the

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regulation of broadcast speakers than of speakers in other media"); Columbia Broad. Sys., Inc. v. FCC, 453 U.S. 367, 395-96 (1981) (citing *Red Lion* to delineate limitations on broadcast license).

[57] See Children's Television Programming Revision of Programming Policies for Television Broadcast Stations, 11 F.C.C. Rec. 10660 (1996).

[58] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended in scattered sections of 47 U.S.C.).

[59] See, e.g., Mississippi Broad. Partners, 13 F.C.C. Rec. 19401 (1998) (upholding fine for violation of regulations pursuant to Children's Television Act).

[60] The court was well aware that the central question before it was how to think about core First Amendment values, developed in a much more intimate information environment, as the setting shifted to a world of electronic mass media. See *Red Lion*, 395 U.S. at 386 n.15.

> public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. *That right may not constitutionally be abridged either by Congress or by the FCC*.[61]

The Court's rationale probably would not have changed had it appreciated that government could allocate "scarce" spectrum not only by licensing, but also by privatization. For example, consider the following passage:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. . . . No one has a First Amendment right to a license *or* to monopolize a radio frequency.[62]

This analysis would not change if spectrum were allocated by auction, instead of by licensing. There still would be only ten broadcasters dominating the most important mass medium. And there still would be a First Amendment commitment to prevent overconcentration of production of the broadcast information environment. The expression of this commitment would have had to focus on designing property rights in spectrum that would counteract undue concentration. The relevant difference, on this reading, between newspapers and broadcasters is not the fable about spectrum scarcity and the chaos of 1926-1927.[63] The difference is the perception that speech using a printing press is relatively easy to produce, and that the market in newspapers is unconcentrated. Broadcasting, on the other hand, systematically will be a highly concentrated information production market, given a certain technological state, whether spectrum-use rights are allocated as licenses or property rights.[64]

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[61] Id. at 390 (emphases added).

[62] Id. at 388-89 (emphasis added).

[63] See National Broad. Co. v. United States, 319 U.S. 190, 210-14 (1943) (Frankfurter, J.) (explaining that licensing was necessary to avoid interference, and that during "breakdown of the law" period of 1926-1927, when there was no licensing, there was chaos and no one could be heard). For a brief description of conflicting historical accounts of the origins of radio regulation, see Yochai Benkler, Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment, 11 Harv. J.L. & Tech. 287, 298-318 (1998) [hereinafter Benkler, Overcoming Agoraphobia].

[64] I have argued elsewhere that the decentralization commitment questions the continued acceptability of both licensing and privatization through spectrum auctions, given the

Red Lion implies that this concentrated market structure justifies, perhaps requires, government intervention to decentralize information production. But the Court did not explicitly endorse such a theory.[65] A few years later, the Court was invited to take that additional step and look to the realities of market structure in the context of the printing press and the concentrated market in daily newspapers. A changed Court refused the invitation.

In *Miami Herald Publishing Co. v. Tornillo,*[66] Jerome Barron, who originated the scholarly argument that the First Amendment requires access to private mass media,[67] represented a candidate running for the Florida House of Representatives.[68] Tornillo sought a right of reply in the pages of the Miami Herald in response to editorials published by the paper against him. He relied on a state "right of reply" statute similar to the fairness doctrine the Court had upheld in *Red Lion*.[69] Barron's argument focused on the concentration of the newspaper business over the course of the twentieth century. Gone were the low-cost presses that permitted unfettered competition in the marketplace of ideas. In the second half of the twentieth century, "[n]ewspapers have become big business."[70] Chains, national newspapers and wire services, and one-newspaper towns dominate the print media. The press "has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."[71] As a result, "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[72] The Court rejected this rationale outright. If the

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emergence of new technologies that permit utilization of spectrum on a commons basis. See Benkler, Overcoming Agoraphobia, supra note 63, at 290-98, 375-400.

65 In fact, at the end of the opinion, the Court expressly postpones consideration of the argument. It states:

> [Q]uite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.

Red Lion, 395 U.S. at 401 n.28.

66 418 U.S. 241 (1974).

67 See generally Jerome A. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

68 See *Tornillo*, 418 U.S. at 242-43.

69 See id. at 244.

70 Id. at 249.

71 Id.

72 Id. at 251.

measure necessary to avoid this monopoly is government coercion, the Court held, then,

> this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.
>
> . . . .
>
> . . . A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.
>
> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[73]

That should have ended the story, but it did not. *Tornillo* did not overturn (or even mention) *Red Lion*. In the area of broadcasting, access rights continued unabated, despite a nod in the direction of *Tornillo*.[74] The state of access rights in First Amendment law was later defined in *FCC v. League of Women Voters*:[75] *Tornillo* was the law of print, while *Red Lion* was the law of broadcast, and the difference was technologically determined.[76] The status quo after *League of Women Voters*—a technologically balkanized First Amendment law—set the stage for yet another round of media regulation cases as cable, the beast that is part carrier, part editor, and part TV "broadcaster," came to occupy an important place in our information environment.

3. Decentralization in the Absence of "Scarcity": Cable "Must Carry" Rules

The latest and most important evidence indicating the Court's acceptance of the constitutional concern with concentration is the *Turner* litigation.[77] These cases involved the "must carry" provisions

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[73] Id. at 254-58.

[74] See Columbia Broad. Sys., Inc. v. FCC, 453 U.S. 367, 395-96 (1981) (emphasizing public right to benefit from media broadcasting of diverse ideas and experiences while noting that "the Court has never approved a *general* right of access to the media").

[75] 468 U.S. 364 (1984).

[76] See id. at 377-78; see also Metro Broad., Inc. v. FCC, 497 U.S. 547, 567-68 (1990) (holding that enhancing broadcast diversity is constitutionally permissible because ensuring multiplicity of views on airwaves serves important First Amendment values), overruled on other grounds by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (requiring strict scrutiny of all governmental racial classifications).

[77] *Turner II*, 520 U.S. 180 (1997); *Turner I*, 512 U.S. 622 (1994).

of the Cable Television Consumer Protection and Competition Act of 1992,[78] which required almost every cable operator to carry a number of over-the-air broadcast signals if a broadcaster made a demand to be carried. The first iteration of the case produced several important holdings.

First, the Court held that because cable did not suffer from the "spectrum scarcity" problem, its regulation was subject to the same degree of First Amendment scrutiny as any medium other than broadcast.[79] Physical spectrum scarcity, not economic concentration, was the relevant factor in making broadcast peculiarly subject to regulation.[80] (As we soon shall see, this claim does not fit well with the Court's distinction between *Turner I* and *Tornillo*.) Second, the Court held that regulation, even economic regulation not immediately directed at content, would be subject to heightened scrutiny if it regulated only the information production and exchange sector.[81] This holding underlies the position that enclosure of the public domain requires heightened constitutional scrutiny, once enclosure is properly understood as a regulation of information production and exchange. Third, the Court held that the "must carry" rules were content neutral, not content based, and thus were subject to an intermediate level of review, not strict scrutiny.[82] This level of review requires that the measure effectively serve an important government interest unrelated to speech suppression in a manner that is not substantially more speech-restrictive than necessary.[83] The government interests claimed here were preservation of "the benefits of free, over-the-air local broadcast television," encouraging information dissemination from a variety of sources, and "promoting fair competition in the market for television programming."[84] A plurality of the Court remanded the case for fact finding as to whether the "must carry" provisions actually served the goal of preserving broadcast television.[85]

The decision in *Turner I* reaffirmed the constitutional concern with an overly concentrated information environment. In listing the important governmental interests that could justify regulation, the Court once more cited *Associated Press*, and explained that "assuring that the public has access to a multiplicity of information sources is a

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[78] 47 U.S.C. § 334 et seq. (1994).

[79] See *Turner I*, 512 U.S. at 637-39.

[80] See id. at 637-38, 640.

[81] See id. at 640-41.

[82] See id. at 643-52, 661-62.

[83] See id. at 662 (restating test first applied in United States v. O'Brien, 391 U.S. 367, 377 (1968) and construed in Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989)).

[84] Id. at 662.

[85] See id. at 667-68 (plurality opinion).

governmental purpose of the highest order, for it promotes values central to the First Amendment."[86] Thus, the Court identified the focus of concern as the availability of diverse information *sources*. The petitioners had argued that, like the Miami Herald in *Tornillo*, they were being forced to speak.[87] In rejecting this claim the Court outlined what it perceived as the crucial distinction:

> [T]he asserted analogy to *Tornillo* ignores an important technological difference between newspapers and cable television. Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.
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> The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.
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> The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[88]

The core difference, for the Court, is that even when a newspaper has a local monopoly, it cannot prevent competing sources of information from reaching willing recipients, whereas cable operators can, because they control the sole conduit into the home. It is this fact that gives cable operators the type of "private power over a central avenue of communication" that permits government to "tak[e] steps to ensure

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[86] Id. at 663.

[87] See id. at 653.

[88] Id. at 656-57 (footnote and citation omitted). The Court also cited *Associated Press*, 326 U.S. at 20 ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.").

that private interests not restrict . . . the free flow of information and ideas."[89]

The Court spent a good deal of energy describing these differences as "physical" and "technological," as opposed to economic or organizational. But in fact they are nothing of the sort. Nothing physically prevents another cable company, or two, from digging trenches and pulling cables to each house, making the "critical pathway of communication" much less so. What prevents such a development is economics. The large fixed costs of wiring a city, and the relatively low incremental costs of distributing information once a city is wired, are what make for cable monopolies. When the Court describes the possibility that newspapers from other towns will distribute copies in a one-newspaper town, it is also describing an economic phenomenon. Newspaper *distribution* is primarily an incremental cost of print publication, not, as with cable distribution, primarily a fixed cost. Once a newspaper has expended the fixed costs of reporting, writing, and laying out its stories, printing additional copies of the paper and trucking them to a nearby town for distribution at higher prices is often economically feasible.

But this does not mean that the Court's analysis in *Turner I* was mistaken. It simply means that the cable/newspaper distinction is not robust enough to limit the Court's holding. Pried loose from the technological determinism that limits its rationale, the Court's rejection of the *Tornillo*-based argument for strict scrutiny is a direct application of *Associated Press*. Government regulation of an information production industry is suspect. But government nonetheless may act to alleviate the effects of a technological or economic reality that prevents "diverse and antagonistic sources" from producing information and disseminating it widely. The necessary inquiry in each case is whether there is enough factual evidence to support the government's claim that its intervention is needed to prevent centralization of information production and exclusion of "diverse and antagonistic sources."

Justice O'Connor's dissent in *Turner I* underscores the importance of decentralization to the Court's decision. The core point of her disagreement with the Court was the validity of achieving decentralization by permitting government regulation. She wrote:

> [I]t is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the question is who will have this control. Under the FCC's view, the answer is Congress, acting within relatively broad limits. Under

[89] Id. at 657.

> my view, the answer is the cable operator. Most of the time, the cable operator's decision will be largely dictated by the preferences of the viewers; but because many cable operators are indeed monopolists, the viewers' preferences will not always prevail. . . .
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> I have no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch. And I have no doubt that Congress can act to relieve this danger. . . . [here Justice O'Connor lists permissible ways, such as subsidies, encouraging competition in cable and alternative media, etc.]
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> . . . .
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> But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression . . . .[90]

It is precisely this calculus—that the fear of government regulation necessarily trumps the concerns raised by a highly concentrated information environment—that the Court rejected.

Three years later, the *Turner* litigation returned to the Supreme Court after the District Court upheld the "must carry" requirement. The Court reiterated its earlier position that Congress properly could seek to attain a wide distribution of information from diverse sources.[91] Once more, the Court specifically rejected the dissent's argument that government intervention in the *Associated Press* tradition is warranted only to counteract anticompetitive behavior that would be illegal for any organization:

> Federal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation. Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression. Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.[92]

The Court's position is that the concern with an overly concentrated market in video programming stems from the First Amendment, and not, as the dissent argued, from a general economic policy favoring competitive markets. The Court expressly accepted the con-

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[90] Id. at 683-85 (O'Connor, J., dissenting).

[91] See *Turner II*, 520 U.S. 180, 192-93 (1997).

[92] Id. at 194 (citations omitted).

gressional purpose of assuring "a multiplicity of broadcast outlets."[93] Moreover, it refined the constitutional dimension of this purpose from the facts of *Associated Press* by stating that this goal is permissible "regardless of whether the conduct that threatens [the multiplicity of broadcasters] is motivated by anticompetitive animus or rises to the level of an antitrust violation."[94] The remainder of the opinion surveyed evidence presented in the lower court to show that Congress reasonably could have found that cable operators have a monopoly on delivery of video programming to many homes,[95] that these operators have incentives to drop some broadcasters,[96] and that broadcasters not carried are likely to decline or disappear.[97]

The Court's position is underscored by the concurrence of the economically-minded Justice Breyer, who replaced Justice Blackmun between *Turner I* and *Turner II*. Justice Breyer concurred to ensure that the Court's opinion not be read to rely too heavily on its descriptions of the anticompetitive behavior and incentives of cable operators:

> Whether or not the statute does or does not sensibly compensate for some significant market defect, it undoubtedly seeks to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate. I believe that this purpose—to assure the over-the-air public "access to a multiplicity of information sources"—provides sufficient basis for rejecting appellants' First Amendment claim.[98]

Justice Breyer recognized that such regulation "extracts a serious First Amendment price."[99] But, he wrote, that price can be justified by the "'"'basic tenet of [our] national communications policy, namely, that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the pub-

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[93] Id.

[94] Id.

[95] See id. at 197 (plurality opinion).

[96] See id. at 197-208 (plurality opinion).

[97] See id. at 208-13.

[98] *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part) (quoting *Turner I*, 512 U.S. at 663).

[99] Id. at 226 (Breyer, J., concurring in part and dissenting in part). Justice Breyer wrote that regulation suppresses speech by "interfer[ing] with the protected interests of the cable operators to choose their own programming; . . . prevent[ing] displaced cable program providers from obtaining an audience; and . . . prevent[ing] some cable viewers from watching what, in its absence, would have been their preferred set of programs." Id.

lic.'"'"[100] That policy is not an economic policy, but rather "seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve."[101]

Justice Breyer's focus on the facilitation of public discourse, and the Court's focus on the importance of maintaining the multiplicity of broadcasters as "an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression,"[102] bring us back full circle to *Associated Press*. For it was there that Justice Black stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[103]

C. The Trouble with Concentrated Information Markets

1. Decentralization in the Service of Political Discourse

Scholarship that followed Barron's pioneering work on access rights[104] has outlined why a democratic system such as ours would seek to decentralize its information production sector.[105] The reasons fall into two broad categories. First, concentrated systems can be expected to produce different information than decentralized systems. In particular, they are likely to exclude challenges to prevailing wis-

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[100] Id. at 226-27 (quoting *Turner I*, 512 U.S. at 663 (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)))).

[101] Id. at 227 (Breyer, J., concurring in part and dissenting in part) (citing Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)); accord Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *Associated Press*, 326 U.S. at 20.

[102] *Turner II*, 520 U.S. at 194.

[103] *Associated Press*, 326 U.S. at 20.

[104] See Barron, supra note 67; Jerome A. Barron, Access—The Only Choice for the Media?, 48 Tex. L. Rev. 766 (1970); Jerome A. Barron, An Emerging First Amendment Right of Access to the Media?, 37 Geo. Wash. L. Rev. 487 (1969).

[105] Chronologically, this scholarship includes Thomas I. Emerson, The Affirmative Side of the First Amendment, 15 Ga. L. Rev. 795 (1981); Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986) [hereinafter Fiss, Free Speech]; Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781 (1987) [hereinafter Fiss, Why the State?]; J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375 [hereinafter Balkin, Some Realism]; C. Edwin Baker, Advertising and a Democratic Press, 140 U. Pa. L. Rev. 2097 (1992); C. Edwin Baker, Private Power, the Press, and the Constitution, 10 Const. Comment. 421 (1993) [hereinafter Baker, Private Power]; J.M. Balkin, Populism and Progressivism as Constitutional Categories, 104 Yale L.J. 1935 (1995) [hereinafter Balkin, Populism] (reviewing Cass R. Sunstein, Democracy and the Problem of Free Speech (1993)); C. Edwin Baker, Giving the Audience What It Wants, 58 Ohio St. L.J. 311 (1997) [hereinafter Baker, Giving the Audience]; Benkler, Overcoming Agoraphobia, supra note 63.

dom that are necessary for robust political discourse.[106] Second, concentrated commercial systems tend to translate unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse.[107] Most of the arguments in both categories are instrumental. They seek to assure robust political discourse, and defend the wide distribution of information production on the ground that it is crucial to that goal. Commentators also have attempted to understand the unequal distribution of power to express oneself as a substantive concern of the First Amendment.[108] Although I do not develop this argument in full here, I outline the considerations that might lead one to adopt such a normative commitment.

The first argument supporting decentralization is rooted in the effects of centralization on the content of information available for a society's political discourse. When the number of producers of information in a large society is small, one of two conditions can prevail. First, producers may speak only what they think is right. In that case only the views of a small, powerful minority will be available for mass consumption. Anecdotal accounts of media moguls like Rupert Murdoch and William Randolph Hearst portray them as media owners of this type.[109] The second, more likely, condition is that commercial producers will attempt to guess what sort of information content consumers prefer, and then attempt to produce it. In their attempt to serve aggregated preferences, information producers are likely to exclude from public discourse many important views.

Barron focused on the incentives of commercial information providers to cater to a relatively "safe" or bland range of tastes.[110] The mass media, he wrote, have an antipathy to novel and unpopular ideas because it is "'bad business' to espouse the heterodox or the controversial. . . . What happens . . . is that the opinion vacuum is filled with the least controversial and bland ideas."[111] Baker has sug-

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106 This is the central point of Barron's critique, see, e.g., Barron, supra note 67, at 1641-42, 1647-50, but it also shows up in Fiss's discussion, see Fiss, Free Speech, supra note 105, at 1407, as well as in Baker's, see Baker, Private Power, supra note 105, at 428-30.

107 This is Fiss's core addition to Barron's critique, see Fiss, Free Speech, supra note 105, at 1412-13, and it is also central to Balkin's work, see Balkin, Some Realism, supra note 105, at 404-12.

108 See infra text accompanying notes 118-20.

109 Paul Farhi, Hearst-Case Scenario: Curbs on Media Moguls May Ease, Wash. Post, July 19, 1995, at A1 (describing debate over proposed changes to law that would reduce restrictions on media ownership); Brian Lowry, Media Consolidation: No Degrees of Separation?, L.A. Times, Sept. 22, 1998, at F3 (reporting allegations that Murdoch forced cancellation of TV movie about Anita Hill).

110 See Barron, supra note 67, at 1646-47.

111 Id. at 1641-47 (footnote omitted).

gested that mass media produce relatively "thin" information that can attract as many people as possible without offending any, for two reasons: the relative flatness of the demand curve for information that is somewhat interesting to many people; and the fact that mass media cannot price discriminate effectively.[112] This effect is reinforced by the high fixed costs of information production, and the relatively low costs of making and distributing copies of information once produced. The economies of scale created by these characteristics focus production on "safe" materials most likely to attract the greatest audience.

When a medium central to a polity's information environment (such as broadcast television in our polity) produces only "safe" materials, it reinforces and makes more predictable the preferences of average consumers. This strengthens the tendency to underproduce information that challenges broadly shared cultural precepts. From a political perspective, this threatens to engender what Justice Brandeis considered "the greatest menace to freedom": "[A]n inert people."[113] For if there is to be choice in a political system, its constituents must have access to information that challenges the status quo. Only when people know their options, and can decide collectively to embrace or reject them, can they either reform or legitimize the status quo. Only then can the status quo claim to be the outcome of a democratic process, rather than the expression of entrenched powers preventing discussion of change.[114]

The second set of concerns revolves around the effects of concentrated commercial information production on the distribution of

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[112] See Baker, Giving the Audience, supra note 105, at 329-30. Baker has explained the economic incentives underlying this aim for the center in terms of the probable slope of the demand curves. See id. at 328-30. Demand for information that is very interesting to a small group is likely to have a very steep demand curve, where a small quantity will be consumed at high prices, but prices must be lowered radically to increase the quantity demanded (by people outside the interest group). See id. at 330. On the other hand, the demand for information that holds the weak interests of a very broad group of people is likely to have a relatively flat demand curve. See id. at 329. Organizations that cannot price-discriminate effectively will tend to prefer the product with the flat demand curve over the product with the steep curve. See id. at 344.

