Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm

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1. INTRODUCTION: THE BACKGROUND OF THE DEBATE

BY WAY OF INTRODUCTION, I will make two comments to serve as background for my discussion. The first comment is meant to describe the contours of current legal and policy debates about intellectual property. The second comment concerns some specific developments in United States (U.S.) legal practice that raise troubling questions about the stability of the official limits of intellectual property protection.

With respect to the first comment, we are witnessing the confluence of three streams of legal rhetoric in discussions of intellectual property: propertization policy, competition policy, and free speech policy. So far, the influence of the latter two discourses is weak, and I urge that we need to expand our discussions of intellectual property policy to include them. With regard to propertization policy, it appears to be difficult for many in the U.S. to understand that when it comes to propertization, more is not necessarily better. Those who study economics can readily understand, however, that past some specific point, increasing propertization will create more problems than it will solve. The cost of monopolies, and the cost of implementing the system, will outweigh the gains in innovation associated with the monopoly incentives. There are also difficult problems with regard to propertization policy, such as whether to evaluate an intellectual property regime on a rule-by-rule basis or as a whole. Perhaps the U.S. Supreme Court's recent decision in *Eldred v. Ashcroft*,[1] upholding the *Copyright Term Extension Act*,[2] is most charitably interpreted as telling us to evaluate the efficiency of the system as a whole, so that though some rules may engender costs, they will be out-

1. *Eldred v. Ashcroft*, 537 U.S. 186 (2003), <http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf>, [*Eldred* cited to U.S.].
2. *Sonny Bono Copyright Term Extension Act*, 17 U.S.C.S. § 101 (1998).

weighed by the benefits of others.[3] Also, the role of "political economy" or public choice should be taken more seriously than it has been hitherto in policy debates. To put it mildly, we should not blindly assume that legislative decisions reflect a considered view of what is in the best interest of the public.

With respect to competition policy, we know that firms naturally try to expand their spheres of influence and to exclude their competitors in the hope of increased profits; but, anti-trust law must impose some limit to their expansion in order to ensure the possibility of entry by new firms and the benefits of a competitive market. It has proved especially difficult to draw such limits in the intellectual property field. While there are promising doctrines, such as copyright misuse, this arena of debate is not as well-developed as it should be.

With respect to free speech policy, we see an interesting convergence of two very different rhetorics. We speak of commodified content, which when it is propertized is called "expression" in the language of copyright. However, in the language of the First Amendment, "expression" is something that is not propertized, and indeed is something whose value requires it not to be propertized. While there is interesting new scholarship emerging from this convergence, I suggest that courts have not really ventured into examining the ramifications of it.[4]

With respect to my second comment, in the landmark holding of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,[5] the US Supreme Court held as a constitutional matter that facts are not original expression and hence cannot be subject to copyright. This holding has therefore blocked the ability to protect databases under the current copyright regime. The US legal system has not yet provided an alternative method for the protection of databases, though firms obviously continue to try to protect their information assets. There are two ways that firms have utilized the legal system in that effort, each of them quite clever and quite troubling. The first is the resurrection of the trespass to chattels action, now applied to servers. This strategy involves both a resistance to the claims of free speech and to the claims of free competition. In the anti-competition realm, in cases such as *eBay, Inc. v. Bidder's Edge, Inc.*[6] and *Register.com, Inc. v. Verio, Inc.*,[7] the plaintiffs argue that a competitor has invaded and harmed their servers by attacking them with incoming tangible objects, specifically by the electrons which make up the signal that the competitor's software creates. Of course what is really going on is that the competitor has copied information that the plaintiff did not want the competitor to have. The plaintiffs cannot secure that information under copyright because of the holding in *Feist*, and they cannot secure it by means of the common law rights against misappropriation or