[113] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[114] The court implied as much in *Red Lion*, quoting from Mill:

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them."

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 n.18 (1969) (quoting John Stuart Mill, On Liberty 55 (John Gray & G.W. Smith eds., Routledge 1991) (1859)). Fiss devotes a good deal of attention to this entrenchment effect. See Fiss, Why the State?, supra note 105, at 788-89.

power to participate in public discourse among the constituents of a polity. A commercial system distributes its resources based on the extant distribution of wealth. A commercial information production system operating in a society such as ours therefore will tend to cause unequal distribution of private power over information flows. This raises two concerns.

First, power over information flows that mirrors economic power in society will tend to prevent effective political challenge to the prevailing order, however inimical that order may be to a majority of the polity. Fiss suggested that if information production is centralized and controlled by forces already relatively powerful in society, then that control will render the social, economic, and political powers that be impervious to political challenge.[115] This imperviousness in turn undermines credible public debate, the very heart of democracy.[116] Like the first category of arguments, this is an instrumental concern. It focuses on the First Amendment as an institutional device that assures robust democratic discourse.

The second concern with the distributive effects of commercial concentration is that a lopsided distribution of private power in society can be "censorial." It can inhibit free exchange of information and ideas and prevent many people from expressing themselves. Baker argued that "most people (possibly not including most constitutional lawyers) believe that a violation of freedom of the press occurs if a conglomerate owner, say a company that produces nuclear reactors, causes its television network to promote positive stories but not to cover negative stories about nuclear energy."[117] The point here is not instrumental. It does not concern the effects of private censorship on the public value of political discourse. The point is that someone cannot speak his mind, and cannot do so because someone else tells him

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[115] See Fiss, Why the State?, supra note 105, at 786.

[116] See id. Fiss describes the threat to democracy as follows:

> [I]n modern society, characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens . . . placing a zone of noninterference around the individual or certain institutions is likely to produce a public debate that is dominated, and thus constrained, by the same forces that dominate social structure, not a debate that is "uninhibited, robust, and wide-open."
>
> . . . .
>
> We will come to see that the state's monopoly over the lawful infliction of violence is not a true measure of its power and that the power of an agency, like the FCC, is no greater than that of CBS. Terror comes in many forms. The powers of the FCC and CBS differ, one regulates while the other edits, but there is no reason for believing that one kind of power will be more inhibiting or limiting of public debate than the other.

Id. at 786-87.

[117] Baker, Private Power, supra note 105, at 425 (footnote omitted).

that he *must* not.[118] That other person can do so by controlling the resources necessary to effective communication. And the reason she can control those resources is that the state enforces property rules that give her a veto power, backed by a credible threat of state force, over their use.[119]

2. *Decentralization in the Service of Self-Governance*

Scholarship that focuses on the private censorship dangers in unequal distribution of power to control information flows hints at deep individual liberty concerns implicated by media concentration in particular, and social concentration of information production in general. The literature suggests that a concentrated information production and exchange system has negative effects not only on political discourse—political self-governance—but also on individual self-governance.[120]

This is not the place to expound upon self-governance. But some basic observations will suggest how a commitment to individual self-governance supports a commitment to avoid concentration of information production in society. No one can be completely self-governing in the very strong sense of being the person who determines all the constraints on how his or her life goes. At the very least, there are constraints imposed by the way the world is and the technological conditions of our time. No one can even be the sole source of human choices that constrain her life. Living in society, each of us is constrained by political choices that society has made as a group.[121] Each of us is also constrained by the individual choices of others who share our environment. This is probably the most important element of Coase's insight into the reciprocal nature of causation.[122] I propose a weaker conception of self-governance that measures self-governance as the importance of an individual's choices as the source of con-

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[118] On the importance of keeping distinct public interest and individualist arguments, and keeping one's eye on both, see Waldron, supra note 3, at 844-46, 857-62 (arguing that focus on public interest may result in neglect of or confusion regarding individual rights).

[119] This point is central to Balkin's "realist" conception of the First Amendment. See Balkin, Some Realism, supra note 105. Balkin's focus on the individual capacity to communicate, as opposed to the public value of speech, is how he sets his populism apart from the views of those he terms "progressive" First Amendment scholars. See Balkin, Populism, supra note 105, at 1945-50.

[120] See supra notes 118-19.

[121] Bill Gates, for one, seems to be finding that even legendary wealth cannot make himself the sole source of human choices that constrain his life. See, e.g., Joel Brinkley, Microsoft Witness Peppered with Questions from Judge, N.Y. Times, Feb. 26, 1999, at C3 (reporting that Microsoft antitrust trial "has not gone well for the company").

[122] See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2 (1960) (arguing that harm is not inflicted on one actor by another but results from actors affecting each other).

straints on his life, relative to the importance of choices others make as constraints on his life. The distribution of the power to control our information environment has significant implications for the distribution of self-governance in this sense.

To plan a life, one must be able to conceive the state of the world as it is and the range of possible paths one might pursue, and to choose a path from the set of available options. A person's choice-set at a given moment is a function of her perceived state of the world and her plausible known options for action.[123] A person's perception of the state of the world, and the person's *known* plausible options, may be limited by internal or external factors, each of which might engage different normative concerns. First, one's perception may be limited by internal or external objective "facts of life," such as innate mental capacity, or the existence of very high mountains that hide from one's view the oncoming clouds that would rain on one's planned parade. A strong commitment to overcome these constraints would engage our commitment to a strong version of "positive liberty" with its familiar defenses and critiques.[124]

Second, one's perception of the world, including knowledge of one's options, might be limited by constraints imposed externally by political action—for example, a prohibition on reading certain kinds of information. This type of constraint would squarely engage our "negative liberty" concerns, although if we are assured of the individual's participation in the political process that creates the constraint, we might choose to endorse the outcome of the political process as a product of, rather than a constraint on, the individual's self-governance.

Third, constraints on one's perception of the world might result from free choices one made in the past that had the known consequence of restricting future choice-sets. Negating these constraints would seem to defeat, rather than serve, the possibility of self-governance. Where a person has chosen a path at T_1, and that choice has restricted his or her choices later along that path, we do not respect

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123 I use the term "plausible known options" to define a choice-set at a given moment, on the assumption that a person's ability to choose a course of action for his or her life is not affected by actually being able to do something, say, remember all the numbers in the telephone book, unless the person knows of that ability and of its relevance to his or her choice set (hence "known options"). It also does not increase one's choice-set to have a false perception of the availability of an option, for example, to "become superman." Hence "plausible."

124 While it is neither impossible nor unreasonable to develop a First Amendment argument about access rights based on a positive liberty conception, my focus here is much narrower. I leave to future scholarship the examination of just how far the decentralization commitment can go, or how "strong" a commitment we want.

the person's original choice unless we include the choices unavailable due to past choices in the person's quantum of self-governance. That Ulysses, bound to the mast, cannot jump into the water is not an impediment to his self-governance—it is its implementation.

The fourth and final form of constraint, which concerns us here, involves constraints that individuals place on each other through their willed choices. Parents blocking Internet materials from their children, a corporation using its ownership of a broadcast network to prevent a reporter from reporting about security failures at its facilities, or an advertiser bombarding viewers with ads about the desirability of its products, are instances of more or less successful attempts by one person to control and manipulate the information environment of others. To the extent that such efforts are successful, the choices of the information controller, rather than those of the information recipient, constrain the life of the recipient.

The First Amendment concern with concentrated information production arises when a society's legal institutions create systematic asymmetries in the distribution of power among its constituents to affect their information environment. To illustrate why this is an appropriate focus for a First Amendment concerned with self-governance, imagine that a society has two classes of people, Class A and Class B. Class A see n plausible choices, including the option to define, for themselves and others, which of the options $1 \ldots n$ they will know about. Class B (everyone else) are free to choose as they please, but their choice set is $1 \ldots (n\text{-}1)$; the option removed is the option to define for all persons, including themselves, what, out of the set of $1 \ldots n$ options they will see. If Class A persons all choose to show to all Class B persons the options $1 \ldots (n\text{-}1)$, then, as a practical matter, Class A and Class B have the same choice-set, since Class A has chosen to set the value of the n^{th} option at zero. If, on the other hand, members of Class A choose to use option n positively, by "hiding" from Class B some of the options, so that Class B members see a plausible choice set of $1 \ldots (n\text{-}5)$, then members of Class A have exercised dominion over the members of Class B whose choice set has been so constricted. Capacity to plan and live a life has been reallocated from Class B to Class A. Among other things, Class A can manipulate the information environment of Class B in order to make it more likely that they will choose to behave in ways that make room for, or facilitate, the life choices of Class A persons. The difference between n and $n\text{-}1$ is, then, a difference in the distribution of autonomy in society: Members of Class A are more self-governing than members of Class B, and they are so partly by exercising dominion

over members of Class B.[125] Laws that concentrate control over information production and exchange in the hands of a small number of organizations have the effect illustrated above.

D. Outline of a Constitutional Constraint

More than any other case, *Denver Area*[126] illustrates the difficulty of constraining our understanding of the First Amendment in a mass-mediated environment within the technological boundaries erected in *Red Lion* and *Tornillo*. *Denver Area* involved a series of regulations that gave cable operators the power to refuse carriage to indecent materials, on channels that the cable operators otherwise were required to provide on a common-carrier-like model. Beneath the veneer of an indecency case, *Denver Area* was a case about access rights. There, a majority of the justices acknowledged that access rights to the cable medium served the First Amendment by permitting many and diverse sources to reach viewers over this concentrated medium.[127] These justices treated decisions by cable operators not to carry certain programming as "censorial,"[128] and acknowledged that the availability of access to such a medium was a question of constitutional moment. Only the partial dissent by Justice Thomas thought that government intervention by requiring access rights was the relevant constitutional concern.[129]

In this complex context, the Court came closest to identifying not only a constitutional interest in diversity, but an actual constitutional constraint on regulation that unnecessarily causes concentration. In the first part of the opinion, the Court decided that permitting cable operators to exclude indecent programming from channels available to commercial programmers on a common carriage basis (leased ac-

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[125] In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court privileged members of the Old Order Amish community to refrain from sending their children to school, in contravention of Wisconsin's truancy law. This case permits some people (parents) to control what information other people (their children) have access to (in order to prevent them from getting too clear an understanding of alternative ways of life). The Supreme Court was able to hold that the interest of the parents was weightier than that of the children, see id. at 231, because we have a general cultural perception that children are not *self*-governing, but instead are governed by their parents. The point is that the case was about control of one group over the information environment of another, which gave the former group the capacity to control the latter's lives.

[126] 518 U.S. 727 (1996).

[127] See id. at 753-60.

[128] Id. at 773 (Stevens, J., concurring); id. at 782 (Kennedy, J., concurring in part and dissenting in part).

[129] See id. at 815-17 (Thomas, J., concurring in part and dissenting in part) (discussing analogous cases finding cable operators' rights to be relevant free speech concern).

cess channels) did not violate the First Amendment.[130] But there remained the question of whether the same mechanism was constitutional when applied to PEG access channels.[131] The plurality found that a central difference between the PEG channels and the commercial leased access channels was that, as to the former, franchise agreements commonly set up a "system of public, private, and mixed nonprofit elements," that "can set programming policy and approve or disapprove particular programming services."[132] In the presence of such entities, permitting the cable operator to exclude programming would constitute a censorial veto, which could not be justified as necessary to protect children from indecent materials given the existence of the supervisory entities.[133]

The Court thus held that giving the private, commercial owner of a communications medium the right to decide what goes on its channels threatens the First Amendment because the owner could prevent carriage of programs in a community that already has set up a politically accountable body to make the equivalent editorial decisions as to these channels' content. This was no slip. Justice Stevens, a member of the plurality, also wrote separately. He emphasized that

> [w]hat is of critical importance . . . is that if left to their own devices, those [local] authorities may choose to carry some programming that the Federal Government has decided to restrict. . . . [T]he federal statute would . . . inject federally authorized private censors into forums from which they might otherwise be excluded, and it would therefore limit local forums that might otherwise be open to all constitutionally protected speech.[134]

Denver Area, for all its opacity, indicates how a constitutional constraint could implement the normative recognition of the First Amendment costs imposed by concentrated private control over information flows. This constraint would be something less than a positive First Amendment right of access to communications media, but something other than a pure commitment to avoid government regulation. At a minimum, laws intended to regulate or affect information production and exchange must account for their effects on the distribution of power among constituents of the regulated information environment. If a law results in a lopsided distribution of capacity to

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130 See id. at 746 (plurality opinion).

131 PEG access refers to access that is limited to institutions or topics that qualify as public, educational, or governmental. They thus differ from leased access channels, which are available to all paying programmers on a first-come, first-served basis.

132 *Denver Area*, 518 U.S. at 762.

133 See id. at 763.

134 Id. at 773 (Stevens, J., concurring) (footnote omitted).

access and communicate information, that attribute must be treated as a First Amendment "cost." Any benefits the law seeks to advance must be weighed against this cost in a constitutional calculus. In the *Denver Area* example, the plurality found that the cost of shifting power to control PEG channels' content from local groups to cable operators was not worth the added protection children might receive if the regulation were upheld.[135] It therefore invalidated the law on First Amendment grounds. To analyze copyright or related property rights in information products, only this framework of review is needed. For enforcement of such property rights—intended to maximize aggregate production, but operating, as we will see in Part IV, to concentrate control over information—is precisely the type of regulation captured by this framework.

III
The Public Domain and "Make No Law"

A. Copyright and the First Amendment

It is hardly new to observe that there is a tension between the constitutional command that "Congress shall make no law . . . abridging the freedom of speech" and the practice of copyright law systematically to prohibit specific instances of speaking and reading. Melville Nimmer first analyzed it in 1970.[136] For Nimmer, the interests served by copyright—providing economic incentives for production—and the interests served by the First Amendment—freedom of democratic deliberation and personal expression—conflicted with each other. His purpose was to balance these conflicting interests.[137]

Nimmer mediated the conflict he saw by focusing on a core element of copyright doctrine: the idea-expression dichotomy. He argued that the idea-expression dichotomy in copyright law well balanced the conflicting interests of copyright and the First Amendment in most cases.[138] He reasoned that the privilege to use ideas gives access to almost all the benefits of free speech and dissemination of thoughts, while constraining only the form of their communication. The exclusive rights over the form of expression, on the other hand, seem to provide sufficient incentives to serve the purposes of copyright.[139] This happy accident of copyright doctrine, correctly under-

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[135] See supra notes 131-33 and accompanying text.

[136] See Melville B. Nimmer, Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?, 17 UCLA L. Rev. 1180, 1181-86 (1970).

[137] See id. at 1186-89.

[138] See id. at 1189-93.

[139] See id. at 1189-91.

stood, permitted copyright to dwell in the neighborhood of the First Amendment without too much conflict.

The idea-expression dichotomy was not, however, completely sufficient to resolve the conflict. Nimmer suggested, for example, that the then-existing perpetual common-law copyright in unpublished works was constitutionally frail. In his words,

> If I may own Blackacre in perpetuity, why not also *Black Beauty*? The answer lies in the first amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright.[140]

Nimmer further suggested that when copying the expression provided "a unique contribution to an enlightened democratic dialogue" the speech interest must outweigh the copyright interests.[141] As he put it, "It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs."[142] In an analysis quite pertinent to contemporary debates, Nimmer criticized the then-pending legislation to extend the term of copyright protection to already existing works. He claimed that this extension exerted a price in terms of free speech, without adding incentives to create because the affected works already would exist.[143] His argument stands with equal force against the Sonny Bono Copyright Term-Extension Act.[144]

Nimmer concluded by advocating the need for a First Amendment limitation on copyright, rather than expansion of the "fair use doctrine."[145] Fair use in his conception was reserved for uses that did not impair the marketability of the author's work. It was a matter of congressional policy—whether more or fewer uses should be permitted as consistent with the purposes of copyright protection. The First Amendment exception he proposed would apply to uses that were not "fair" in this sense. A narrow class of uses of information with a sufficiently strong public interest component would override copyright in the interest of the free flow and exchange of ideas.[146]

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140 Id. at 1193.

141 Id. at 1197.

142 Id.

143 See id. at 1194-95.

144 Pub. L. No. 105-298, 112 Stat. 287 (1998) (codified at scattered sections of 17 U.S.C.). The act, among other things, extended copyright for works "created but not published or copyright before January 1, 1978." Id. § 102(b)(3), 112 Stat. at 287 (codified at 17 U.S.C. § 303 (Westlaw 1999)).

145 See Nimmer, supra note 136, at 1200-04.

146 See id.

A few months after Nimmer, Paul Goldstein also published an analysis of copyright and the First Amendment.[147] Like Nimmer, Goldstein recognized that "[a]lthough its censorship function was dissipated with enactment of the Statute of Anne, copyright persists in its potential for conflict with the first amendment. Dispensed by the government, copyright still constitutes the grant of a monopoly over expression."[148] Goldstein's ire was provoked by Howard Hughes's attempt to prevent Random House from publishing a biography about him by purchasing the rights to the biography's sources.[149] Goldstein saw this as an example of how an enterprise that holds many copyrights "has a degree of control, roughly proportional to the size of its copyright aggregation, over the content and the selection of works which are made available to the public."[150] He explicitly based his concern on Barron's argument for First Amendment rights of access to the mass media.[151] But the issue Goldstein addressed was not as general as Nimmer's. He focused on enterprises that dominate the market through the ownership of many copyrights. He suggested that these enterprises exercise the kind of regulatory powers practiced by quasi-governmental organizations, like the Stationers' Company of the sixteenth and seventeenth centuries,[152] or, as in *Marsh v. Alabama*,[153] the company towns required to open their facilities to speakers.[154]

Goldstein's solution was to impose a constitutional limitation on the enforcement of copyright. He suggested that, just as *New York*

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147 See generally Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970).

148 Id. at 984.

149 See generally Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966). Hughes had arranged for the creation of a corporation called Rosemont, which bought the copyrights to many articles in which information about Hughes had been compiled, and then attempted to prevent publication of the biography by refusing to license their use to the biographers and suing to enjoin publication of the biography in violation of its copyrights. See id. at 304-05.

150 Goldstein, supra note 147, at 986.

151 See id. at 986 n.20 (citing Barron to support argument); see also supra text accompanying notes 66-72.

152 See Goldstein, supra note 147, at 983-84.

153 326 U.S. 501, 506-09 (1946) (requiring company town to permit individual to speak on its streets, because, although privately owned, town operated for its residents just as any other town subject to public forum doctrine would).

154 See Goldstein, supra note 147, at 983-84 (discussing Stationers' Company); id. at 987 n.25 (citing *Marsh*). Note that Goldstein seems to focus solely on government regulation, and discusses private action only to the extent that he finds it analogous to government regulation. Nimmer, by contrast, expresses a Realist's concern about consequences to public discourse, irrespective of whether such consequences stem from government or private action. See Nimmer, supra note 136, at 1186-88 (discussing various justifications for free speech and for copyright).

Times v. Sullivan[155] and *Time, Inc. v. Hill*[156] had imposed constitutional limits on reputational rights, so too must the First Amendment excuse infringing uses of copyrighted matter that advance the public interest.[157] But Goldstein thought that infringement served only the short-term interest in dissemination of information, while harming the long-term interest in its production.[158] He suggested an elastic relationship between the political and economic interests related to copyright. The greater the public interest in permitting the use of the work, the more courts should permit the use; the more the infringement adversely affects the economic incentives to create the work, the more the public interest in dissemination should give way.[159] He also suggested that in cases of public interest, infringement should be recognized only where there is actual economic damage, and that damages, rather than an injunction, generally should be the remedy.[160] In effect, this would recognize a compulsory license.[161] Goldstein also argued that in addition to the constitutional exception, copyright doctrine itself ought to be interpreted in light of the conflict with the First Amendment. He suggested that First Amendment concerns must instruct the application of the idea-expression dichotomy, the originality requirement, and fair use.[162]

Nimmer and Goldstein's work, as well as a similar article by Robert Denicola,[163] are largely "internal" to copyright doctrine. In addition to considering a First Amendment exception to copyright, they identified aspects of copyright doctrine that mediated what they saw as the inherent conflict between property rights in information and a commitment to communication unfettered by government. All three focused on the idea-expression dichotomy. Nimmer added term limi-

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155 376 U.S. 254 (1964).

156 385 U.S. 374 (1967).

157 See Goldstein, supra note 147, at 994-95.

158 In this Goldstein foreshadowed his present position: That copyright serves, rather than conflicts with, the free flow of information and diversity of information sources. See infra text accompanying notes 175-78.

159 See Goldstein, supra note 147, at 1016-17, 1029-30.

160 See id. at 1030 ("The economically based tenet of the second accommodative principle holds that, to be actionable, invasions of the copyright must effect economic harm and that an award of damages should be preferred to the injunctive remedy.").

161 See id. at 1034 (discussing effects of monetary relief as, among other things, implicitly endorsing scheme of compulsory licensing).

162 See id. at 1011-15, 1017-22 (discussing recognition of public interest in access).

163 See Robert C. Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Cal. L. Rev. 283 (1979) (arguing that unresolved conflict between copyright law and free speech requires recognition of independent First Amendment privilege and careful analysis of need for appropriation so as not to distort fair use doctrine).

tations.[164] Goldstein added originality, and, like Denicola, fair use.[165] All three understood that doctrinal decisions that define the boundaries of the public domain raise questions of constitutional dimension.

This uniform position of the 1970s scholarship stands in marked contrast to more recent approaches. Some scholars now suggest that fair use should be considered a subsidy for users with special needs,[166] or as a response to market failure rendered superfluous by technical improvements in the means of tracking and selling information products.[167] These contemporary positions require us to examine the analytic basis of the claim that there is a conflict between copyright and the First Amendment injunction against laws that abridge the freedom of speech. This examination, in turn, will provide the analytic basis for seeing the public domain as a constitutionally necessary element of our information law, rather than as a vestige of an imperfect, but fast-improving, information market.

B. The Public Domain Is the Institutional Framework Within Which People Are Negatively Free to Speak

A person is free to say something, in the minimal negative liberty sense, if he or she is not liable to be prevented from saying that thing, or to be penalized for saying it.[168] Nothing practically prevents me from writing:

'Twas brillig, and the slithy toves

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164 See Nimmer, supra note 136, at 1193-96 (stating that copyright interest in encouraging creativity "largely vanishes" beyond life expectation of author's children and grandchildren, while free speech interest remains constant).

165 See Denicola, supra note 163, at 293-99 (arguing that purposes of copyright and First Amendment are better served if fair use doctrine is viewed as substantive rule of copyright, reducing inherent tension between free speech and property rights); Goldstein, supra note 147, at 1020-22 (positing that effect of originality requirement is to retain economic incentive for creator).

166 See supra note 7 and accompanying text.

167 See Merges, supra note 7, at 133 (arguing that market for parodies is example of instance where fair use is logical way to prevent loss to public benefit). The original shift to viewing fair use as a means of correcting market failures was introduced by Wendy Gordon. See generally Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600 (1982) (stating that presence or absence of indicia of market failure provides rationale for predicting outcome in fair use cases).

168 The point about the negative liberty effects of intellectual property and the public domain is derived from Jeremy Waldron's work on traditional property law and negative liberty. See Jeremy Waldron, Homelessness and the Issue of Freedom, 39 UCLA L. Rev. 295, 304-08 (1991). The First Amendment's commitment to avoidance of prevention of speech by government entails this dual aspect: that speech neither be subject to prevention by law nor to punishment by law. This proposition is stated plainly in *Thornhill v. Alabama,* 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all mat-

Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.
"Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
The frumious Bandersnatch!"[169]

I am perfectly capable of writing it. I just did. I would have been perfectly capable of writing it even if *Alice in Wonderland* had not been in the public domain. If *Alice* were under copyright, and for some reason my direct quote from *Jabberwocky* were not held a fair use, I would still *be able* to write it. But I would not *be free* to write it. The publisher could sue me and have me penalized for having written it. For I am under a legal obligation not to write it.[170] In this sense, I am not free to sing the song of the Jabberwock. And I am not free in exactly the same sense that I would not be free if the law said "the Undersecretary of Commerce may, at his discretion, prohibit the quotation of nonsense." There is a law that says that, absent the consent of another, the state will prevent me from, or punish me for, quoting nonsense.

What makes this observation about property and negative liberty counterintuitive is that normally we do not think of our negative liberty as affected by the decisions of nongovernment actors. When the law directly prohibits our chosen behavior, we say we are not free to do that thing. Say, murder. When the law prohibits our chosen behavior without permission from a government agent, we again say we are not free to do that thing. Say, hunt. But when we say that the law prohibits our chosen pattern of behavior without permission of a person not then acting as a government agent, we find it less intuitive to say that we are not free to do that thing. Say, walk across land owned by another. But the progressives and realists long ago taught us that there is nothing "natural" or "intuitive" about any one configuration of property rights.[171] Property rules are the result of the exercise of

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ters of public concern without previous restraint or fear of subsequent punishment." (footnote omitted)).

[169] Lewis Carroll, Jaberwocky, in More Annotated Alice: Alice's Adventures in Wonderland and Through the Looking Glass and What Alice Found There 165 (Puffin Books 1997) (1871).

[170] On the unintended, but profoundly important, expansion of copyright by the Copyright Act of 1909 to cover copying—actually sitting in front of a printed copy and copying by hand (or keyboard)—as opposed to solely commercial reproduction and distribution, see Patterson, supra note 5, at 41-42.

[171] See Vegelahn v. Guntner, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting) ("The true grounds of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of

state power in pursuit of policy goals.[172] It would be ironic indeed if in this most "metaphysical"[173] and artifactual area of law—intellectual property—we were suddenly to adhere to a more naturalistic conception than we now hold of one's right to quiet enjoyment of one's home.[174]

Hohfeld clarified long ago that to say that *A* has a right *means* that *B* has a duty.[175] To say that *A* has a right means that *A* can call upon the government to get *B* to do or not do something, under threat of force. To say that *B* has a privilege is to say that *A* has no right. And again, what that means is that where *B* is privileged, the government shall neither prevent *B* from doing something nor punish him for doing it. If we consistently apply our understanding of the scope of our negative liberty as referring to all, and only, those actions that we may take without incurring legal liability to be prevented from, or penalized for that action, then we will realize that our negative liberty consists at any given moment in the range of actions that we are privileged to take. To the extent we are under a duty, we are unfree, in this purely negative sense.

None of this is to say, necessarily, that rights in general, or intellectual property rights in particular, are a bad thing. Delineating spheres of exclusive control is integral to how we live as social beings. Doing so through the state is how we live as social beings in a complex

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law which no body disputes."); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 820-21 (1935) (discussing necessity of political and normative judgment in resolving labor injunction cases); Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 465 (1897) ("Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given place and time.").

172 See Cohen, supra note 171, at 814-17 (arguing that economic value of trade name depends on extent to which it will be legally protected, as opposed to view that legal protection is based on economic value of name); Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 8-11 (1927) (noting that meaning of property can be stretched or diminished to serve policy interest of sovereign); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 470-75 (1923) (discussing relationship between owner and nonowner of property as derived from coercive power of state).

173 This is where the obligatory citation to Justice Story's designation in Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) must appear: "Patents and copyrights approach . . . what may be called the metaphysics of the law, where the distinctions are . . . . very subtile and refined, and, sometimes, almost evanescent."

174 I am referring of course to the wide contemporary acceptance of the Coasian insight into the reciprocity of harm and the regulatory-choice nature of decisions concerning the scope of one landowner's right to quiet enjoyment. See Coase, supra note 122, at 44 (explaining why decision to recognize or not recognize right to quiet enjoyment is regulatory choice about conflicting land uses).

175 See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 32 (1913).

society. But we must recognize that the range within which we are negatively free in our day-to-day behavior is the set of our activities that is privileged in the Hohfeldian sense. Recognizing a right in *A* is not solely, or even primarily, concerned with enabling *A*. It is first and foremost an instance of disabling *B*.[176]

Focusing on the duty side of intellectual property clarifies that we are free to communicate at a given moment only to the extent we communicate using information that is in the public domain, we own, or we have permission to use for the proposed communication. An increase in the amount of material one person owns decreases the communicative components freely available to all others.[177] Obtaining permission to use already assumes a prior state of unfreedom, lifted at the discretion of a person with authority over our proposed use. Only an increase in the public domain—an increase in the range of uses presumptively privileged to all—generally increases the freedom of a society's constituents to communicate. Enclosure, by contrast, redistributes freedom. It reduces the negative liberty of all those previously privileged to use information in a particular way in order to enhance the positive liberty—the capacity to govern the use of one's utterances—of the newly-declared owner.

The conflict between the First Amendment and copyright can be generalized as follows. Recognizing property rights in information consists in preventing some people from using or communicating information under certain circumstances. To this extent, all property rights in information conflict with the "make no law" injunction of the First Amendment. In Nimmer's terms, this is the difference between Blackacre and *Black Beauty*.[178] The public domain—the range of uses and communications of information privileged to all—is the legal space within which Congress has "made no law."

Whether considering the idea-expression dichotomy, the originality requirement, the fair use doctrine, the first sale doctrine, term extension, or any related laws, this analytic structure is a constant feature. For each of these doctrines, an interpretation that expands property rights increases the range of instances as to which the government affirmatively commits to intervene on behalf of one party to silence another. It is no different from a federal law that would give a federal right of action to any person whose reputation was impugned

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176 On the importance of focusing on the duty-bound person, rather than exclusively on the right holder, see Waldron, supra note 3, at 842-44.

177 "Freely" here means without needing the permission of anyone else, not "at no cost."

178 Waldron makes a strong argument why having too much of Blackacre conflicts with other, even more basic liberty concerns, see Waldron, supra note 168, at 300.

using a wire in interstate commerce. We have known (at least) since *New York Times v. Sullivan* that such a law implicates the First Amendment commitment that government shall not abridge the freedom of speech. We therefore know that where enforcement of even uncontroversial private rights prevents some people from speaking as they will and can, the First Amendment injunction that "Congress shall make no law" is engaged.

IV
Enclosure and the Concentration of Information Production

The conflict described in Part III pits the interests served by copyright against those protected by the First Amendment. But the Supreme Court has stated, and some scholars have argued, that copyright itself serves an important First Amendment interest. By fostering the development of the marketplace of expressions, it facilitates the expression and exchange of ideas in a robust and diverse marketplace of ideas. Section A of this Part outlines two versions of this position.[179] Section B challenges the descriptive accuracy of the claim that copyright and related laws increase the diversity of information sources. I suggest that given the way information is currently produced in our society, and assuming at least some nontrivial level of intellectual property protection,[180] further enclosure will tend to concentrate production. Large organizations like Disney, Time-Warner, or Microsoft will produce more information at the expense of smaller organizations like Free Republic or Pacifica and individuals like Dennis Erlich or Matt Drudge. Section C then explains why, to the extent that the descriptive analysis in Section B is correct, enclosure

[179] One might note that even if this proposition were true, copyright rules still ought to be subjected to the same kind of scrutiny that the Court has applied to media regulation. Copyright and related rights single out the production and use of information for regulation, but do so, on this theory, to serve the important value of "Progress of Science and useful Arts," U.S. Const. art. I, § 8, cl. 8, as well as to increase the diversity of information sources available to public discourse. In doing so, however, copyright and related rights employ various mechanisms, each of which abridges speech. One might think that such mechanisms would be subject to some degree of scrutiny, as in the case of media regulation. But this has not been the practice.

[180] Whether the level of intellectual property protection today is equivalent to the historical level (e.g., akin to the protection we had 25 years or more ago), is not central to my analysis, and cannot be deduced from the model I describe. I offer an ex post model intended to describe the likely responses of organizations to increases in intellectual property rights protection given the state of the world in which we live, based on the best available observations of that world. Given that we are faced with an enclosure movement today, with our level of protection and our information production system, this ex post approach seems sufficient to yield the type of predictions we should be assessing normatively.

will tend to increase the type of private censorial power that permeates the media regulation cases discussed in Part II.

A. The Free Speech Case for Copyright

1. The Importance of Predicting the Effects of Copyright Protection

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[181] the court said: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[182] Relying on this proposition, the Supreme Court rejected the argument developed fifteen years earlier by Nimmer and Goldstein that there ought to be a First Amendment privilege to use copyrighted materials under conditions analogous to those present in *New York Times v. Sullivan*.

The decision in *Harper & Row* underscores the constitutional implications of delineating the boundaries of the enclosed and public domains. The case concerned a news report in *The Nation* magazine about the upcoming publication of former President Ford's memoirs.[183] The report used excerpts from the memoirs. Its publication prompted *Time* magazine to rescind a contract with Ford's publisher to serialize the memoirs prior to publication as a book. The *Nation* story was a 13,000 word news article, the subject of which was the memoirs of an ex-president, at the time still considered a viable candidate to run against his successor. The article quoted verbatim a total of 300 words from different places in a 200,000 word manuscript. The 300 words reflected editorial judgment concerning the most important information in that manuscript. At most, the use of the excerpts cost the copyright owner the value of serializing excerpts from the manuscript in a magazine (valued at $12,500). It was not claimed that the publication in *The Nation* adversely affected sales of the book itself. Needless to say, there was no finding that former officials will refrain from publishing their memoirs should they lose the expected value of magazine serializing. Despite these factors the Court held that the use of the excerpts did not fall within the bounds of the fair use defense.[184]

Justice Brennan directed his spirited dissent at this narrow construction of fair use. His concern was not, however, to assure the doctrinal integrity of the fair use defense. Instead, Justice Brennan was

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[181] 471 U.S. 539 (1985).
[182] Id. at 558.
[183] See id. at 542-45.
[184] See id. at 542.

concerned with the constitutional implications of the narrow construction adopted by the Court:

> The copyright laws serve as the "engine of free expression" only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas. To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right.
>
> . . . .
>
> The Court has perhaps advanced the ability of the historian—or at least the public official who has recently left office—to capture the full economic value of information in his or her possession. But the Court does so only by risking the robust debate of public issues that is the "essence of self-government."[185]

It is important to recognize that a significant element of the dispute between the majority and dissent in *Harper & Row* reflects differing factual predictions. Both agreed that what was at stake was the commitment to broad dissemination of ideas in a democratic society. Each claimed that her or his solution would bring about behavior that would serve that commitment. Justice O'Connor, writing for the Court, decided that broad copyright protection was the way to serve this interest, since it would create the incentives for production and dissemination.[186] Justice Brennan's dissent disputed this assumption, suggesting instead that too broad a monopoly would—again as a practical, predictive matter—negate the same commitment. The remainder of this Part will explain why, as a positive predictive matter, Justice Brennan probably relied on the more plausible assumption.

2. The Arguments that Copyright Increases Diversity of Information Production

Probably the most straightforward and forceful statement of the prediction that extensive copyright protection will enhance free speech interests is, surprisingly, Paul Goldstein's. A quarter of a century after he wrote that companies that own large aggregations of copyrights were akin to the censorial Stationers' Company,[187] Goldstein argued that "copyright developed in the eighteenth century as a market alternative to royal sources of centralized influence."[188]

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[185] Id. at 589-90, 605 (Brennan, J., dissenting) (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

[186] See id. at 557.

[187] See supra text accompanying notes 147-53.

[188] Paul Goldstein, Copyright's Highway, From Gutenberg to the Celestial Jukebox 232 (1994).

Copyright frees expression, Goldstein argued, by displacing responsiveness to aristocratic patrons with responsiveness to consumers.

> The digital future is the next, perhaps ultimate phase in copyright's long trajectory, perfecting the law's early aim of connecting authors to their audiences, free from interference by political sovereigns or the will of patrons. . . . [T]he best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is any measure, the results should be to promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard.[189]

The core of the argument looks like Economics 101. Demand drives supply. Prices inform suppliers of demand. To create a market in which consumers can signal their preferences by offering a price, you need to clarify property rights in the resource you wish allocated. That is all there is to it. If you want producers to produce information that everyone values, create property rights in all uses that anyone might value. In the market for these rights in information uses and communications every person will register her preference and its intensity by offering a price that reflects what information she wants, and how much she wants it. Authors will devote their resources to producing those works that will draw consumers who will be willing to pay more in the aggregate than any other group of consumers for the production of a different work. Since consumers consist of people of different political and cultural stripes, each subgroup will register its preferences, and all groups will be supplied their preferred content. The result will be that as much information as people want will be produced (dissemination will be "the widest possible"), and its content will be as diverse as the interests of people prepared to pay for its production ("diverse and antagonistic").

This is not the place to recount that the prevailing wisdom among economists is that when the resource to be allocated is information, rather than land or grain, it is impossible to determine *a priori* whether any given level of property rights increases or decreases incentives for production.[190] It is, nonetheless, worthwhile to point out two basic fallacies in Goldstein's position. First, a market structure of "diverse sources" of the product being priced is an assumption of the

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[189] Id. at 236.

[190] The primary reasons for this are that information is nonrival and is both an input and an output of its own production process. The *locus classicus* for this insight is Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in The Rate and Direction of Inventive Activity: Economic and Social Factors 609, 616-17 (1962). For more details on this idea, see infra notes 272-73 and accompanying text.

neoclassical model, not its prediction. Decentralization seeks to assure that many and diverse organizations will in fact engage in information production. The market of the neoclassical model does not *obtain* that result. It *relies* on it as a precondition. The claim, therefore, that absolute propertization will lead to diversity assumes the required outcome—diversity of sources—as its own precondition. In the absence of diversity of sources, there is no efficient market, and in the absence of an efficient market, there is no diversity of outputs.

The second problem with Goldstein's view is that he invests the predictive model with normative value by equating consumer sovereignty with personal and political sovereignty. Absolute propertization of all uses of information valuable to any user will, he argues, free both authors and audiences to pursue what they care about, not what is dictated by sovereigns and patrons. This market freedom was undoubtedly a central aspect of the liberal revolution of the eighteenth century. It is unclear, however, how useful it remains in the context of late-twentieth-century information economies. In what sense, precisely, is an employee of the Walt Disney Corporation more "free" than the recipient of a five year NSF grant or a MacArthur fellow? In what sense are Fox News reports, produced by reporters who work for News Corp., more politically free and diversity-enhancing than the work of an amateur moderator of a listserve who does not seek direct economic returns, or a tenured member of the history department at CUNY? Without a good reason to believe that the former in each of these comparisons is "better" for the democratic exchange of ideas than the latter, simply recognizing that copyright protection prefers Disney and Murdoch to academics or amateur listserve moderators is not a strong defense of the diversification effects of extensive property protection.

But the claim that copyright serves the democratic commitment to decentralize information production and to free information flows does not rely solely on economic arguments. Neil Netanel has proposed a "democratic paradigm" that delineates the boundaries of copyright so that it does support the sought after diversity of viewpoints.[191] Netanel explains that civil society[192] is "a necessary, proac-

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[191] See Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 341-63 (1996).

[192] Netanel defines civil society as an amalgam of "voluntary, non-governmental associations in which individuals determine their shared purposes and norms," like "unions, churches, political and social movements, civic and neighborhood associations, schools of thought, educational institutions, and certain forms of economic organization." Id. at 342. Generally, he excludes from this definition the state, the market, and the family. See id. at 342 n.280.

tive foundation for democratic governance in a complex modern state."[193] Law in a democratic society ought therefore "underwrite a robust, democracy-enhancing civil society through a combination of state involvement and private initiative."[194] Netanel suggests that civil society requires careful institutional design if it is to survive in the presence of its overbearing rivals—the state and the market. Unfettered, the market leads to wealth disparities that are translated into disparities in individuals' capacity to participate in civil life and set political and social agendas. To counteract this tendency, Netanel suggests that government involvement is necessary insofar as it prevents a market-based hierarchy from emerging. But too little reliance on the market is also harmful because it leads to "an all-encompassing bureaucratic state," which permits even less individual choice, political autonomy, and associational diversity than the market.[195]

Having thus established the role of law, Netanel suggests that copyright promotes and stabilizes democratic civil society, and its doctrines ought to be interpreted so as to sustain this role.[196] His predictive model shares much with Goldstein's. First, he argues, by creating incentives for production, copyright increases the output and exchange of expressions on political, social, and aesthetic issues, which are vital to a democratic civil society.[197] Second, by creating a market, "copyright fosters the development of an independent sector for the creation and dissemination of original expression, a sector composed of creators and publishers who earn financial support for their activities by reaching paying audiences rather than by depending on state or elite largess."[198] Netanel, like Goldstein, roots this latter function in the experience of the bourgeois liberal revolution and its relations to the pre-mass-media press. He suggests that in the digital environment copyright can aid authors to distribute their work free of the homogenizing effects of government grants and corporate patronage.[199]

Netanel departs from Goldstein's totalizing vision of copyright when he recognizes that market actors, in particular media conglomerates, can be as inimical to civil society as the state.[200] Furthermore, he recognizes that simply maximizing consumer payments need not necessarily result in the diversity and richness truly desired by a soci-

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193 Id. at 342.
194 Id. at 345.
195 Id. at 346.
196 See id. at 347.
197 See id. at 347-51.
198 Id. at 347.
199 See id. at 352-62.
200 See id. at 358.

ety's constituents.[201] His conclusion is that copyright's democratic role entails not only recognition of copyrights, but their limitation as well. Despite this caveat, Netanel retains the belief that even in the information economy it is copyright protection, not its limitation, that is crucial to permitting authors to be free of the aggregating, homogenizing effects of dependency on advertisers, patrons, or government largesse.[202]

B. The Public Domain and the Organization of Information Production

The claims that copyright increases the diversity of information sources, and hence is an engine of free expression, are normative arguments that rely on predictive claims. One must be convinced that the underlying positive claims are likely to be correct before assessing their normative appeal. First, a given expansion of copyright or related rights must be shown to be likely to increase information production in the aggregate. Second, enclosure will serve diversity if and only if enforcing property rights encourages production by many small, commercially-minded producers, who will respond well to consumer demand and bring "freedom" from patronage and state control. If enclosure is likely (as a predictive matter) to lead to concentration among commercial producers, it is unlikely to deliver diversity under either the "economic" or the "democratic" story. A concentrated market structure wreaks havoc on the "economic" argument from responsiveness to consumer demand. It also forces the "democratic paradigm" to recognize that enclosure tends to produce market-based hierarchy, rather than to facilitate and sustain independent yeoman authors.