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3. *Supra* note 1 at 206. The *Eldred* court held that Congress has broad power to structure copyright law as a whole, such that its rules are not to be re-examined by the courts individually. Thus, a charitable interpretation of the case, from an economic perspective, is that in order to evaluate the efficiency of copyright law, a more general equilibrium analysis, rather than a partial equilibrium analysis, is required.
4. See e.g. Mark A. Lemley & Eugene Volokh, "Freedom Of Speech And Injunctions In Intellectual Property Cases" (1998) 48 Duke L.J. 147, <http://www.law.duke.edu/shell/cite.pl?48+Duke+L.+J.+147>.
5. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), 111 S.Ct. 1282 [*Feist*].
6. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp. 2d 1058 (N.D. Cal. 2000), 54 U.S.P.Q.2d (BNA) 1798.
7. *Register.com, Inc. v. Verio, Inc.*, 126 F.Supp. 2d 238 (S.D.N.Y. 2000), 63 U.S.P.Q.2d (BNA) 1957.

unfair competition because these are largely pre-empted by the federal copyright regime.[8] They cannot secure it as a trade secret because they put it on a public website. The development of the contemporary tort action of trespass to chattels provides a form of database protection that has none of the checks and balances that one would expect to find in a statutory intellectual property regime, at least one that took seriously the costs as well as the benefits of restricting the competitive use of information. And also, I might add, that variety of protection runs right up against the reality of free speech protection, a matter of federal law that pre-empts state law.[9]

The second way that firms have tried to maneuver around the limits of the copyright regime is by means of contract. For example, a database can be protected by conditioning access on a promise not to extract and use the facts therein in a derivative product. The leading case in the US on establishing rights in information by contract that are not generally recognized at law is the *ProCD, Inc. v. Zeidenberg* case from the Seventh Circuit Court of Appeals.[10] In that case, the contract on a piece of software was used to prevent the copying of information which was, from the point of view of copyright law, in the public domain. There are a few peculiarities in that opinion that might limit its force, even in the limited jurisdiction where it sets the law: Judge Easterbrook assumed that competition policy favoured this result, which might not be the case in other situations. He assumed that the contract was not unconscionable, which might not hold true in other situations. He also held that the contract establishing a legal right to prevent copying of information in the public domain was not pre-empted by federal copyright law. There are many academics who have suggested that this result was mistaken.[11] I would like to suggest that the argument for pre-emption is even stronger in the case of a widespread standardized contract that attempts to effect the same result. I discuss these particulars below in my analysis of the opinion.

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8. There is a twist to the rule of pre-emption where the defendant appropriates "hot news." An older Supreme Court case, *International News Service v. Associated Press*, 248 U.S. 215 (1918), established a common law right against misappropriation of hot news. However, this case stems from an era in which federal common law existed, and it has been undercut by later developments. In the contemporary era, the tort of misappropriation is strictly a state law matter, and therefore vulnerable to pre-emption by the federal law of intellectual property. A leading contemporary case construing New York law, *NBA v. Motorola, Inc.*, 105 F.3d 841 at 845 (2d Cir. 1997), is representative of how a state law action for misappropriation may be limited due to the pre-emption of federal copyright law. In that case, the court held that in order to escape pre-emption it must be shown that (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

9. In the other main branch of the new trespass to chattels doctrine, which is beyond the scope of this paper, the owner of a server claims invasion by unwanted electrons in order to keep out messages whose content is disliked by the owner—the electronic version of an attempt that, in the real world of physical mailboxes, is precluded by the First Amendment. Some courts have been willing to find that unwanted email messages constitute trespass to chattels. See for example, *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997). A recent holding in California, however, refused to sanction unwanted email messages by means of the electronic trespass to chattels doctrine. *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

10. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), <http://www.ca7.uscourts.gov/op3.fwx> [*ProCD*].