Elsewhere, I have developed an analysis explaining the effects of enclosure.[203] I will briefly recapitulate the analysis here. Methodologically, my analysis modifies traditional economic analysis of intellectual property rights by treating the decisions of organizations about how to organize their production as endogenous. This analysis is particularly useful here because it allows us to assess not only the aggregate effects of expanding property rights in information, but also the effects of enclosure on the way in which information production is organized in a society that adopts an enclosure strategy. My conclusion is that enclosure is likely to lead organizations engaged in infor-

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[201] See id. at 358-62.

[202] See id. at 362-63.

[203] See Benkler, Intellectual Property, supra note 20, at 12-21 (outlining various effects of increased protection of information).

mation production to converge on a more limited range of strategies for information production than they currently employ.[204] That convergence will be towards concentrated, commercial production by organizations that vertically integrate new production with inventory management of owned information.[205] It is important to note at the outset that this is an ex post analysis—it takes the current distribution of production strategies as a given. It also therefore assumes some nontrivial level of intellectual property protection in order to sustain the Mickey and romantic maximizer strategies described below. I am not arguing here for a "zero protection" policy. I am simply suggesting what the likely consequences of the present enclosure movement may be, given that it operates in information and legal environments that have the characteristics that we observe around us.

Enclosure affects different organizations engaged in information production differently. This is because information is not only an output of information production, but also one of its most important inputs. Enclosure increases the cost of information inputs for all organizations engaged in information production. Depending on what information inputs an organization uses, enclosure will impose greater costs on some organizations than on others. Similarly, depending on how different organizations appropriate the benefits of their production, enclosure will provide greater benefits to some organizations than to others. Enclosure thereby increases the payoffs to some strategies at the expense of others, likely causing some organizations to shift strategies in at least two ways. First, enclosure will tend to lead organizations that appropriate the benefits of production without asserting rights to shift to strategies that do rely on claiming rights. Second, it will lead organizations that do not vertically integrate new production with management of owned-information inventories to become, or merge with, vertically integrated organizations.

Organizations engaged in information production can be ideal-typed as utilizing one, or a mix of, the following five strategies.[206] These strategies differ in terms of how organizations acquire informa-

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[204] See id. at 32-33.

[205] See id.

[206] This typology of strategies is my own. It relies on empirical and case study literature that describes information production markets. The most extensive of these studies is Richard C. Levin et al., Appropriating the Returns from Industrial Research and Development, in 3 Brookings Papers on Econ. Activity 783 (Martin Neil Brady & Clifford Winston eds., 1987). Another seminal piece is Edwin Mansfield et al., Imitation Costs and Patents: An Empirical Study, 91 Econ. J. 907 (1981); see also Edwin Mansfield et al., Technology Transfer, Productivity, and Economic Policy 149-50 (1982) (discussing effects of imitation costs on entry and concentration).

tion inputs, how they organize the application of human capital to information, and how they appropriate the benefits of their products.

The first two strategies are variants of the behavior assumed by the traditional economic model to be the usual appropriation strategy. These organizations sell permission to use the information, based on a legal right to exclude. The first type of organizations own an inventory of information, and vertically integrate sale and management of this inventory with the production of new information. Disney or Time-Warner are examples. Let us call this strategy "Mickey." The second strategy describes organizations that do not own inventory, but do sell permission to use their information outputs. They sell either directly to consumers or to inventory managers, including Mickey organizations. This strategy includes organizations that sell a single piece of software or a patented gadget, as well as authors selling movie rights or independent code writers who sell to a large software company. Because it describes the traditional conception of an author laboring in expectation of royalties, one might call this strategy "the romantic maximizer." As for information inputs, both strategies acquire some information at marginal cost—zero—from the public domain and purchase, to the extent necessary and possible, information inputs owned by other organizations. Mickeys also have access to their own inventory as a source of information inputs, and this is their primary distinguishing characteristic from romantic maximizers.

The third strategy seems to be a dominant strategy for industrial R&D outside of drug companies. The distinguishing feature of this strategy is that it relies on quasi-rents generated by time- and efficiency-based advantages associated with early access to the information produced. In addition to obtaining information inputs from the public domain and by purchasing owned information, these organizations may also share information with similar organizations to capture economies of scale, or with organizations similarly invested in information production but producing in different industries, to capture economies of scope.[207] These organizations do not directly sell information or assert rights to exclude competitors. They use their early access to the information, generated by their investment in information production, to collect quasi-rents in a market that permits above-normal profits to those who have early access to the information. This

[207] See Richard R. Nelson, The Simple Economics of Basic Scientific Research, 67 J. Pol. Econ. 297, 303 (1959) (discussing importance of "broad technological base" for research activities); Walter W. Powell, Networks of Learning in Biotechnology, Opportunities and Constraints Associated with Relational Contracting in a Knowledge-Intensive Field, in Intellectual Products: Novel Claims to Protection and Their Boundries, supra note 20, at 4-19.

can be done by increasing efficiency of production relative to competitors while keeping the information secret,[208] by participating in an oligopolistic pool, entry into which is reserved for those who have sufficient information production capacity to "pay" for participation by explicitly bartering access to their own information, or by being one of a small group with sufficient knowledge earned through information production to exploit the information generated and shared by all of the group's participants.[209] Rents are obtained from the concentrated market structure.[210] This strategy can be called "quasi-rent seekers." An equivalent strategy in the realm of the copyright industries is used by news organizations that rely on timeliness and accuracy of information, rather than on long-term control and licensing of the information's reuse. Daily newspapers and, especially, wire services fit this model. Similarly, U.S. publishers of books from England in the nineteenth century relied on first-mover advantages to publish books not then protected under U.S. copyright law, and generated more revenue for English authors from early sale of galley proofs in the U.S. than from the sale of final, copyrighted copies in England.[211]

The fourth strategy still involves market actors, but their investment in information production is not based on quasi-rents generated by early availability *to them* of access to the information. Rather, these organizations depend on the positive correlation between availability of the information they produce *to others* and the demand for a different product these organizations also produce. Companies that produce (buy) advertisements for their products are an obvious example. Doctors or lawyers who publish in trade publications are a more interesting instance. This is the model of appropriation heralded a few years ago by Esther Dyson[212] and John Perry

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208 See Levin et al., supra note 206, at 794-95 (arguing that lead time and learning curve advantages are more effective than secrecy, and secrecy in turn is more effective than patent in appropriating benefits of process innovations).

209 See, e.g., Wesley M. Cohen & Daniel A. Levinthal, Innovation and Learning: The Two Faces of R & D, 99 Econ. J. 569, 570, 593-94 (1989) (positing that investment in research and development is necessary to access and exploit external knowledge and that this access is sufficient incentive to invest).

210 See F. M. Scherer, Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation, 62 Am. Econ. Rev. 422, 423 (1972) (stating that market structure generates quasirents necessary to discipline market prices).

211 See Robert M. Hurt & Robert M. Schuchman, The Economic Rationale of Copyright, 56 Am. Econ. Rev. Papers & Proc. 421, 427 (1966) (discussing "advantage of being first on the market with a new book"); see also Breyer, supra note 2, at 282-83 (describing alternatives to copyright for compensating authors). The story is told as a cautionary tale under the assumption that in the absence of protection, production will suffer.

212 See Esther Dyson, Intellectual Value, Wired, July 1995, at 136, 137-38 (proposing that advertising will help solve problems posed by devaluation of information transfer on internet).

Barlow[213] as the future of content production in the digitally-networked environment. Another example is companies that make their information freely available so as to set a standard that produces a product ecology conducive to the success of another product.[214] The adoption of an open source strategy by companies such as Netscape[215] and Sun Microsystems[216] is an example. Let's call this the "scholarly lawyer" strategy. These organizations, like romantic maximizers, obtain information inputs from the public domain and by purchase where necessary. Unlike romantic maximizers, they do not sell their information outputs. They explicitly produce them for free distribution, so as to maximize utilization, and maximize the effect on the positively correlated market.

The last strategy lumps together nonmarket actors, often described as indispensable to a society's information production sector.[217] These include universities and other research institutes, government research labs, individual academics, and authors and artists playing to "immortality," or, to use the increasingly persuasive case of noncommercial development of the Linux operating system, "egoboo."[218] This category also encompasses a host of amateur endeavors, ranging from contributors to the op-ed page, to amateur choirs, to friends sitting around a coffee table exchanging news of the day, all of whom cross-subsidize their information production with revenues entirely unrelated to the information production function

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213 See John Perry Barlow, The Economy of Ideas, Wired, Mar. 1994, at 84, 128 (arguing that in new technologies, value derives from "supporting and enhancing the soft property . . . rather than selling it . . . or embedding it").

214 For an accessible statement of the dynamics that drive this strategy, see W. Brian Arthur, Increasing Returns and the New World of Business, Harv. Bus. Rev., Jul.-Aug. 1996, at 100, 105-07 (noting that discounting initially promotes sales of linked products, which in turn makes one product a standard).

215 See Denise Caruso, Netscape's Decision to Give Away Code Could Alter the Software Industry, CyberTimes—The New York Times on the Web (Feb. 2, 1998) <http://archives.nytimes.com/archives>.

216 See John Markoff, Sun Microsystems Is Moving to an 'Open Source' Model, CyberTimes—The N.Y. Times on the Web (Dec. 8, 1998) <http://archives.nytimes.com/archives>.

217 Richard Nelson provided the first significant discussion of the role of these nonmarket actors in the overall mix of an economy's information production sector. See Nelson, supra note 207, at 304-06 (comparing government and other nonprofit research endeavors with industry research endeavors); see also Arrow, supra note 190, at 616-19 (discussing imperfect relationship between inputs, such as nonmarket actors, and outputs); Richard R. Nelson, What Is "Commercial" and What Is "Public" About Technology, and What Should Be?, in Technology and the Wealth of Nations 57, 65-68 (Nathan Rosenberg et al. eds., 1992).

218 See Eric S. Raymond, The Cathedral and the Bazaar § 10 <http://www.tuxedo.org/~esr/writings/cathedral-bazaar/cathedral-bazaar_10.html> (defining "egoboo" as "the enhancement of one's reputation among" peers through voluntary contributions to collective efforts).

they fulfill. I call this strategy "Joe Einstein." Information inputs are obtained from the public domain and purchases of owned information, where necessary. Information outputs are made freely available, generally in the public domain. Appropriation is obtained, if at all, through reputation gains, research grants, charitable contributions associated with reputation, or teaching positions allocated by publication-based reputation. Some production may occur with no expectation of appropriation.

TABLE 1: FIVE INFORMATION PRODUCTION STRATEGIES

	Mickey	Romantic Maximizer	Quasi-rent Seekers	Scholarly Lawyer	Joe Einstein
Production	•vertically integrated new production and inventory management	•new production separated from inventory management	•new production separated from inventory management	•new production separated from inventory management	•new production separated from inventory management
Output	•sells permission to use information	•sells rights to inventory management organizations; •sells permission to use information	•maintains secrecy; •sells time-sensitive access; •shares information	•makes information freely available	•makes information freely available
Input	•public domain materials •purchases •reuse of existing inventories	•public domain materials •purchases	•public domain materials •purchases •information received in sharing	•public domain materials •purchases	•public domain materials •purchases
Revenue/ Appropriation	•sales and re-sales of new and old inventory	•royalties from sale to inventory management firm •sales of emerging inventory	time-based quasi-rents: •exclusive access •early access of pool participant •sales of time-sensitive access	•access *by others* to information produced is positively correlated with sales of a different product	•reputational gains; •nonmarket grant funding; or •no appropriation expectation
Examples	Disney, Time-Warner; Drug companies	•authors of novels •independent software developers •inventors with small companies that sell their invention	•companies that rely on lead-time instead of patents •Merck & Co's funding of public domain basic research •newspapers, stock-quote services •19th century U.S. publishers of books from England	•lawyers who publish in trade papers or produce newsletters •companies that advertise •Netscape's adoption of open source strategy for its browser	•teaching & research institutions •HTML •Linux •"letters to the editor" •amateur choirs or weather observers •friends talking about the news

Given this distribution of strategies for appropriation, an increase in intellectual property rights—a shift of some uses from the public domain to the enclosed domain—will have the following qualitative effects, summarized in Table 2.

TABLE 2: EFFECTS OF ENCLOSURE ON COSTS AND REVENUES OF ORGANIZATIONS EMPLOYING DIFFERENT STRATEGIES FOR APPROPRIATING THE BENEFIT OF INFORMATION PRODUCTION.

	Mickey	Romantic Maximizer	Quasi-rent Seekers	Scholarly Lawyer	Joe Einstein
Input Costs	increase, mitigated by inventory reuse	increase	increase, mitigated by sharing/barter	increase	increase
Revenue	largest increase: •new sales •higher prices because of absence of public domain substitutes •inventory windfall	increase: •new sales •higher prices because of absence of public domain substitutes	•no effect	•no effect, decrease, or increase, depending on strategic response in information and correlated markets	•no effect

Input costs increase for all organizations because some information previously available at no charge from the public domain is now available only for a price. Input costs are mitigated for Mickey organizations, because they can cover some of their lost inputs by intensifying reuse of their owned inventory as inputs into new production at its marginal cost of zero. For quasi-rent seekers who rely heavily on information sharing, the effect is mitigated to the extent they need not rely on buying owned information, and rely on intensified use of shared information. Revenue increases only for Mickeys and romantic maximizers, because only these organizations rely on assertion of rights, including the newly expanded rights, to appropriate the benefits of their production. The other organizations' revenues are generally unaffected.[219] Revenues for Mickeys increase more than for rational maximizers, because to the extent the change in law permits assertion of rights over more uses of already existing and owned information, it provides Mickey organizations with a windfall that is unavailable to organizations that do not own an inventory.

Given these effects on payoffs, scholarly lawyer and Joe Einstein strategies fare worse than all the other strategies in response to an increase in property rights. Quasi-rent seekers may suffer a lower increase in costs than scholarly lawyer or Joe Einstein strategies, but

[219] Scholarly lawyers, however, might be able to offset some of the increased costs or lost revenue from the correlated market by introducing a mixed rights-based appropriation strategy with their own.

like them they do not see increased revenues. An increase in property rights is therefore a net loss to this strategy. Mickey and romantic maximizers therefore are the only strategies that benefit from an increase in property rights, except where the change in law was a clear policy error at the aggregate level.[220] If the increase in costs for these strategies is greater than the increase in revenues, quasi-rent seekers could be better buffered from the excessive expansion of rights. This would depend on whether the increased costs for Mickeys and romantic maximizers, minus increased revenues, are greater than the lower increased costs of the quasi-rent seekers unmitigated by an increase in revenue.

Mickeys outperform romantic maximizers. This means that romantic maximizers will reach the point at which the standard economic model predicts that increased protection will lead to declining productivity sooner than Mickey organizations. Before aggregate productivity declines, romantic maximizers will shift to a Mickey strategy.

As a result of the payoff structure described here, an increase in property rights in information will likely result in the greatest increase in information production by Mickey organizations, and the greatest decline in information production using scholarly lawyer and Joe Einstein strategies. Some rational maximizers may cease operations or shift to a Mickey strategy (e.g., be bought out for their incremental addition to inventory and for their human capital). The overall number of Mickey organizations may decline, however, because consolidation of inventories will yield greater benefits to integration. This is likely because integration avoids transaction costs associated with purchase of information inputs owned by others, and because information inventories have economies of scope as sources of inputs for new production. Two organizations that combine their creative workforces and give the combined workforce access to the joint inventory are likely to be more productive than these same two organizations when each workforce utilizes only its organization's independently owned inventory.[221]

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220 The standard economic model of intellectual property rights predicts that at a certain level of protection, increased input costs will be greater than increased prices obtainable from sales and will therefore lead to a decline in productivity. See William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 333 (1989).

221 This is an extension of Romer's explanation for why information production is an increasing returns activity. See Paul M. Romer, Endogenous Technological Change, 98 J. Pol. Econ. S71, S93-S95 (1990). The argument in brief is this. Assume that the probability that a unit of preexisting information will be useful as an input into a new product is unaffected by who owns the existing input unit. Having access to a larger pool of units that have an equal probability of being useful increases the likelihood that each person working

The initial expected responses to an increase in intellectual property protection would likely have feedback effects that amplify the direction of the shift in strategies. A larger ratio of new information will be produced by organizations whose output is owned, rather than from public domain material. To the extent that new information is likely to be an important input into everyone's productive activities, the probability that an input needed by a producer will be owned, rather than public domain, increases. This effect further decreases the availability of pertinent public domain materials. Furthermore, more investments will be made in producing consumer demand for information of the type produced by reuse of existing inventories. More investments will also be made in further institutional changes that make ownership of inventory and integration of new production with inventory management more profitable. Finally, organizations that expect these developments will more rapidly shift to the preferred strategies. The sum total of these effects will be to amplify, speed up, and lock in the effects of enclosure predicted by this analysis.[222]

By increasing the costs of an essential input, enclosure increases the entry barriers to information production. In particular, enclosure is likely to have the most adverse effects on amateur and other noncommercial production. These strategies are the source of the greatest potential diversity because, unlike market-oriented strategies, they are undisciplined by the need to aggregate tastes. As among commercial information producers, enclosure tends to benefit organizations with large owned-information inventories. The increased value of inventory and the more rapid decline in the benefits of enclosure for romantic maximizers than for Mickeys would lead us to expect that enclosure will lead to consolidation among organizations devoted to commercial information production.

C. Enclosure of the Public Domain and Decentralization

If the analysis in the preceding section accurately describes the likely effects of enclosure on the organization of information production, it undermines the claim that copyright serves the commitment to

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with information inputs will be able to produce a new product. Information inputs are available for intrafirm use at marginal cost, but are priced above marginal cost when appropriated from external sources. Thus, the probability that employees will succeed in being productive with inputs available at marginal cost increases with the size of the pool of intrafirm-owned information inputs. To the extent that they will search for inputs from intrafirm-owned inventory before searching externally owned inputs, employees will likely be more efficient the larger the intrafirm-owned pool. Employees will work with more likely optimal inputs, assuming that imperfect fits available at marginal cost will be used before slightly better inputs priced above marginal cost by extra-firm owners.

[222] See Benkler, Intellectual Property, supra note 20, at 18-21.

attain "the widest possible dissemination of information from diverse and antagonistic sources." It does so whether one adopts the "economic" version of the argument or the "democratic paradigm" version.

The first part of the argument that copyright increases the diversity of information sources in society is that by increasing incentives for production, copyright increases the production and communication of expressions that circulate in the information environment. The discussion in the preceding section suggests that this argument systematically overestimates the benefits of increases in intellectual property rights. It does not account for decreased production by organizations using strategies that do not benefit from increased protection, yet suffer the increased production costs enclosure imposes. Reliance on the traditional assumption about the beneficial incentive effects of protection too often is likely to lead us to think that a given change in law will, in the aggregate, increase production. It is quite likely that in certain instances, for certain kinds of works, a given increase in property rights will increase aggregate information production. It is also possible that the same change, applied to a broader range of sectors, or a different change applied to the same activity, will cause a decline in production. The *a priori* claim that we should presume that increases in property protection for information production will increase aggregate production is false. The economic argument simply cannot yield such *a priori* determinacy, and the standard economic model does not purport to do so.[223] Each rule change must be evaluated, in its specific domain of application, over the entire range of affected communications and uses of information, to determine its likely outcome.[224]

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[223] Neoclassical economic analysis considers the effect of any *given* change in intellectual property law to any given level of protection a matter for empirical investigation, not *a priori* determination. See, e.g., Landes & Posner, supra note 220, at 332-33 (explaining how duplication of effort by competing firms can lead under certain circumstances to overinvestment in R&D, which would nonetheless result in too low a rate of innovation); see also Arrow, supra note 190, at 619 (explaining that market incentives alone will lead to underinvestment in information products, because incentives require positive price, and positive price for nonrival goods implies underutilization; because of need for unrestricted access to information where information production is risky; and because value of information to user cannot be determined until after user has information); Partha Dasgupta & Joseph Stiglitz, Industrial Structure and the Nature of Innovative Activity, 90 Econ. J. 266, 271-87 (1980) (identifying tension between authors' need for property rights to appropriate benefits of their investment, on one hand, and their need for cheap inputs, on other hand, and claiming that "[i]n principle there is a level of protection that balances these two competing interests optimally").

[224] See Benkler, Intellectual Property, supra note 20, at 28-30 (discussing application effects, which may alter neoclassical formula).

More importantly, the preceding analysis challenges the prediction that increases in copyright protection will lead to greater diversity of content through greater responsiveness to the preferences of diverse audiences rather than solely those of high brow patrons or overbearing officials. Enclosure is likely to lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owned-information inventory management. This movement is composed of two elements: first, the declining viability of information production strategies that do not rely on sale of rights, and the shift of organizations and individuals towards commercial production; and second, the likely decline in production by small independent producers—both Joe Einstein-type amateurs and romantic maximizers.

The first element—the adverse effects on strategies that do not rely on commercial sale of their product—seems to leave the argument for copyright-as-decentralization unaffected. That argument claims that noncommercial models of production—primarily Joe Einstein—are those that rely on government grants and the patronage of the wealthy. As hinted earlier, though, when one pauses to describe the various strategies that will be adversely affected by increases in intellectual property, the simple dichotomy between "free" market actors and "beholden" beneficiaries of government or private patronage becomes highly problematic.

Amateurs are beholden to no one. In a digital environment where distribution costs are very small, the primary costs of engaging in amateur production are opportunity costs of time not spent on a profitable project and information input costs. Increased property rights create entry barriers, in the form of information input costs, that replicate for amateur producers the high costs of distribution in the print and paper environment. Enclosure therefore has the effect of silencing nonprofessional information producers. To treat enclosure as diversity *enhancing*, one must be willing to say that giving the *Los Angeles Times* and other large media outlets incentives to hire a few more reporters will increase diversity more than losing the robust debates on the Free Republic website and similar fora. Otherwise, an intellectual property rule that protects the incentives of the *Los Angeles Times* by making it harder for Free Republic to operate hardly seems diversity-enhancing. In particular, this should be troubling to those concerned with civic society. Information production amateurs are not exclusively individuals, but may also be civic organizations that do not professionally produce information and that subsidize their information production from other sources, like members' dues.

Many social clubs, church groups, or reading groups are Joe Einstein organizations.

Furthermore, nonmarket organizations are not monolithic lackeys of their funding sources. They exist in complex institutional frameworks. Some elements of these frameworks are specifically intended to maintain the independence and freedom of expression of the recipients of public subsidies or private beneficence. The academe is pervaded by such institutional arrangements. "Tenure," "academic freedom," and "peer review grant funding" are the most obvious examples. To the extent that a tenured professor of history is thinking about a new book, she faces very few constraints on her choices. Were she to adopt a market focus, however, she would have to forgo writing a text solely for her immediate discipline, or one likely to attract only a very small audience. Such a focus would likely impose greater constraints on her research and writing than considerations of how the book would affect her salary—whether she teaches at a state school or one that relies on tuition and private gifts.

Commercialization, and the increase in input costs, can cause the loss of many works and of the productive efforts of many individuals and organizations. Projects may be abandoned because the cost of the inputs necessary to pursue them is too high after the enclosure, or because previously noncommercial distribution channels, like university presses, have turned commercial. Individuals and organizations may cease to produce information on an amateur or noncommercial basis because they can no longer afford to produce in a more completely appropriated environment. In all these cases, diversity is reduced not only in number, but also in the range of strategies used to produce and the range of motivations driving those who put fingers to keyboard to compose.

The adverse effects on small-scale production relative to large-scale production similarly challenges the argument that copyright fosters diversity of information producers and products. The literature on media concentration has demonstrated that companies that must attract the attention of broad audiences tend to eschew unconventional tastes and to focus production on the mainstream, the inoffensive, the orthodox.[225] Too heavy a focus on the market does not "free" information production. Rather, it concentrates production in the hands of a small number of commercial organizations. These information producers may then exercise the type of inordinate power

[225] See supra text accompanying notes 109-14; see also Netanel, supra note 191, at 333-34 & nn.243-44 (utilizing media studies to assess effects of concentration on range of content produced).

in the information environment whose prevention is a central reason for permitting government intervention in media markets. Whether their products reflect the interests of their owners or managers, or the preferences of the largest audiences,[226] enclosure will likely be detrimental to, rather than supportive of, the development of diverse and antagonistic information sources in society.

Parts III and IV identify an unusual alignment of constitutional concerns. In traditional media regulation cases, the concern over concentration of information production was usually juxtaposed with the concern over permitting government to regulate the information environment. The tension between these two First Amendment concerns constrained the degree to which government could act to effect decentralization. Enclosure of the public domain compromises both concerns. It increases the number of instances in which government is committed to preventing people from using or communicating information. It also seems likely to concentrate, rather than diversify, information production. The unusual alignment of these two concerns demands that we take a very close look at new proposals for enclosure.

V
Implications for Pending Enclosure Legislation

The current regulatory agenda of the enclosure movement includes three major components: the prohibition on circumvention of technological protection measures at the heart of the Digital Millennium Copyright Act of 1998;[227] the institutional entrenchment of standard contracts for mass-marketed information products by proposed U.C.C. Article 2B;[228] and the protection extended to raw information by the Collections of Information Antipiracy Act.[229] It is unclear whether these laws could meet the constitutional requirement that they be supported by more than bare assertions of their desirability.

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[226] I have suggested elsewhere, however, that the strict dichotomy between what consumers want and what owners of mass media want may be overstated. Consumer preferences are extremely difficult to identify, and it is not at all clear that consumers even invest in developing preferences before owners have invested in producing a menu of offerings. It is quite likely that producers must develop a menu before consumers will invest in defining a preference ordering, and having so developed the menu of choices, producers will invest in directing the preferences of consumers towards the menu of choices they offer. See Benkler, Overcoming Agoraphobia, supra note 63, at 365-68.

[227] Pub. L. No. 105-304, 112 Stat. 2860 (to be codified at scattered sections of 17 U.S.C.).

[228] U.C.C. § 2B-208 (ALI Council Draft, Dec. 1998) (official draft available at <http://www.law.upenn.edu/library/ulc/ucc2b/2bALId98.htm>).

[229] H.R. 2652, 105th Cong. (1998).

All three laws compromise First Amendment concerns. They are not laws of general application that happen to be applied to communicative behavior.[230] They are instead laws that single out the use of information and its communication for special regulation.[231] They are content and viewpoint neutral, but their effects on speech are not incidental. Rather, their primary institutional attribute is prohibiting the use and communication of information. The standard for reviewing laws that directly regulate information production and exchange markets requires that the Digital Millennium Copyright Act, the proposed U.C.C. Article 2B-208, and the proposed Collections of Information Antipiracy Act be shown to serve an important governmental interest, and to do so without restricting substantially more speech than necessary.[232]

Furthermore, as explained in Part IV.B, these laws will tend to concentrate control over information production and exchange. Recall the suit brought by the *Washington Post* and the *Los Angeles Times* against the Free Republic website.[233] The defendants are a group of people who share digital clippings on their web site and discuss them on their conservative political forum. The newspapers sued the website for making unauthorized copies of the papers' stories. With technological protection measures there would have been no need for the suit. The newspapers simply would have made their stories physically unreadable except when viewed from their site, upon payment. If the Free Republic users had tried to get around the encryption in order to share the stories, then, under the Digital Millennium Copyright Act they would have been liable for civil and criminal sanctions—even if all they did was quote short snippets in their political discussions.

The Free Republic problem underscores what is at stake: the extent to which our political conversation will be forced to flow through a few owned and edited channels. The question is whether we will be able to use the unique attributes of the digitally networked environ-

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230 See United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (stating that "incidental" restriction on First Amendment freedom is permissible in furtherance of substantial government interest).

231 See *Turner I*, 512 U.S. 622, 662-63 (1994) (sustaining intermediate level of scrutiny where public access to information is at stake); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (condemning tax that selectively targeted press).

232 See *Turner II*, 520 U.S. 180, 189 (1997) (reaffirming that regulations must advance "important governmental interests unrelated to the suppression of free speech" and must not "burden substantially more speech than necessary to further those interests"); *Denver Area*, 518 U.S. 727, 755-56 (1996) (same); *Turner I*, 512 U.S. at 664 (holding that government regulation must alleviate feared harms "in a direct and material way").

233 See supra note 14 and accompanying text.

ment to permit a broadly distributed, robust, and diverse marketplace of ideas, or whether instead that same environment will become a commercial system where our public discourse will be much more tightly controlled than was ever possible in the mass media or print environments.

A. The Digital Millennium Copyright Act

1. The Circumvention Problem

A key question for the future of copyright is to what extent information vendors will be able to use technology, rather than legal enforcement, to charge for access to their products. The legal element of this question is whether law should facilitate introduction and implementation of technological self-help measures, and if so, how.

Debate now centers on the problem of circumvention of technological protection measures.[234] Because technological protection measures can unilaterally alter the range of uses under an owner's control, they can displace background law as the primary means of regulating access to information they protect. And, like other physical self-help measures, they can do so without reference to whether the use they regulate is permitted or prohibited by law. They can as easily prevent a parody or a tiny quotation inserted in a critical review as they can prevent wholesale copying and distribution by a competitor. Like any form of encryption, however, technological protection measures are liable to be decoded. Users who wish to access encrypted information may be able to use decryption software instead of asking the information vendor for the code that would enable them to use the information. They may wish to do so for very good reasons, such as parodying the contents of a work when the seller will not sell them the code. Or they may wish to do so simply to avoid paying. Recent legislation attempts to reinforce the efficacy of technological protection measures by making circumvention illegal.

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234 "Technological protection measures" refers to techniques that permit providers of information in digital form to use self-help to regulate access to their products. These measures can perform a range of functions. They can gather information about every use of a digitally encoded piece of information. They can also limit or altogether prevent its use. See Mark Stefik, Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing, 12 Berkeley Tech. L.J. 137, 138-40 (1997) (arguing that recent shifts in technology can allow greater control over copyrighted works in digital media); Mark Gimbel, Note, Some Thoughts On the Implications of Trusted Systems for Intellectual Property Law, 50 Stan. L. Rev. 1671, 1675-80 (1998) (describing how "trusted systems"—software or hardware that can follow instructions attached to digital work—threaten to make technology, rather than law, prime mechanism for protecting intellectual property).

2. *The Anticircumvention Provisions*

The Digital Millennium Copyright Act of 1998 provides that "[n]o person shall circumvent a technological protection measure that effectively controls access to a work protected under this title."[235] It is important to underscore that the provision is imposed on the act of circumvention per se, not on the act of circumvention in order to infringe a protected right. In a separate provision the Act defines additional violations with respect to circumvention of measures that protect "a right of the copyright owner."[236] Thus, it becomes clear that the basic prohibition imposed by the Act on circumvention of any measure that "effectively controls access to a work" operates irrespective of whether the access gained, apart from the circumvention needed to effect it, infringes a property right in the work.

The Act also prohibits manufacture, sale, or importation of products or services primarily designed to enable circumvention of technological protection measures or that have limited commercial significance other than for circumvention.[237] The Act imposes severe criminal sanctions on circumvention and on manufacture or sale of the means of circumvention "willfully and for the purposes of commercial advantage or private financial gain."[238] It also provides civil remedies and imposes civil sanctions, including injunctions, impoundment of the decrypted materials, and treble damages for repeat offenders.[239] The civil remedies and sanctions are available irrespective of the state of mind or knowledge of the person circumventing the technological protection measure. Both criminal and civil sanctions apply to circumvention per se, whether or not the underlying use is privileged.

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[235] Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863-64 (to be codified at 17 U.S.C. § 1201(a)(1)(a)). The Act use the following definitions:

> (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
>
> (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Id. § 103(a), 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(a)(3)).

[236] Id. § 103(a), 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(b)(1)(A)).

[237] See id. § 103(a), 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(b)(1)).

[238] Id. § 103(a), 112 Stat. at 2867 (to be codified at 17 U.S.C. § 1204(a)) (imposing five to ten years imprisonment and $500,000-$1,000,000 fines). Nonprofit libraries, archives, and educational institutions are exempt. See id., 112 Stat. at 2867 (to be codified at 17 U.S.C. § 1204(b)).

[239] See id., 112 Stat. at 2874-75 (to be codified at 17 U.S.C. § 1203).

Understanding the relationship between the Act's two main anticircumvention provisions is crucial to understanding the anticircumvention law as a regulatory framework and to assessing its constitutional implications. From a practical perspective, the prohibition on manufacture, importation, or sale of circumvention devices ("the anti-device provision") is the more important of the two prohibitions.[240] Even if a few savvy users can circumvent without relying on the products or services of others, the vast majority of users will have to rely on such products or services. Prohibition on the means to circumvent effectively excludes most users from most uses of technically-protected information. Prohibiting manufacture, importation, or sale of devices without prohibiting copying would by and large negate the possibility of circumvention. It would do so just as surely as prohibiting manufacture or sale of VCRs would, as a practical matter, prevent home copying of television broadcasts, even if home copying were expressly privileged.

Despite the practical importance of the anti-device provision, the direct prohibition on circumvention per se, as opposed to circumvention for the purpose of making an infringing use, plays a crucial conceptual role in the anticircumvention legal framework. If the act of circumvention were privileged to users, particularly if it were privileged as a matter of free speech, it would be difficult to sustain a prohibition on manufacture and sale of the products necessary to enable users to engage in circumvention. Imagine, for example, the constitutional implications of a law that prohibited manufacture or sale of printers or modems, while maintaining the right of users to write and distribute anything they choose. While it would be difficult to suggest that the free speech rights of Hewlett Packard or U.S. Robotics were violated, it would be much easier to claim a violation of the rights of the tens of millions of people who print handbills or use the Internet over their home telephone lines. We probably would think of the prohibition in today's digital environment as a violation of the freedom of the press. For if freedom of the press means anything distinct from freedom of speech, it must be the freedom to use the machines necessary to engage in effective speech. Establishing the illegality of circumvention per se is therefore a conceptually crucial element of justifying the prohibition on manufacture and sale of the means of circumvention. It is only because the underlying behavior—circum-

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[240] See Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 13 Berkeley Tech. L.J. (forthcoming 1999) (manuscript at 20-28, on file with the *New York University Law Review*) (analyzing in detail centrality of antidevice provisions to excesses of anticircumvention framework).

vention—is unlawful, that a prohibition on all production and sales of equipment necessary for engaging in that behavior can be sustained.

The legislators who drafted the Act were keenly aware of the deep concerns surrounding the prohibition on circumvention. Academics[241] and affected industry groups[242] argued against it. The Act addresses these criticisms in two ways. First, it includes a list of exemptions that provide a snapshot of negative side effects of the anticircumvention law that were presented to Congress at the time of legislation.[243] Second, and probably more importantly, the Act creates a formal administrative rulemaking process to assess the effects of the direct prohibition on circumvention, and to exempt classes of uses or materials from the Act's prohibitions.[244] This administrative process applies, however, only to the direct prohibition on circumvention. The Act expressly excludes use of the conclusions of the administrative process as a defense in an action based on manufacture or sale of circumvention devices.[245] The administrative process, and the exclusion of the anti-device provision from it, invite First Amendment challenges to the Act. But more on that later.

The Act's numerous exemptions from the anticircumvention provision reflect a wide range of concerns about the implications of extensively deployed technological protection measures and a comprehensive ban on circumventing these measures.[246] The first of these exemptions, for nonprofit libraries, archives, and educational institutions, is in fact quite the opposite of an exemption. The "exemption" for nonprofit libraries, archives, and educational institutions permits these organizations to gain access to a work without authorization, if they do so solely to make a good faith determination

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241 See, e.g., Julie E. Cohen, A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace, 28 Conn. L. Rev. 981 (1996); Letter from Keith Aoki, Professor of Law, University of Oregon, et al., to Representative Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property (Sept. 16, 1997) (available at http://www.dfc.org/issues/graphic/2281/proflt/proflt.html); Letter from Keith Aoki, Professor of Law, University of Oregon, et al., to Senator Tom Bliley, Chairman, Commerce Committee (June 4, 1998) (available at http://www.dfc.org/issues/graphic/2281/proflt3/proflt3.html),

242 See, e.g., The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications, Trade, & Consumer Protection of the House Comm. on Commerce, 105th Cong. 58 (1998) [hereinafter Copyright Hearings] (statement of Seth Greenstein, Digital Media Association) [hereinafter Digital Media Association Testimony]; id. at 30 (statement of Chris Byrne on behalf of Information Technology Industry Council) [hereinafter Information Technology Industry Council Testimony].

243 See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2866-70 (to be codified at 17 U.S.C. § 1201(d)-(j)).

244 See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)).

245 See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(E)).

246 See Samuelson, supra note 240, at 15-17 (describing political battle waged by information technology industry to gain exemptions).

whether to buy a copy of the work, and only to the extent that circumvention is actually necessary in order to make that determination.[247]

As a practical matter, the exemption is empty. A seller of any goods, including digitized information, that did not permit its largest buyers to examine the goods to the extent necessary to make a good faith determination of whether to buy them, would go out of business in less time than it takes to explain why.[248] But the exemption is not without some effect. Through the magic words *expressio unius, exclusio alterius est* the "exemption" threatens to nullify a number of real exemptions that the Copyright Act recognizes for nonprofit libraries, archives, and educational institutions. For example, a library is privileged to copy a single article from journals or collections it owns, if it gives the copy to an individual user for "private study, scholarship, or research."[249] Relying on this exemption, a library could defensibly circumvent the protection measures of an online journal to which it subscribes in order to make a copy for an individual user. But the goods-inspection exemption, acting through the *expressio unius* canon, would preclude that defense. The same is true of other exemptions that the Copyright Act provides to libraries and schools.[250] The result is the very real expectation that libraries will be hampered in their capacity to provide inexpensive, widely available access to digitized materials.

The remaining exemptions really are exemptions. They exempt circumvention: for purposes of law enforcement, intelligence, and other government activities intended to assure computer security;[251] by software manufacturers who reverse engineer a competitor's software, to the extent necessary to make the manufacturer's product compatible with that of the competitor;[252] for purposes of encryption research;[253] in part of a product that does not itself violate the Act, to the extent that the part is intended to exclude minors from Internet materials;[254] to the extent necessary for a user of a protected product to avoid revealing personally identifiable information about the user

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247 See id. § 103(a), 112 Stat. at 2866 (to be codified at 17 U.S.C. § 1201(d)).

248 See, e.g., Copyright Hearings, supra note 242, at 66-67 (statement of Professor Robert L. Oakley, Library Director, Georgetown University Law Center) [hereinafter Library Associations Testimony] (explaining why libraries do not need this exemption).

249 17 U.S.C. § 108(d)(1) (1994).

250 See id. § 108 (listing exemptions).

251 See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2866 (to be codified at 17 U.S.C. § 1201(e)).

252 See id. § 103(a), 112 Stat. at 2866-67 (to be codified at 17 U.S.C. § 1201(f)).

253 See id. § 103(a), 112 Stat. at 2867-68 (to be codified at 17 U.S.C. § 1201(g)).

254 See id. § 103(a), 112 Stat. at 2868 (to be codified at 17 U.S.C. § 1201(h)).

to the owner of the protected materials;[255] and to the extent necessary to engage in bona fide security testing of computer systems.[256]

While the exemptions respond locally to a variety of concerns raised by the anticircumvention provision, they do not respond to the most fundamental objection to it. The fundamental objection is that the anticircumvention provision would prohibit anyone from using materials protected by technological measures without permission, even for a privileged purpose.[257] For example, a literary critic blacklisted by a publisher would be subject to the criminal provision if he uses circumvention software to read and review (with limited quotations) that publisher's new book. If the critic is paid for the review by a newspaper, he may have five years in prison to dull his critical faculties, so that when he is again free he can earn the $500,000 necessary to pay his fine without offending publishers.