11. See for example, Sajida A. Mahdi, "Gateway to Arbitration: Issues of Contract Formation Under the UCC and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods" (2001) 96 Nw. U.L. Rev. 403; Roger E. Shecter, "The Unfairness of Click-On Software Licenses" (2000) 46 Wayne L. Rev. 1735; David Nimmer, Elliot Brown & Gary N. Frischling, "The Metamorphosis of Contract into Expand" (1999) 87 Cal. L. Rev. 17.

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2. RESTRUCTURING THE IP REGIME BY PROMULGATED CONTRACTS

THE WIDESPREAD REGULATION of intellectual property rights by contract threatens, in principle, to undermine the official regime of intellectual property. My discussion will focus on what I will call EPSERs (Efficacious Promulgated Superseding Entitlement Regimes).[12] This is meant to be a general theoretical category for the regimes that are implemented, or are attempted to be implemented, by contracts and licences. For example, the End User Licence Agreement (EULA) in a standard software package is an attempt to put in place a contractual agreement of rights where there is likely a background of intellectual property rights and limitations established by the official regime. A firm might use such contractual terms to bar, for example, reverse engineering or copying of materials, regardless of whether these materials are protected by copyright or are in the public domain. Almost every website includes such terms, usually available through a small link hidden somewhere on the border of the home page—what has been called browsewrap, just as the click-through agreements have been called clickwrap. These are called "efficacious" when they actually result in conformity to their terms, whatever the explanation. We do not really know how efficacious these regimes are at the present, but if you use a computer regularly you know that the use of such terms is widespread.

EPSERs supersede the entitlement regime of the state. So for example, if the state says that only the original arrangement of a set of facts is protected (by copyright) but the facts themselves are not, a contract that binds the recipient not to copy the facts is subject to a superseding entitlement regime. The threat of these legal instruments is that they may allow firms to replace the law of the state with their own regime. Democratic debates about the fine details of intellectual property law will become irrelevant as more and more people are "contracted" out of the official regime and into the realm of EPSERs.

A policy debate about propertization traditionally concedes that it is up to the legislature, with assistance from the courts, to arrive at the right balance of propertization and non-propertization. An extreme variant of this assumption is that the balance struck by the prevailing legal regime of intellectual property is the right one. That is a big assumption, and there are a lot of arguments that the assumption is false. The contrary view that the prevailing legislative regime reflects excessive propertization is not a fringe position.[13] Whether or not the legislative regime is optimal or already biased toward over-propertization, the extensions accomplished by EPSERs must be assumed to be a step in the direction of over-propertization. The effects of over-propertization, according to the standard economic narrative in this field, would include a diminution of the level of innovation that would have been achieved by implementing a more optimal balance.

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12. I adopt this category (and acronym) from Margaret Jane Radin, "Regulation by Contract, Regulation by Machine" Journal for Institutional and Theoretical Economics [forthcoming in 2004].

13. See *e.g.* Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harv. L. Rev. 281.

Whether or not one accepts that the regime of the state is optimal, the hypothetical scenario of EPSERs counsels that academics and policy-makers should spend more time examining the official regime of contract. In evaluating a regime and the state of the world it is expected to produce over the long run, it is important to know not just where the rights start out, but where they may end up.[14] In particular, the EPSER scenario counsels that we should now pay additional attention to which parts of the official property regime are rules that can be waived and which are entitlements that cannot be waived. That difference is crucial to understanding the limits of the enforceability of the contracts that are meant to implement EPSERs.

I want to ask, therefore, to what extent we should allow the potential development of EPSERs by specifically focusing on the limits of waivability. What rules should be marked as default rules that can be waived and what should we impose as immutable rules or inalienable rights?[15] At present, for example, US copyright law does not routinely designate which rights are freely alienable.[16] Should fair use rights be completely waivable? The statute does not tell us. It is generally assumed, however, no doubt because of prevailing free-market ideology, that rights are alienable unless otherwise stated.[17]