Or recall Dennis Erlich, the Scientology minister turned avid critic of the Church of Scientology.[258] After the court issued the TRO and Erlich's computer, disks, and documents were seized, the court ordered some of the materials returned. These pertained to his posting of documents that had fallen into the public domain. But if the same documents had been protected by encryption, and even though Erlich would have been perfectly privileged under copyright law to use them to criticize the church, he would have remained under a court order prohibiting him from reading, let alone distributing, the materials that he wished to criticize. To publish these materials on the Internet, Erlich would have had to remove the code that protected them. And that removal, despite any privilege he might have to use the underlying materials, would expose him to civil sanctions and to seizure of his computer.

To address the concerns about the effect of the anticircumvention provision on the ability of users to make privileged uses of information, Congress postponed application of the direct prohibition for two years, and created an administrative process to review that prohibition's effects. The Act instructs the Librarian of Congress to conduct

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[255] See id. § 103(a), 112 Stat. at 2868-69 (to be codified at 17 U.S.C. § 1201(i)). This section responds to objections to circumvention devices on the grounds of their ability to intrude on the privacy of users. See generally Cohen, supra note 241 (arguing that First Amendment rights to browse and read free of intrusive oversight outweigh interest of digital publishers to monitor access to copyrighted works).

[256] See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2869-70 (to be codified at 17 U.S.C. § 1201(j)).

[257] Samuelson, for example, argues that these exemptions should be supplemented with a general exception for "other legitimate purposes." See Samuelson, supra note 240, at 17-20.

[258] See supra notes 8-12 and accompanying text.

a rulemaking on the record to determine "whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3 year period, adversely affected by the prohibition [on circumvention] . . . in their ability to make non-infringing uses under this title of a particular class of copyrighted works."[259] The Librarian must then publish a list of any class of works regarding whose use there is such a concern, and the prohibition on circumvention is waived as to that class of works for the ensuing three year period.[260] (Indeed, Samuelson has suggested that to a great extent, "the battle in Congress over the anti-circumvention provisions of the DMCA was a battle between Hollywood and Silicon Valley."[261]) The Librarian's findings, however, are explicitly precluded from any proceeding to enforce the prohibition on sale, manufacture, or importation of circumvention devices.[262] The remainder of this section explains why the decisions of the Librarian must be subject to heightened First Amendment scrutiny, and why enforcement of the anti-device provision is unconstitutional unless and until the Librarian makes a determination that no noninfringing uses will be adversely affected by utilization of technological protection measures.

3. Why is the Anticircumvention Provision a Restriction on Speech?

Why is a prohibition on circumvention a restriction on speech? Why is it anything but a rule against picking locks? After all, one might say, the anticircumvention provision does not say that you cannot read a work or quote it in a critical review. It is a rule about using decryption software, not about accessing information. It says no more than, if the owner has set up a fence, you cannot break down the fence.

The fence analogy is instructive, but only if it is expanded to include the public domain. Imagine that no one had ever thought of building a fence. People who walked on the sidewalk sometimes strayed over property lines and walked on the grass. But that was the way of the world. Sometimes owners sued, and sometimes they won. Then someone came up with the idea of a picket fence. Immediately everyone started putting up fences. In their enthusiasm, homeowners built their fences not only all around their property, but also across the sidewalks in front of their homes, all the way to the edge of the paved road. Now it became physically impossible to walk on public

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[259] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)).

[260] See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(D)).

[261] Samuelson, supra note 240, at 2.

[262] See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(E)).

sidewalks. So people took to walking around with folding foot stools. When they came to a fence on a sidewalk, they unfolded the stool, stepped on it and over the fence, and continued merrily on their way, on the public sidewalk.

Now imagine that Congress decided that foot stools effectively negate the efficacy of picket fences in clarifying property rights, and passed an act that prohibits the carriage or use of stools to cross any fence. It would be odd if we were to say that the congressional act regulates foot stools, but not the freedom to walk on the sidewalk. Applied in the technological context for which it was enacted, the anti-stool act will prevent people from walking on sidewalks. And what will prevent people from walking on sidewalks is law, not technology. Stools are available. It is the prohibition on their use, given the practice of fencing in sidewalks, that closes the sidewalks to the general public.

The anticircumvention provision is analogous. It does not prohibit circumvention for the purpose of infringement of the copyright owner's exclusive rights. It prohibits circumvention per se,[263] with the legal consequence of giving the copyright owner a power to extinguish the user's privileged uses. The copyright owner is privileged to include a protection measure. By doing so, the owner erects a *legal* barrier between the user and the user's privileged uses of the work. The barrier is legal, not technical or physical, because circumvention technology exists. What prevents the privileged use is that it is illegal to circumvent the barrier. A more narrowly tailored law, one that enhances penalties for an infringing use achieved by knowing circumvention of a technological protection measure, for example, would not have this effect. But that is not this law. This law gives owners of copyright the power to extinguish the privileges reserved to users under background copyright law.

The anticircumvention provision is based on the premise that it is worthwhile to make many users lose some privileged uses in order to assure that the owners of copyrighted materials can more completely capture the value of their products. It relies on the dubious intuition that the *Los Angeles Times* or the *Washington Post*, for example, will produce more information if they can technically prevent users of the Free Republic website from clipping articles and posting them on their

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263 The choice to prohibit circumvention per se, rather than circumvention for infringing purposes, was not mere oversight. Congress chose this form after its implications were expressly raised in committee hearings. See Copyright Hearings, supra note 242, at 56 (testimony of Steven J. Metalitz on behalf of Motion Picture Association of America) [hereinafter Motion Picture Association Testimony]; Library Associations Testimony, supra note 248, at 64.

forum. It then assumes that this economically dubious prediction is worth the First Amendment cost of denying those users the ability to structure their conversations around stories that they find thought-provoking and politically evocative.

4. Assessing the Justifications for the Anticircumvention Provisions

Testimony at committee hearings on the anticircumvention provision suggests that the provision responds to concerns expressed primarily by the motion picture and musical recording industries.[264] What seems to drive these industries to seek the anticircumvention provision is a fear and a hope. The fear is that digital reproduction produces copies that are too good at too low a price, and that digital distribution is too cheap and too efficient. Together these attributes eliminate the most important bottlenecks at which copyright owners have traditionally placed their tollbooths—the movie theater, video store, broadcast licensee's studio, or music store down the street. They threaten the established business model these enterprises have relied upon for decades. The hope, on the other hand, is that digitized works can provide vastly more efficient fee collection mechanisms than previously available. Books simply cannot prevent you from flipping the page, but digital files can. Video cassettes cannot ask you for your name and password every time you watch them, but a digital video disk or a movie downloaded "on-demand" can.[265] Digital technology thus offers copyright owners the hope that every single copy of their work will become its own tollbooth.

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[264] See Motion Picture Association Testimony, supra note 263, at 56 (defending anticircumvention provision as necessary for robust electronic commerce); Copyright Hearings, supra note 242, at 45 (statement of Hilary B. Rosen, President and Chief Executive Officer, Recording Industry Association of America) [hereinafter Recording Industry Testimony] (supporting anticircumvention provision). The software industry was more fractured. Some in this industry supported the anticircumvention law. See, e.g., Copyright Hearings, supra note 242, at 37 (statement of Robert W. Holleyman, II, President and CEO, Business Software Alliance) [hereinafter Business Software Alliance Testimony] (asserting that anticircumvention provision is "most important element" of legislation). But many software and new media producers appeared to be concerned that the anticircumvention provision would harm, not help, producers. See, e.g., Digital Media Association Testimony, supra note 242, at 58 (discussing flaws in anticircumvention provision); Information Technology Industry Council Testimony, supra note 242, at 32 (arguing that anticircumvention provision will complicate efforts to innovate and to establish necessary digital infrastructure).

[265] The final version of the Act actually requires home VCRs to be designed with the capability to read color coding that will permit owners of video programming to lock their analog programming in the same way, but prohibits use of this locking technology for video signals transmitted over the air or over channels transmitted on cable as part of the basic service tiers. See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2870-71 (to be codified at 17 U.S.C. § 1201(k)).

Faced with this fear and hope, the copyright industries made several arguments to Congress. First, in the absence of adequate protection, producers will not make content available in a digital form capable of networked distribution.[266] Second, the copyright industries are an important economic sector of the U.S. economy, particularly in terms of exports. They need this protection to sustain all the jobs and revenue that they generate because contemporary technology makes the production and dissemination of unauthorized copies too easy.[267] Finally, the legislation must prohibit circumvention per se, not only circumvention for the purposes of infringement, because relying on legal enforcement of copyright is more cumbersome and porous than self-help.[268]

Because of the constitutional implications of the anticircumvention provision, these claims must be evaluated to assure that they are "real, not merely conjectural."[269] The prohibition on circumvention per se, irrespective of whether the information use sought is itself privileged, must be shown to alleviate these harms in a "direct and material way."[270] Observed reality gives cause to be skeptical of all three claims.

First, the vast array of works offered on the Internet belies the notion that producers will refuse to make their works available for digitally-networked distribution in the absence of an adequate prohibition on circumvention of technological protection measures. The availability of information from amateurs may not be probative, but the availability from market-based organizations certainly is. Many works are offered on an advertiser-supported model; some are offered on an access-fee model; and still others on a tied-product or self-advertising model. The Internet completely lacks legal prohibitions on circumventing technological protection measures. Yet, if there is one thing the Internet does not lack, it is content. Movies are absent from the Internet because of bandwidth constraints, not because there are

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[266] See Business Software Alliance Testimony, supra note 264, at 36 (noting that software piracy costs businesses nearly $13 billion per year); Motion Picture Association Testimony, supra note 263, at 54-55 (arguing that digital distribution is vulnerable to theft in absence of technological protections); Recording Industry Testimony, supra note 264, at 43 ("[C]opyrighted works will not have a business online unless copyright owners . . . are convinced that their products are secure.").

[267] See Business Software Alliance Testimony, supra note 264, at 36-37 (suggesting that eliminating piracy would add 430,000 jobs in United States worth $5 billion annually in wages); Motion Picture Association Testimony, supra note 263, at 53 (noting that "it has never been cheaper or easier to steal intellectual property than it is today").

[268] See Motion Picture Association Testimony, supra note 263, at 106 (discussing limitations of linking act of circumvention to infringement).

[269] *Turner I*, 512 U.S. 622, 644 (1994).

[270] Id.; see also supra text accompanying notes 79-85.

no means of appropriation. There is no more reason to think that the movie industry will avoid digital network distribution than there is to think that it will refuse to put its movies on broadcast television, where they are free for millions of households to copy on private tapes.

The point runs deep to our understanding of information economics. Slippage is the rule, not the exception, in information goods. People share books, videos, or software as a matter of course. Some of this sharing is privileged under copyright law. Some is prohibited. But the point is that whether privileged or not, people gain access to information all the time, and owners usually cannot prevent all access. Economists call this technological characteristic of information goods partial excludability.[271] Our entire understanding of the economics of information and innovation has been built around the technological assumption that slippage happens. We have no idea how a world in which information goods are perfectly excludable—as technological protection measures promise to make them—will look. Because of the nonrival[272] nature of information, prevailing economic theory would suggest that we are as likely to lose as gain productivity from this technological change.[273]

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271 A good is excludable to the extent that its producer can deny the good's benefits to anyone who does not pay for the privilege of using it. See, e.g., Romer, supra note 221, at S94-S95.

272 An economic good is nonrival if its consumption by one person does not diminish its availability for consumption by another person. See, e.g., id. Think of the difference between information and bread or cannons. When John eats a loaf of bread, the loaf is unavailable for Jane to eat. The social cost of John having eaten the loaf is Jane not having it to eat. The social cost of using a baker's helper to make another loaf with which to feed Jane is that George won't have the labor he needs to build a cannon for his army. Information is different. Once information is produced, the social cost of its use by any additional individual is zero. The information is no less available for other users, and no new unit of the information needs be produced to satisfy the need of other users. If John reads about the economic conditions in Indonesia, his knowledge of that information in no way diminishes Jane's ability to learn and use the same information as well. Once the information has been produced, Jane's acquisition of it does not require the diversion of any other resources away from any other activities (like the production of George's cannons). Jane's access is not costless, in that she must spend time or effort to read or understand the information, or it must be delivered to her doorway in the form of a newspaper. That means that *communication* of information is a rival good. No more resources need be devoted, however, to production of a new unit of the information itself.

273 Because use of information by an additional user imposes no social cost, the optimal demand price of a nonrivalrous good is zero. More effective exclusion technology simply makes it possible for producers to price more uses of more of the information at inefficiently high prices. There is no systematic reason to believe that the increased revenue will lead to so much more new production that its benefits will outweigh the deadweight loss it will impose. Without an empirical basis for deciding one way or the other, the newfound ability to exclude is simply a new way of accumulating rents, and imposing deadweight losses, in the information market. All technological measures do is increase

The argument that the United States should protect its copyright industries as a matter of industrial policy may have a more obvious economic explanation. The standard economic model of copyright suggests that increases in intellectual property rights *reduce* aggregate welfare *per work*.[274] But protection shifts some of what, without protection, would have been consumer surplus in existing information goods, into producer surplus. This shift is what increases incentives to produce.[275] As far as U.S. policymakers are concerned, producers are overwhelmingly domestic companies, while consumers include billions of foreign citizens. The effect of increased protection—if it can be parlayed into greater international protection—therefore should redistribute wealth from foreign (as well as domestic) consumers to domestic producers. Measuring this policy by a constitutional rod, however, courts will have to weigh whether this bounty to the domestic motion picture industry is worth silencing speakers such as the Free Republic forum or Dennis Erlich.

Most troubling, the legislative hearings show little evidence that the necessity of the element of the legislation with the most far-reaching implications for free speech—the prohibition on circumvention *per se* rather than on *infringing* circumvention—was the subject of sustained consideration. The sole argument presented in favor of this element was that by limiting the prohibition on circumvention to infringing uses, Congress would "provide a roadmap to keep the purveyors of 'black boxes' and other circumvention devices and services in business . . . reduc[ing] the legal protection for . . . [self-help] technologies to an inadequate and ineffective level."[276]

The argument is that if law recognizes circumvention as a legitimate way to make privileged uses, it will become more difficult to sue manufacturers and vendors of circumvention software. The Supreme Court has stated that the manufacturers of devices with bona fide non-

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excludability. For true public goods, this does not change the nature of the economic problem: how to maintain adequate incentives without increasing costs too greatly. It affects both sides of the equation in the same direction by increasing incentives while also increasing costs. There is no theoretical reason to think that one side will systematically increase more rapidly than the other, and hence no systematic reason to think that technological protection measures will alleviate, rather than aggravate, the public goods problem of information production.

274 See Landes & Posner, supra note 220, at 340-41 (demonstrating that increasing copyright protection reduces welfare benefits of each copy by raising production and copying costs).

275 The justification of protection is that the increase in the aggregate number of works created by the increase in incentives to producers will offset the lost welfare per work on all works that already exist, and on all works that would have been produced even without the increase in protection.

276 Motion Picture Association Testimony, supra note 263, at 57.

infringing uses cannot be sued simply because these devices can also be used to make infringing uses.[277] While the *Sony* decision expressly concerned only copyright contributory liability, its rationale is quite persuasive in this context as well. *Sony* would give broad protection to manufacturers and sellers of technology that has wide uses for acceptable circumvention; it would be difficult to hold them liable absent a showing that they intend to aid circumvention for inappropriate purposes. Owners of copyrighted materials would have to do the same kind of tedious work they do today. They would have to uncover where infringement occurs, sue the responsible parties, and if a manufacturer knows of and contributes to this infringement, they could sue the manufacturer as well. If circumvention itself is illegal then there is no noninfringing use of circumvention technology. Owners could then go after all manufacturers of all products that permit circumvention without linking their suit to specific acts of infringement.

It is not at all clear that a law that absolutely prevents participants in the Free Republic website from using any part of a newspaper story from the *Washington Post*'s website can be justified on the basis that it would make enforcement of copyrights easier. It seems, rather, to fall into the category of those laws that "'sacrific[e]' important First Amendment interests for too 'speculative a gain.'"[278] The convenience of using self-help measures rather than the more ponderous legal process is not an insignificant value. But it is one that courts and legislators have often decided must yield in the face of important countervailing interests. Landlords can no longer use self-help against tenants in most jurisdictions, but instead must resort to summary process.[279] Life, limb, and the public peace were considered by courts too important to sacrifice in the name of effective self-help. The claimed inefficiency of courts at enforcing copyrights hardly seems an adequate reason to prevent individuals from reading, criticizing, or mocking the words of others in ways that the law of copyright privileges them to do.

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[277] See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 442-56 (1984) (holding that VCRs were capable of being used for time shifting, that time shifting was legitimate use, and hence that VCR producers could not be sued for contributory infringement simply for manufacturing and selling equipment that could be used for infringing as well as noninfringing uses).

[278] *Denver Area*, 518 U.S. 727, 760 (1996) (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973)); accord FCC v. League of Women Voters, 468 U.S. 364, 397 (1984).

[279] See, e.g., Berg v. Wiley, 264 N.W.2d 145, 151 (Minn. 1978) (holding, in wrongful eviction case, that if tenant does not voluntarily abandon possession, landlord must "resort to judicial process" to dispossess tenant).

5. Consequences for Constitutional Review

The Digital Millennium Copyright Act's anticircumvention provision invites two successive constitutional challenges. The first arises during the administrative process. The second concerns the exclusion of evidence produced in the administrative process from actions to enforce the prohibition on manufacture, importation, and sale.

The Act requires the Librarian of Congress to conduct a rulemaking on the record to determine the effects of the circumvention prohibition on the availability of copyrighted works for noninfringing uses. The Librarian must consider the availability of copyrighted works for use, the availability of works for nonprofit archival and educational purposes, the impact of the prohibition on criticism, comment, news reporting, teaching, scholarship or research, and the effect of circumvention on the market or value of copyrighted works.[280] The Act, then, explicitly contemplates the possibility that government enforcement of the anticircumvention provision will inhibit, among other things, "criticism, comment, news reporting, teaching, scholarship, or research."[281] Congress knew full well that it was enacting a law that directly impacts the marketplace of ideas. It postponed application of the Act for two years pending study of its adverse effects on the flow of information in society.[282] And it mandated exclusion of all materials whose noninfringing use the Librarian of Congress deems will be adversely affected if included in the Act's coverage.[283]

Congress's clear acknowledgment of the risk that the Act poses to many privileged uses, including "criticism, comment, news reporting, teaching, scholarship, or research," requires special attention to the administrative process the Act created.[284] Determination of whether the Act's application really does adversely affect the free flow of social discourse, and whether the benefits of technological protection are worth the First Amendment risks they create, falls within the ambit of the Court's heightened First Amendment scrutiny. The administrative process must be subject to that searching level of scrutiny.

Moreover, it is far from clear, given the potential for adverse effects on core First Amendment activities, that the absolute prohibition on manufacture, importation, or sale of anticircumvention devices and services is constitutional. Imagine, for a moment, that the Librarian of Congress determines that if users lose the ability to electronically

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[280] See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)(i)-(iv)).

[281] Id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)(iii)).

[282] See id. § 103(a), 112 Stat. at 2863-64 (to be codified at 17 U.S.C. § 1201(a)(1)(A)).

[283] See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(D)).

[284] Id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)(iii)).

cut and paste newspaper stories and editorials, they will lose to a significant extent their ability to offer their own criticism and comment. She could, for example, find that the effort of retyping or retelling the story would eliminate too many amateur exchanges that take place on forums like Free Republic. Now let us say that the Librarian makes the additional plausible determinations that newspapers recover their costs from print editions, that their revenue from online advertising is more than enough to lead them to make their papers available online, and that the loss of those few users who would read the clippings of others instead of reading the original website is of minimal effect. The sum of these effects is that enforcement of the anticircumvention law would impinge the First Amendment rights of users without generating enough benefit to justify the infringement.

None of this will prevent newspapers from locking up their stories. The Librarian's decision excludes their materials from protection under the anticircumvention prohibition. It does not in any way affect the newspapers' ability *or right* to use technological protection measures. And if locking up the stories permits the newspapers to charge for reading, or to require that readers view their stories on the newspapers' sites, framed by the newspapers' ads, there is no reason to think that they will not do so.

This is where the prohibition on manufacture, importation, and sale enters. Under the Act, the Librarian's determination only affects the prohibition on direct circumvention by users. It has no effect on the anti-device provision. Indeed, the results of the Librarian's rulemaking are expressly excluded from consideration as a defense in actions brought against manufacturers or sellers of circumvention capabilities.[285]

So now let's return to the Free Republicans who have in their hands a piece of paper published by the Librarian of Congress, after a rulemaking on the record, that says in effect that their First Amendment rights to read and produce criticism and commentary will be adversely affected if they are prohibited from circumventing technological protection measures placed on news articles. They merrily surf to the *Washington Post*'s website to download the latest story, only to find that when they try to upload it on their own website, it is garbled beyond recognition. Secure in their piece of paper from the Librarian, the Free Republicans look around for some software, or hardware, or at least a web-based service, that will help them strip the story of the offending technological protection measure. They are officially privileged by law to strip the code that locks the story. But

[285] See id. § 103(a), 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(E)).

there is no software. There is no hardware. There is no service. Providers of circumvention technology are still prohibited, by criminal and civil sanctions, from selling in the United States. The Free Republicans have encountered an unusually crisp instance of a violation of the freedom of the press. For while they are permitted to print and distribute their virtual pamphlets, there is an absolute prohibition on the manufacture, importation, or sale of virtual presses.

The same problem questions the status of the prohibition on manufacture, importation, and sale in the two years following enactment of the Digital Millennium Copyright Act. Remember that Congress was so unsure of the extent to which the prohibition on circumvention will limit the freedom of criticism, commentary, scholarship, teaching, and news reporting that Congress postponed the effective date of the direct prohibition for two years. The prohibition on manufacture, importation, or sale, however, is effective immediately. What this means is that, without knowledge of the effects on First Amendment interests, and in the officially acknowledged absence of such knowledge, the manufacture, importation, and sale of presses are being prohibited. It would appear that any attempt to enforce the prohibition prior to the Librarian's determination must be held an unconstitutional abridgment of the freedom of the press. After the Librarian's determination, it would still be hard to justify this sweeping prohibition as long as some nontrivial amount of circumvention is privileged.

B. Contractual Enclosure

1. The Licensing Problem

Commercial communications of information are increasingly being enclosed by contractual means, displacing the background law that demarcates the public domain. The most important element of this contractual enclosure entails enforcement of standard licenses for mass market information products, like software programs and databases. These licenses include terms that specify the uses to which the consumer can put the information. Some of these terms significantly increase the control of producers over the uses that users can make of their products.

For many years, the practice of selling mass-marketed information products subject to a license that restricts their use, known as "shrinkwrap licensing," was considered by courts and commentators a

lawyer's superfluity.[286] Two concerns animated this view. First, these licenses were believed to lack adequate assent from consumers. Second, enforcement of these licenses under state law was preempted to the extent that they purported to give sellers more rights than the background copyright law provided them. Because copyright represented a federal legislative balance between producers and users of information, state enforcement of contracts that upset that balance was inconsistent with federal policy.

The decision in *ProCD, Inc. v. Zeidenberg*[287] seemed to have changed all that, and has opened the door for licensing in mass market settings to become a serious enclosure strategy. The case involved facts similar to those that led the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*[288] to *permit* the defendant to copy the contents of a telephone directory. The plaintiff in *ProCD* was a producer of a directory, like the plaintiff in *Feist*.[289] As in *Feist*, the defendant was a competitor who bought the plaintiff's directory, which was stored on a CD-ROM, and used the information in it to create a competing directory.[290] The difference between the two cases was that the CD-ROM that contained the ProCD directory had a shrinkwrap license that limited use of its contents to noncommercial purposes.[291] There was little question that use by a competitor to extract information for a competing directory was not permitted under the license. There was little question that such competitive use was privileged under the rule in *Feist*. The question was whether the license was a valid contract, and if so, whether its enforcement under state law was preempted by federal law.[292] Judge Easterbrook declared the license a valid contract with little difficulty, reasoning that copyright is a form of property rule.[293] Parties are generally entitled to contract around property rules, subject to U.C.C. and common law contract constraints. Furthermore, he held that the terms of a contract for sale of consumer goods need not be visible before a con-

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286 See Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239, 1248-53 (1995) (reviewing rationales behind courts' general refusals to enforce shrinkwrap licenses).

287 86 F.3d 1447 (7th Cir. 1996).

288 499 U.S. 340, 344-64 (1991) (holding that copying raw contents of directory, as well as obvious, nonoriginal organizational principles, like alphabetical listing, was not infringement of copyright, and could not, consistent with constraints of Patents and Copyright Clause, be protected).

289 See *Feist*, 499 U.S. at 342; *ProCD*, 86 F.3d at 1449.

290 See *Feist*, 499 U.S. at 343-44; *ProCD*, 86 F.3d at 1450.

291 See *ProCD*, 86 F.3d at 1449.

292 See id. at 1448-49.

293 See id. at 1450.

sumer purchases the product.[294] It is enough that the consumer has the opportunity to return the product for a refund after the purchase, thereby rejecting the terms of the license.[295] The court also held that enforcement of the contract was not preempted. Federal law, Judge Easterbrook wrote, preempts general rules of law, but does not preempt contracts that govern only the respective rights and duties of private parties.[296]

ProCD provided the template for an extensive institutional elaboration of its basic approach—the mass market licensing provision of proposed U.C.C. Article 2B. The proposed U.C.C. section 2B-208 will universally validate and enforce mass market standard licenses. Shrinkwrap licenses will be enforceable under this provision, subject to the consumers' right to reject the license and return the product for a refund if the license is hidden from sight at the time they access the information.[297]

The proposed U.C.C. Article 2B and the decision in the *ProCD* case have been the subject of extensive critique. The core of this critique has been that if mass market licenses are enforced, they will govern most information transactions, displacing copyright and related laws. They will thereby fundamentally alter the relative rights, privileges, and duties of information producers and users for most practical purposes.[298] Because of this effect, it is appropriate to think of mass market licenses as a contractual form of enclosure. This is not the place to repeat the many criticisms of U.C.C. Article 2B. But it is important to clarify how contractual enclosure, like enclosure produced by altering the background rules of intellectual property, is a matter of constitutional concern. In other words, it is important to explain why it is that if states adopt a provision like U.C.C. section 2B-208, or if courts generally enforce mass market licenses as the court did in *ProCD*, these actions will raise the same type of constitutional concerns raised by the anticircumvention law.

Understanding licensing as a form of enclosure that implicates the First Amendment is conceptually trickier than understanding why

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294 See id. at 1451.

295 See id. at 1451-53.

296 See id. at 1454-55.

297 See U.C.C. § 2B-208 (ALI Council Draft, Dec. 1998) (official draft available at <http://www.law.upenn.edu/library/ulc/ucc2b/2bALId98.htm>).

298 See, e.g., Rochelle Cooper Dreyfuss, Do You Want to Know a Trade Secret? How Article 2B Will Make Licensing Trade Secrets Easier (But Innovation More Difficult), 87 Cal. L. Rev. 191, 198, 238-52 (1999) (arguing that private controls can decrease innovation); Niva Elkin-Koren, Copyright Policy and the Limits of Freedom of Contract, 12 Berkeley Tech. L.J. 93, 94 (1997) (stating that licensing may replace copyright with contracts); Netanel, supra note 191, at 383-84 (criticizing *ProCD*).

that amendment is implicated by the anticircumvention law. We tend to think that when it enforces a contract, the state enables rather than regulates. How, one might ask, can enabling people to commit credibly to their own promises be an abridgment of their freedom to speak? How can enforcing the private decisions of many individuals be a policy that centralizes decisions about information production?[299]

People do not contract in a vacuum. They contract against the background of law that defines what is, and what is not, open for them to do or refrain from doing. What background law makes possible is all that there is on the table. They negotiate from within the universe produced by law as to what they bring to the table and what they are permitted to take away. Defining the background rules about what is and is not up for grabs in the contracting process significantly affects the outcome. And that definition is a governmental decision.[300]

The practical effect of the decision to enforce mass market information licenses is that more uses of information will be prohibited to more people. First, when courts or legislatures permit companies to expand the range of uses of information that are subject to the companies' control through shrinkwrap licenses, they provide companies with incentives to "wrap" their products in order to attain an enhanced negotiating position. Second, if there are high transaction costs to negotiating individual variations from standard shrinkwrap

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[299] Important work on answering various aspects of this question of the relationship between claims that markets enhance consumer sovereignty and claims that they diminish political self-governance includes Rosemary J. Coombe, Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, 69 Tex. L. Rev. 1853, 1865-66 (1991) (discussing impact of commodification of cultural texts on human subjectivity); Niva Elkin-Koren, Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace, 14 Cardozo Arts & Ent. L.J. 215, 267 (1996) (arguing that copyright tends to commodify and centralize information); Netanel, supra note 191, at 305-06 (discussing implications of expanded contractual rights on copyright regime).

[300] The source of this critique is Robert Lee Hale's extensive work on the role of background legal rules in bargaining. See Robert L. Hale, Freedom Through Law 11-12 (1952) (arguing that unequal legal rights embody economic inequalities); Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 603 (1943) (arguing that government and law play greater role in determining freedom of contract than generally recognized); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 470 (1923) (arguing that laissez faire systems are permeated by governmental coercion). Hale's work has been reviewed and elaborated in Warren J. Samuels, The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale, 27 U. Miami L. Rev. 261, 262-63 (1973) (presenting systematic review of Hale's work and life) and Duncan Kennedy, The Stakes of Law, or Hale and Foucault!, 15 Legal Stud. F. 327, 332-34 (1991) (describing and extending Hale's analysis). The most extensive study of Hale's work is Barbara H. Fried, The Progressive Assault on Laissez-Faire (1998). The centrality of this critique to contemporary debates over the First Amendment was elaborated in Balkin, Some Realism, supra note 105, at 410, 415-18 (using Hale's theory of coercion to characterize captive audience's agency in free speech context).

contract terms, or if uses privileged by background law have high positive externalities, then terms imposed in mass market licenses will not be negotiated. Enforcing these contracts will systematically cause privileged uses to become subject to exclusive rights. Third, it is important to recognize that this shift in the legal status of information uses is not the result of the absence of government regulation. It is the result of a government decision to enforce these contracts. This decision is no less and no more a regulatory decision than the decision not to enforce them.

If uses of information that background law treats as part of the public domain are unalterable by contract, they are not negotiable. The user comes to the table with those privileges in his or her pocket. What remains to be negotiated are terms like price and quality of access.[301] If law does enforce contracts that prohibit public domain uses, then those uses are on the negotiating table. They can be exchanged for reduced price or quality of service, for example. Faced with background law that allocates certain privileges to users, but that will enforce contracts to the contrary, a rational vendor of information products would invest in enhancing its negotiating position by "wrapping" the product with a license. This practice would thereby displace background law and give the vendor control over more uses of the work. The licensing practice would continue as long as the cost of wrapping is less than the benefits obtainable from the enhanced negotiating position.[302]

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[301] It is important to remember that because information products are nonrival, the standard economic critique of nonwaivable consumer protection provisions does not apply. Nonrival goods, like information products, are always sold at above marginal cost prices. Their price is not constrained by marginal cost and competition, but by the same constraint imposed on any monopolist—the rent-maximizing price. This is adjusted by the extent to which there are decent near-substitutes for the product. On the assumption that an information vendor will price at its rent-maximizing price irrespective of other terms, "forcing" a user to retain a privilege by refusing to enforce a license waiving it should not be reflected in an increased price. There is no double dipping into monopoly rents. If the seller could charge more for its product without losing rents, it would do so irrespective of the allocation of the privilege. The reallocation of the privilege to the producer of the information will result only in a reduction of near-substitutes for purchased access to the work, and presumably therefore in an increase, not a decrease, in the price.

[302] Because of the discipline that near-substitutes impose on the prices owners of information products can charge, and because privileged uses are near-substitutes (e.g., borrowing a book from a friend under the first-sale doctrine instead of buying a copy), producers will have an incentive to "wrap" products and prevent privileged uses for no other reason than to eliminate some near-substitutes for paid access to the work. For a rich analysis of the bargaining relationship in mass market licenses, see Julie E. Cohen, *Lochner* in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 Mich. L. Rev. 462, 517-33 (1998) (analyzing relationship as "contested exchange").

Vendors make the opening move by deciding whether to offer the product with a license or subject to background law. By "wrapping" their products, they shift to themselves the right to permit uses that would be privileged to the users under background copyright law. Since the incentives of all vendors are similar, and since vendors make the first move as a class (they must make a product available before users can buy it), we would expect to see increasing portions of the universe of information products offered with a license that displaces background law. As an increasing proportion of information products are wrapped, the availability of unwrapped substitute products will decline. This further enhances the value of "wrapping" (because there are no "unwrapped" substitutes) and increases incentives for contractual enclosure.

But, the counterargument might go, the parties will negotiate to optimal terms. If, for example, producers value the prevention of certain privileged uses more highly than consumers, then contracts will give only limited use rights. But if the opposite is true, then the market will lead producers to offer their products without restrictions beyond those imposed by background law. The answers to this objection are transaction costs and externalities.

First, as Coase taught us, entitlements do matter in the presence of transaction costs.[303] In individual transactions, the value of the transaction may well be high enough to justify negotiation costs. But in the context of mass market products, sold with mass market standard contracts, the costs of negotiating individual variances can be enormous. Form contracts are developed precisely to avoid these costs. Given high transaction costs, entitlements will remain where they are originally located. While background property law locates some privileges with users, enforcement of mass market licenses is likely to shift many of those entitlements to information vendors.

Furthermore, even if transaction costs were not prohibitive, users would underinvest in buying uses currently in the public domain because these productive uses have high positive externalities. Users who use public domain information as an intermediate product to producing other information goods will buy permission to use newly enclosed information only if their private benefits outweigh the private costs to vendors of permitting the transformative use. This would leave information underutilized in all instances where the social benefits of a transformative use of information outweigh the private costs to the sellers, but the private benefits to transformative users do not. Studies that demonstrate that social returns to investment in informa-

[303] See Coase, supra note 122, at 15-19 (explaining transaction costs' import).

tion production systematically exceed private returns suggest that this may be a common occurrence.[304]

2. *The Constitutional Dimensions of the Licensing Problem*

Let's assume that in fact a judicial or legislative commitment to enforce mass market licenses will cause producers to wrap their products in such licenses. And let's assume that because of transaction costs and externalities this practice will result in prohibiting to most users many uses previously in the public domain. How do these facts bear on the constitutional concerns with government regulation and concentration of information markets?

The answer for the concentration effect relies on the functional equivalence of legislative and contractual enclosure. As explained in Part IV.B, changes in background law that enclose the public domain are likely to lead information producers to converge on commercial, concentrated production that vertically integrates new production with inventory management. For this conclusion to apply to enforcement of mass market licenses, what remains is to explain the functional equivalence of legislative and contractual enclosure from the perspective of organizations and individuals engaged in information production.

Begin with the following condition. Background law at T_1 says that A has a right to control uses (U_1-U_6), but no right to control uses (U_7-U_n). Uses (U_7-U_n) are privileged to all, and contracts that prohibit users from making uses (U_7-U_n) will not be enforced. At T_2 a new law is passed that gives A the right to control uses (U_7-U_{10}), leaving in the public domain only uses (U_{11}-U_n). This is direct legislative enclosure of uses (U_7-U_{10}). If users want to make information uses (U_7-U_{10}) they now must negotiate with A, and either pay A's price or refrain from use. It is this aspect of enclosure that is responsible for the generally accepted effect of enclosure—that it raises the prices of

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[304] See Jeffrey I. Bernstein & M. Ishaq Nadiri, Interindustry R&D Spillovers, Rates of Return, and Production in High-Tech Industries, 78 Am. Econ. Rev. 429, 429-34 (1988) (confirming Mansfield et al.'s results); Edwin Mansfield et al., Social and Private Rates of Return from Industrial Innovations, 91 Q. J. Econ. 221, 233 (1977) (finding median social rate of return of 56% and private rate of return of 25% in 17 studied innovations); see also Richard R. Nelson, The Simple Economics of Basic Scientific Research, 6748 J. Pol. Econ. 297, 302-04 (1959) (discussing gap between private and public benefits from basic research). Mansfield et al. interpreted their results as supporting "the hypothesis that the gap between social and private rates of return tends to be greater for more important innovations and for innovations that can be imitated relatively cheaply by competitors." Mansfield et al., supra, at 237. This hypothesis was introduced in Arrow, supra note 190, at 622.

information inputs. It is this effect that triggers the behavioral adaptations described in Part IV.B.

Now assume instead that at T_2 a new law is passed that does not change the background law definition of A's bundle of rights. Instead it declares that contractual arrangements that give A the right to control uses (U_7-U_{10}) will be enforced. A then redrafts its contracts to give itself the right to control uses (U_7-U_{10}). One of two things may happen: Users will negotiate for deleting uses (U_7-U_{10}) from their contract, or they will not. If they do, they probably will pay the same amount for this exclusion that they would have paid for permission under the alternative change that directly assigned these uses to A. If users do not negotiate, they will be forced to refrain from using the information altogether if they choose not to sign the contract, or, if users do sign the contract, they must refrain from using the information in the ways it prohibits. In either event the functional effect is identical to the effect of the first change in rule. To make use of the information in ways (U_7-U_{10}), users must negotiate with A and get its permission for a price, or refrain from the use. By promising to enforce contractual provisions that prohibit uses (U_7-U_{10}), the new law places these uses on the negotiating table, where they are located in the hands of the information's producer at the opening of negotiations, just as though the law had directly enclosed them.

To the extent one believes that First Amendment concerns are raised by laws that tend to concentrate control over information flows, the formal difference between legislative enclosure and contractual enclosure is unimportant. What is important is the functional equivalence in the likely effect of these changes in law on the organization of information production. Whether the availability of information from "diverse and antagonistic sources" is compromised by a law that declares certain uses to "belong to the owner," or a law that declares certain uses "open for negotiation," is irrelevant. Insofar as the decision to enforce mass market licenses is likely to conflict with the First Amendment commitment to assure a diversity of information producers, it raises concerns of a constitutional dimension.

Enforcement of mass market licenses can also be understood as raising concerns over government regulation of speech, but reaching this conclusion is more complex. The difficulty is illustrated by the following story. Imagine that Michael Jordan negotiates a sponsorship deal with Nike. Each side hires lawyers to draft a fifty-page contract. In an extensively negotiated provision, Jordan promises to refrain from endorsing any product sold in direct competition with Nike during the duration of the contract, and for a period of ten years following the last Nike advertisement using his name or likeness. He

also promises not to disparage or otherwise criticize, directly or indirectly, Nike or its products during the same period. The parties expressly agree that the harm from breach of this provision would be irreparable, and that the proper remedy is an injunction, where possible, or damages equal to three times the value of the contract. The contract's recitals state that, should Jordan criticize Nike after having been presented by the company as its icon, the damages would far exceed the benefits of his endorsement in the first place.

A few years later, after Nike is accused of using child labor in terrible work conditions, Jordan is criticized for supporting the company. To rebut the criticism, Jordan pays a surprise visit to an overseas factory, and is so appalled by the conditions that he holds a press conference, deeply criticizes Nike for its labor practices, and breaks off the contract. Nike sues for breach of contract, seeking an injunction to prevent Jordan from speaking out against Nike in a planned network television interview, as well as the damages fixed in the contract.

From an instrumental, pro-political discourse perspective, a court order silencing Jordan disserves the First Amendment. It would be akin to permitting a libel action against the New York Times under the conditions of *New York Times v. Sullivan*. But insofar as we are concerned with free speech as a dimension of self-governance, the outcome is not as clear. The argument would run as follows. The government is not abridging Jordan's freedom of speech. It is enforcing a general rule of law that is not limited or directed to communicative behavior.[305] That rule of law is an enabling rule of law. Its function is

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[305] Cf. Cohen v. Cowles Media Co., 501 U.S. 663, 668-72 (1991). In *Cohen*, a five-Justice majority, per Justice White, held that the First Amendment did not bar a confidential source from recovering damages on promissory estoppel grounds after two newspapers published the source's name in violation of their secrecy agreements. See id. at 672. The respondent newspapers had argued that allowing Cohen to recover under promissory estoppel would "inhibit truthful reporting" by giving news organizations an incentive not to reveal a source's name even when the source's identity is itself newsworthy. See id. at 671. But the Court rejected this argument, emphasizing that "any restrictions . . . that may be placed on the publication of truthful information" were imposed by the parties' own agreement. See id. The Court went on to say that any inhibition on truthful reporting

> is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them. . . . [T]he First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law . . . .