Familiar kinds of concerns are in play when we try to find the proper limits of waivability, such as concerns about commodification, wealth distribution, market power, heuristic biases, the extent to which information is impacted, and so on. The arguments are complex.[18] I urge that we pursue a more earnest debate about how these concerns should limit the universe of waivability. To see the importance of that inquiry, consider fair use. A rigorous debate about what constitutes fair use may turn out to be useless if it soon comes to pass that all rights to fair use can be, and are, routinely waived by consumers. Many clickwrap or browsewrap agreements include terms that effect a waiver of fair use rights. Reverse engineering is allowed as fair use under some circumstances, but many standardized terms would nevertheless preclude it. Many standardized terms say that the recipient cannot copy anything at all—of course that reads out fair use. Moreover, it also precludes copying a lot of items in the public domain—facts, functional items, ideas, items where expression is merged with ideas, etc. If we treat the entire property regime as a set of default rules, we should recognize that it will most often be in the economic interests of rightsholders to contract around them when they can. That is, it will be in their economic interest to gain more control rights, as long as the value of that control is achieved at a cost of less than what the control is worth to them. Recognizing this, we should think seriously about whether some rules should be non-waivable.

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14. Note that the same counsel applies equally to the issues of privacy: what matters is who ends up controlling privacy rights.
15. The language of default rules is taken from Ian Ayres & Robert Gertner, "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules" (1992) 101 Yale L.J. 729.
16. Neil Netanel, "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law" (1994) 12 Cardozo Arts & Ent. L.J. 1.
17. One controversial exception to the general rule of free-market alienability is the provision in the copyright statute for the right of termination of a transfer by the author after thirty-five years. *U.S. Copyright Act*, 17 U.S.C. § 203 (1998), <http://www4.law.cornell.edu/uscode/17/203.html>.
18. See Margaret Jane Radin, *Contested Commodities*, (Cambridge: Harvard University Press, 1996).

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3. EFFICIENCY ARGUMENTS

WE MAY START A CONSIDERATION of the limits of waivability by taking into account some efficiency arguments (of the kind traditionally associated with the University of Chicago).[19] Normally, of course, Chicago-type proponents of efficiency argue that all rights should be alienable. In order to find exceptions to their position, one might argue, first, that a blanket inability to waive certain exceptional categories of entitlements would be less costly and less uncertain in its implementation than case-by-case judicial determinations by means of traditional contractual doctrines, such as unconscionability. A finding of unconscionability is in the discretion of the judge, and not easily predicted: the same provision is often upheld in one jurisdiction but not in another. Second, consider the practice of routinely waiving the recipient's litigation rights and compelling arbitration. Although common law case-by-case adjudication might not be the most efficient way to solve a problem, forcing disputes out of the courts and into alternative dispute resolution could be worse. It might be inefficient for society as a whole to permit firms to impose mandatory arbitration on every party with whom they deal. Further, arbitrators and arbitration mechanisms vary in expertise. Their decisions are not published and are generally not subject to appellate review. Their decisions do not create a clear body of law, and, from an efficiency standpoint, clarity and consistency are primary values of law.

A related efficiency concern involves the availability of class actions. Avoiding class action litigation is a major reason that firms impose mandatory arbitration. Where no one has immediate access to court, a widespread or common controversy cannot be used to bring a class action. Where a legislature has made a class action remedy available—assuming that the legislature is acting in the public interest—it has made a judgment that it is inefficient for society to tolerate the otherwise recurring small unredressable losses, which, in the aggregate, can add up to large-scale redistribution in favour of the firms causing these losses. The power of firms to abrogate that legislative judgment, at least where the abrogation is part of a widespread superseding promulgated regime, should at least require justification. These are reasons, therefore, that weigh in favour of saying that the rights to litigate rather than to arbitrate, and to initiate class actions where the legislature has provided for them, should be among the rules that cannot be waived. At the least, they should not be waivable unless an efficient justification is shown rather than just assumed.

A more theoretical concern, still within the domain of efficiency, raises the question of whether firms themselves have an efficiency interest in whether certain kinds of rules are non-waivable. This possibility can be seen as a standard coordination problem usually labeled a prisoner's dilemma. Suppose a situation in which each firm would prefer to keep all of the content it discloses from being

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19. See *e.g* William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Legal Stud. 325, <http://www.journals.uchicago.edu/JLS/journal/index.html>. For a historical account of the development of economic analysis of copyright law, see Gillian Hadfield, "The Economics of Copyright: An Historical Perspective," (1992) 38 ASCAP Copyright Law Symposium 1.

used by others, but at the same time it would prefer to have access to content disclosed by others. This situation may very likely occur where firms need access to others' content as inputs to further innovation and information asset creation, but at the same time wish to lock up the information assets they already have. In most cases, it would be difficult or impossible to implement this optimal solution for all firms. Suppose further that the second preferred option is that everyone be allowed access to a certain portion of content disclosed by others. Here we suppose that, as a fall-back option, a firm would be willing to allow other firms access to some portion of its content in return for free access to some portion of the content of all other firms. This second preferred solution can be achieved through coordination. However, spontaneous coordination is unlikely and also unstable since each individual firm is tempted to "defect" and try to lock up its own content while still having access to the content of others. The classic prescription for securing the second preferred solution is pre-commitment through legislation. Firms can agree in advance to have the state require them to cooperate in this rational manner, and the state prevents defection afterwards.

In fact, parts of the copyright regime itself can be interpreted as a solution to the coordination problem. To the extent that this is true, the regime sets out some rules specifying where disclosed content is available for use by others, rules that all firms have an interest in supporting. That is, firms would have a rational incentive to organize and get copyright legislation enacted that does allow each firm to have access to some portions of content held by others on a reciprocal basis. But if copyright rules establishing that some kinds of content are open to access to others are merely default rules, then an individual firm can contract around them. This capability destroys, or at least destabilizes, the commitment enacted in legislation that is meant to secure a solution to the original problem. To the extent that copyright rules establishing kinds of content that are not propertized (for example, facts, functional items, ideas, merged ideas and expression) or describing situations in which propertization can be overridden (for example, fair use) represent an efficient solution to a coordination problem involved in fostering innovation, widespread promulgated rules that obviate the legislated non-propertization should perhaps be disallowed, or at least be scrutinized carefully rather than assumed to be efficient.

A more complicated question is whether ESPERs could themselves be considered to be efficient. When considering standardized (purported) contracts, a set of economic questions is always relevant. A central question is, to what extent does the existence of these regimes indicate that they are efficient? One response to this efficiency question is that each regime in its market would have to be investigated—Microsoft's EULA in the market for PC operating systems, Google's terms of use in the market for internet search engines, and so on. Another central economic question is broader than individual markets: evaluating the net effect for the economy, as a whole, of the reduced incentives for innovation and of the increased transaction costs for follow-on innovation associated with increasing propertization in individual markets. I will say a few words below

about these economic questions.[20] By asking these questions, though, it is important not to obscure a more basic question, namely the question of whether (or when) it is acceptable to override the democratically promulgated regime by one promulgated by a corporation, even if that of the corporation were to be efficient. Holding or assuming that an EPSER is efficient does not exhaust questions about whether we want to permit them to operate unchecked. It does not exhaust questions for those of us who adhere to non-economic value schemas, in addition to economic ones. Furthermore, it probably does not exhaust questions, even for an economist monomaniac, because she would have to investigate not only the costs to the overall economy of higher levels of propertization, but also the costs to the overall economy of undermining sovereignty and the law of the state. I am mentioning this here because I think the point tends to be overlooked in economic debates.