Id. at 672.

On the way to this holding, the Court quickly dismissed the argument that Cohen's promissory estoppel claim did not implicate the First Amendment at all because it did not involve state action. See id. at 668. The Court held that state courts' enforcement of the newspapers' promises would constitute state action. See id. The Court did not, however,

to permit people to make commitments that they will, in the future, be bound to follow. In this sense, it serves people's capacity to direct their own lives. It permits them to choose a course of action for the future, and allows them to commit to others that they will stay that course. When the government enforces such a contract, it is enforcing Jordan's own decision, and its promise to do so is what makes the agreement between Jordan and Nike possible in the first place. It is the choice that Jordan and Nike made, not the government's, that governs whether Jordan will or will not speak.

The Jordan hypothetical suggests that enforcing contracts that prohibit the promisor from saying something or using information restricts present negative liberty to speak in order to respect past autonomous choices about speech.[306] The hypothetical also suggests that the self-governance argument in favor of enforcing a speech-restrictive contract depends on the degree to which the contract reflects the autonomous choices of *both* parties. When at least one party has little opportunity to exercise self-governance in entering a contract, the argument for a negative liberty-based First Amendment privilege against enforcement becomes more forceful.

Return back to the buttons on the first setup screen of a computer program. Form contracts for mass-marketed information prod-

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consider whether a pure contract claim would constitute state action as well; Cohen's contract claims had been dismissed on common law grounds by the courts below. See id. at 666.

In *Cohen*, the Court essentially decided to respect the defendant newspapers' autonomous past choices to restrict their speech, even at the cost of inhibiting the present flow of truthful information to the public. For purposes of my argument, it is important to remember that confidentiality agreements between a reporter and a source will typically be negotiated individually, with little question that both parties are making an autonomous choice; in this sense these agreements differ from form contracts for mass-marketed information products. See infra notes 306-09 and accompanying text.

306 This defense of enforcing the contract is a positive, not a negative, liberty argument. A negative liberty version of the First Amendment would be concerned that government neither prevent nor punish people for speaking. In this case, if the court enforces the contract by its terms, it will most definitely be preventing and penalizing speech. The import of the "contract as freedom" counterargument is that there are freedom-based arguments to support enforcement of the contract. If courts do not enforce the contract, they will rob Jordan of the choice to live his life in a particular way—endorsing products while promising not to criticize their makers. This is a positive liberty argument. It defends contract enforcement as enabling individual self-governance. The contract does this. But it does so by restricting negative liberty at the time of enforcement. This may be, all liberty-loving things considered, an enhancement of Jordan's liberty. Like many other government decisions to restrict speech, it may therefore be appropriate. But it would be appropriate because we thought that respecting negative liberty in this instance would impose too high a price on people's capacity to be self-governing individuals, not because we thought that enforcement did not entail an abridgment of the negative liberty to speak.

ucts present the weakest autonomy-based case for enforcement.[307] Vendors, as repeat players, invest time, effort, and money in drafting contracts. Buyers are presented with a contract that includes many provisions on a take-it-all-or-leave-it basis. They will, of necessity, invest much less than vendors in evaluating the consequences of each provision. The claim from positive liberty for enforcing any particular provision is therefore weakened. Furthermore, as a contract term becomes an industry practice, adherence to it in standard contracts increasingly ceases to be a particular fact about a particular user.[308] It becomes a universal rule, though nongovernmental in origin, about what uses of information are generally privileged to all, and what information uses are not. The universality of a licensing practice eliminates its standing as an expression of the parties' choice. It is simply a nongovernmental institutional constraint on choice. And it is an institutional measure that cannot constrain individual choice except through effective government enforcement.

The point is not to argue that enforcement of all provisions in standard contracts for mass-marketed information products would be unconstitutional. It may be that the appropriate response to these licenses is to develop a *New York Times v. Sullivan*-like constitutional defense around which no parties may contract. Such an approach could, for example, follow the framework Nimmer proposed for a First Amendment copyright privilege many years ago.[309] Communication of information with a strong public interest component would be privileged irrespective of contractual provisions to the contrary. In the alternative, it may be plausible to use First Amendment considerations in the traditional framework of public policy constraints on enforceability. Like contracts that, for example, excuse the vendor from liability for the consequences of its own gross negligence, standard contracts that too extensively regulate the use of information by consumers could be treated as unenforceable. The contours of such a doctrine would not necessarily follow those of the "fair use" doctrine or the idea/expression dichotomy, although those doctrines provide an important point of departure. The point would be to assure that contracts whose enforcement requires the state to prevent people from

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[307] For a more complete statement of this point, see Niva Elkin-Koren, supra note 298, at 111-13 (suggesting that contractual expansion of copyright may limit bargaining between owners and users).

[308] This also makes uses subject to such standard industry-wide provisions no longer in the public domain, in a way that a use prohibited by an individualized contract would not. See supra Part I (defining public domain as uses privileged except where there are individualized facts, like contract, that exclude use by particular person).

[309] See supra text accompanying notes 136-46.

using information are enforced only if they in fact reflect the considered will of both parties, and if their enforcement will not cause too great an enclosure of the public domain.

C. The Collections of Information Antipiracy Act

1. Provisions of the Collections of Information Antipiracy Act

The Collections of Information Antipiracy Act (CIAA)[310] is the latest iteration in a long debate. One side of the debate claims that information collections are costly to make and will be under-produced without protection. The other side argues that the policies underlying the requirement of originality and the idea/expression dichotomy in copyright law militate against recognizing exclusive rights in information collections. By locking up the information itself, rights in databases would do more harm than good.[311] In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[312] the Supreme Court weighed in on the side that the use of information *qua* information is privileged to all, and that copyright law does not protect the information contained in a collection.[313] This decision galvanized the database industry to pursue legislative avenues. Its drive was given increased urgency when the European Commission passed a directive protecting databases, and denied that protection to producers whose home countries did not provide similar protection.[314] American database producers argued that if the U.S. did not pass reciprocal legislation, their databases would be pirated with impunity by European companies.[315]

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310 H.R. 2652, 105th Cong. (1998).

311 For two descriptions of this debate from opposite sides, compare Jane C. Ginsburg, Copyright, Common Law, and *Sui Generis* Protection of Databases in the United States and Abroad, 66 U. Cinn. L. Rev. 151, 176 (1997) (arguing in favor of increased protection offered by new initiatives) with J.H. Reichman & Pamela Samuelson, Intellectual Property Rights in Data?, 50 Vand. L. Rev. 51, 137-38 (1997) (arguing that despite need for protection, current initiatives go too far).

312 499 U.S. 340 (1991).

313 See id. at 363-64.

314 Parliament and Council Directive 96/9/EC, 1996 O.J. (L 77) 20 [hereinafter EU Database Directive].

315 See, e.g., Hearing on H.R. 2652, Collections of Information Antipiracy Act. Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) [hereinafter CIAA Hearings] (available at http://www.house.gov/judiciary/41143.htm) (statement of Robert E. Aber, on behalf of Information Industry Association) [hereinafter Aber Testimony]. On the effects of the combined European-American drive to extend protection, see Reichman & Samuelson, supra note 311, at 95-113. The irony of this argument being made by a group that includes Reed Elsevier, the largest European database producer, seems to have been lost on the legislators.

The CIAA would prohibit anyone from extracting or using[316] all or a substantial part of a collection of information, if the collection or its maintenance requires substantial investment of monetary or other resources and the use harms the actual or potential market for any product that incorporates the information collection.[317] The Act explicitly excludes from its coverage extraction and use of individual items of information or insubstantial parts of a collection.[318] But repeated acts of individual extraction are not exempt.[319] The Act also does not give the person who develops a database a monopoly over the information, only over use of the collection to access the information. A competitor may independently collect the information into a competing collection.[320] A person also may use information contained in another's collection solely for purposes of verifying independently collected information.[321] The Act provides civil remedies, including injunctions, impounding, actual damages or restitution of profits, treble damages, and attorney's fees.[322] It imposes severe criminal sanctions on persons who use the information for direct or indirect commercial or financial gain, and cause more than $10,000 in damage in any twelve-month period.[323]

The Act exempts use of information for nonprofit educational, scientific, or research purposes, but only if the use does not harm the actual *or potential* market for the information collection.[324] If the producer of the collection of information intends to sell the collection to

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316 The act says using "in commerce," but this reference appears to be jurisdictional, not substantive. See H.R. 2652 § 2, 105th Cong. (1998) (defining "commerce" in jurisdictional terms). This usage appears to be an attempt to root the authority for this law in Congress's general commerce power, rather than in Article 1, Section 8, Clause 8, the Patents and Copyright Clause, given the likely incompatibility of the Act's purposes and implementation with that clause. In this context, "commerce" should probably be understood to refer to any activity subject to the Commerce Clause, which covers most everything, rather than as words that limit the prohibited uses to commercial uses.

317 See H.R. 2652 § 2, 105th Cong. (1998).

318 See id.

319 See id. While this provision could be interpreted as prohibiting only substantial extractions carried out on an item-by-item downloading, it is not impossible that courts will interpret it to include acts of individual access and use by individual users who only need one or another item of information, once in a while, and use the exemption to extract the information for their individual use on this basis.

320 See id.

321 See id.

322 See id.

323 See id. (imposing $250,000 fine and five years imprisonment for first violation, 10 years and $500,000 fine for subsequent offenses).

324 See id.

researchers, regardless of whether it does so at the time of use,[325] the exemption is eliminated because of the effect on a "potential market."

A second exemption protects any use or extraction

> for the sole purpose of news reporting, . . . unless the information so extracted or used is time sensitive, has been gathered by a news reporting entity for distribution to a particular market, and has not yet been distributed to that market, and the extraction or use is part of a consistent pattern engaged in for the purpose of direct competition in that market.[326]

The exception to the exemption codifies a rule similar to the *National Basketball Ass'n v. Motorola, Inc.*[327] gloss on *INS v. AP*.[328] Given the exception, this is a troubling exemption. It assumes that excluding news reporting under *INS v. AP*-like conditions from the exception will subject that reporting to the Act's prohibitions. For this to be the case, information "gathered by a news reporting entity for distribution to a particular market"[329] must, in the first instance, be covered by the Act. But news agencies do not gather and publish uncopyrightable collections like telephone lists or traffic accident statistics. They "organize" and publish information in the form of copyrightable news stories. But the *information contained* in these stories has never been protected by copyright law. The exception to the exemption therefore relies on an implication that the CIAA protects the information content of copyrightable texts. This implication directly conflicts with the CIAA's explicit statement that it does not enlarge the subsistence of copyright.[330] Nonetheless, it is difficult to give the exception any other meaning. It suggests that there is a real threat that the CIAA may create a residual right that gives producers control over the information contained in their copyrighted works.[331]

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325 The current version of the bill defines "potential market" as "any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information." Id.

326 Id.

327 105 F.3d 841 (2d Cir. 1997). The case outlined the boundaries within which state misappropriation doctrine survives copyright preemption. It covered a narrower range of cases than the CIAA provision, in that it required time sensitivity, free riding, *and* an actual threat to the commercial viability of the plaintiff. See id. at 845.

328 248 U.S. 215, 245 (1918) (creating what came to be known as "hot news" misappropriation doctrine).

329 H.R. 2652 § 2, 105th Cong. (1998).

330 See id. ("Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection.").

331 For similar concerns about this provision, see Jane C. Ginsburg, U.S. Initiatives to Protect Works of Low Authorship 35-36 (June 25-28, 1998) (unpublished manuscript on file with the *New York University Law Review*).

The Act departs from some of the most basic precepts of traditional copyright law. It compromises those elements of copyright law that have long been considered the means by which copyright law mediates its conflict with the First Amendment. The Act requires no originality to gain its protection.[332] It prohibits use of information *qua* information, and is thus intended to protect uses of information under conditions left unprotected by the idea-expression dichotomy.[333] Furthermore, although the Act creates a limitations period of fifteen years from the investment making the information eligible for protection, one qualifying form of investment is "maintenance" of the collection.[334] It remains to be seen whether courts will be persuaded to read this provision as indefinitely protecting collections of information that require continuous updating. The exemptions in the Act partly address important concerns that database protection will harm the efficient production and exchange of information.[335] But they do not address the First Amendment concerns. The Act, even with its exemptions, is a direct prohibition, of potentially unlimited duration, on the use of information *qua* information and may be read to diminish significantly many of the traditional protections included in copyright law that mitigate its speech-restricting effects.[336]

2. *The Justifications for the Protection of Databases and Their Critique*

The basic justification offered in support of the CIAA was that database producers need the protection provided by the Act in order to thrive.[337] Database producers told Congress the following story.

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[332] Cf. Goldstein, supra note 147, at 1020-22 (explaining why originality requirement is important element permitting copyright to coexist with First Amendment).

[333] Cf. Nimmer, supra note 136, at 1186-89 (arguing that idea/expression dichotomy is most important way in which copyright, internally, avoids infringing on users' First Amendment rights).

[334] See H.R. 2652 § 2, 105th Cong. (1998) (qualifying for protection "a collection of information gathered, organized, *or* maintained by another person through the investment of substantial monetary or other resources" (emphasis added)).

[335] For an outline of these concerns, see Reichman & Samuelson, supra note 311, at 113-37.

[336] The Office of Legal Counsel circulated a memorandum raising similar questions about the constitutionality of the bill. See Memorandum from William Michael Treanor, Deputy Assistant Attorney, Office of Legal Counsel, to William P. Marshall, Associate White House Counsel (July 28, 1998) (available at http://www.acm.org/usacm/copyright/doj-hr2652-memo.html).

[337] The most extensive defense of the Act can be found in Aber Testimony, supra note 315 (emphasizing importance of statutory protection); see also Statement on H.R. 3652: The Collections of Information Antipiracy Act, submitted to the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary, 105th Cong. (1997) (statement of Professor Jane C. Ginsburg, of Columbia University

For many years courts maintained a "sweat of the brow" doctrine of copyright protection that covered databases. In 1991, in its *Feist* decision, the Supreme Court laid that doctrine to rest. Since then, the database industry has been stymied in its development by the absence of legal protection for its investments. To make matters worse, in 1996 the European Commission passed its Database Directive. The directive denied protection to databases owned by non-EU companies unless their domicile provides substantially similar protection to databases. This has left American database producers bare to European data privateers bearing the Commission's letters of marque.[338] (Hearing testimony, however, suggested that no such copying had in fact occurred since the passage of the EU Directive.)[339] If the United States is to maintain its primacy in the database industry, it must act to protect databases in a manner equivalent to the EU.

Opponents of the legislation told a different story.[340] According to them, "sweat of the brow" was never the majority doctrine. Even where it was accepted, it retreated after the Copyright Act of 1976 specifically included compilations, but extended protection only to the original selection, coordination, and arrangement of the information, not to the information itself.[341] Throughout the 1980s the doctrine continued to decline until the Supreme Court in *Feist* officially laid it to rest.[342] During the quarter century since the current copyright act was passed, and without a blip since *Feist*, the database industry has enjoyed robust growth within the limited protection afforded by existing law.[343] Much of the testimony argued that database protection

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School of Law) (arguing that Act created no new property right but merely reinstated pre-*Feist* protections); CIAA Hearings, supra note 315 (statement of Richard F. Corlin, M.D., American Medical Association) (arguing that courts had provided insufficient protection to databases and therefore legislation was needed).

338 See Aber Testimony, supra note 315.

339 See id.

340 See CIAA Hearings, supra note 315 (statement of Jonathan Band on behalf of Online Banking Association) [hereinafter Band Testimony] (insisting that *Feist* did not disrupt prevailing standard and did not leave databases open to piracy); see also id. (statement of Dr. Debra Stewart on behalf of Association of American Universities, American Council on Education, and National Association of State Universities and Land-Grant Colleges) [hereinafter Stewart Testimony] (warning that Act would impede new opportunities for research and education); id. (statement of Tim D. Casey on behalf of Information Technology Association of America) (predicting that Act would have destructive effect on growth of information technology industry); id. (statement of William Hammack on behalf of Association of Directory Publishers) [hereinafter Hammack Testimony] (arguing that Act might undermine competition in directory business).

341 See 47 U.S.C. § 103 (1994).

342 See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991).

343 The Band Testimony, supra note 340, introduced statistics developed in Martha E. Williams, The State of Databases Today: 1998, in Gale Directory of Databases (Erin E. Holmberg ed., 1997). These statistics showed that between 1991 and 1997, the number of

would stymie information production by scientific and other academic researchers.[344] *Feist*-like entrants also argued that the Act would prevent them from challenging incumbent database providers in concentrated markets.[345]

3. The Constitutional Dimension

Compared to the mountains of information produced to assess the necessity of the must-carry rules,[346] there is little evidence to suggest that the database industry is suffering, or that the proposed law will address such a problem without doing more harm than good. One reason that so little data was offered to support the bill is probably that it has not generally been thought of as a bill that must withstand First Amendment scrutiny.

This Article has argued that laws such as the CIAA, like copyright, and like the anticircumvention provisions of the Digital Millennium Act, are regulations of speech. The CIAA is intended to affect the production and exchange of information. It operates by prohibiting many uses of information. Like many other such regulations, it may well prove acceptable, even given our polity's long-standing commitments to avoid government regulation of information, and to decentralization of information production. But if it is to prove acceptable, it must do so on the same terms as other laws that regulate information and communication. Given the extensive critique of the underlying factual assumptions and predictions of the Act,[347] the concentrated nature of many database markets,[348] and some evidence of increasing concentration in these markets,[349] it is not at all clear that in defending the CIAA the government could "demonstrate that the

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databases increased by 35%, from 7,637 to 10,338. See Williams, supra, at xviii. The number of files contained within databases almost tripled, from 4 billion to 11.3 billion. See id. at xix. The number of online searches increased from 44.4 million to 79.9 million, an increase of 80%. See id. at xxi. The primary source of this growth was commercial database producers. See id. at xx. From 1977 to 1991, the percentage of all databases produced by government, academic, and nonprofit entities declined from 78% to 30%. See id. at xxvii. Between 1991 and 1997 this trend continued. See id. The share of government, academic, and nonprofit producers fell from 30% to 22%. See id. The commercial sector correspondingly grew from 70% to 78%. See id.

344 See Stewart Testimony, supra note 340

345 See Hammack Testimony, supra note 340.

346 See *Turner II*, 520 U.S. 180, 196-208 (1997) (detailing evidence considered by Congress before enactment of must-carry rule).

347 The most comprehensive such critique is Reichman and Samuelson, supra note 311, at 102-09.

348 See id. at 117.

349 See Band Testimony, supra note 340 (suggesting that growing concentration of ownership deserved congressional scrutiny).

recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[350]

Conclusion

This Article has explained the contemporary force of Justice Brandeis's conception that information should be "free as the air to common use" absent very good reasons to the contrary.

Copyright and related laws regulate information production and exchange in society. They seek to increase information production and flow by instituting a property system in information. To create such a property system, they must prohibit most people from using or communicating information without the permission of an "owner."

As regulations of information production and exchange, copyright and related laws are regulations of speech. They are no less so than other content-neutral regulations of the information production and exchange market that we occasionally see in our complex society, like the cable must-carry rules upheld in *Turner II*. While the Supreme Court has recognized the necessity and appropriateness of such regulations, it appears to hold legislatures to a higher standard when they regulate information production and exchange than when they regulate grain production and exchange. This is not because information is in some sense inherently more important than grain. It is because in our constitutional system, at least since 1937, courts view the regulation of information with greater suspicion than the regulation of grain.

The position that information released into the body of human knowledge is "free as the air to common use" is not an empty aphorism or a transient policy preference. It is a commitment expressed in the First Amendment speech and press clauses. Its institutional implementation is the public domain. Judges and legislators faced with decisions that will lead to further enclosure of the public domain must recognize the constitutional dimensions of their decisions. They must proceed with the caution warranted whenever a government official is asked to restrict the freedom of many people to use information and to communicate it to each other.

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[350] *Turner I*, 512 U.S. 622, 664 (1994).