In the usual kind of economic debate, then, the question of whether a regime of standardized terms is efficient has two branches, the branch where we assume that the standardized regime is operating in a competitive market, so that different competing regimes are available, and the branch where we assume that the regime operates in a situation of market failure of some kind (for example, where the regime has been imposed by an entrenched monopolist, or where there is entrenched information failure). If the regime is imposed by a monopolist, or if the recipients cannot find out what the terms mean because of entrenched information failure, or if for some other reason there is only one regime available, it is easier to argue that its terms are not what the recipients would have chosen, and harder to argue that the terms, considered in conjunction with the product, maximize value or welfare to society.[21] In the case of a promulgated regime that waives background legislated entitlements, one could argue at least that the recipients' democratically chosen regime, in which they ideally did have a voice, is being overridden by the regime promulgated by the firm, in which they do not have a voice. At least where competing terms are not available, they do not have the usual market "voice" of "voting with their feet" since they cannot, by hypothesis, turn to a competitor. In this case one could argue that the firm has replaced sovereign power—the law of the state—with its own. It has done so for its own benefit, perhaps at the expense of the public; at least, it cannot be assumed that benefit to the society as a whole is coextensive with benefits to promulgating firms.

If we assume that the market in which a standardized regime appears is actually competitive, are promulgated superseding regimes presumptively efficient? If each of the competitive firms within a market has a different EULA (for example, a different standardized regime) then we do not have a ubiquitous superseding regime; instead, recipients can move from one regime to another

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20. To my knowledge, the question of the overall net effect on the efficiency of copyright's structure of innovation incentives as a whole, in light of increased propertization in one or more markets, has not been systematically investigated. For insightful forays into the economics of propertization in the digital world, see *e.g* Jonathan Putnam, "The Economics of Digital Copyright" in J. Putnam, ed., *Intellectual Property Rights and Innovation in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 2003) (forthcoming); Yochai Benkler, "Coase's Penguin, or Linux and the Nature of the Firm" (2002) 112:3 Yale L.J. 369, <http:///www.yale.edu/yalelj/112/BenklerWEB.pdf>.

21. Margaret Jane Radin, "Online Standardization and the Integration of Text and Machine" (2001) 70 Fordham L. Rev. 1125.

that they like better. In this scenario there is less of a problem with whether the regime is chosen by the recipients, and thus less of a problem whether they value it more than the competitors, assuming that we are confident that they can acquire and understand the information about the regime and its effects on them. But each regime still supersedes one aspect of the law of the state, specifically, the infrastructure of background rights recognized by law. Therefore, in this scenario we still have the question of to what extent this infrastructure should be understood to consist entirely of default rules, which have the ability to be completely waived at will. As I mentioned above, an understanding of the legal infrastructure as consisting entirely of default rules could lead to inefficiency if the legal infrastructure represents a solution to a coordination problem. In addition, of course, there can be both economic and non-economic arguments about the result for society of the weakening of the law of the state.

On the other hand, still assuming a competitive market, if all of the firms have the same EULA, then the recipient has a choice of firm but not a choice of regime; the regime is ubiquitous in its domain. There still, however, may not be a clear cut problem of choice because, since we are supposing that competition prevails, it may be that this is the set of terms that has won out in a competitive market. If it has won out, that means that in a previous stage of this market, different sets of terms were offered and the users and customers who chose this set of terms forced all firms to offer them in order to maintain their market share. In these circumstances, we might not be too worried about choice because we are supposing that choice has caused this set of terms to win out. But this supposition is complicated by the possibility that imperfect information has caused market participants to choose an inefficient set of terms as the standard. In this case, choice does not imply an efficient outcome, and the normative persuasiveness of choice is undermined by information impactedness.

As noted above, an overarching economic question is how to evaluate the altered incentive structure for innovation brought about by proliferation of EPSERs. An EPSER could be deemed efficient in one market and yet cause serious disincentives for knowledge creation in one or more different markets. An EPSER could be deemed efficient in the short-run, responding to current preference in light of current available choices, and yet have deleterious effects on incentives for innovation in a longer time frame.

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4. PRE-EMPTION AND THE COALESCENCE OF CONTRACT AND PROPERTY

THE ARGUMENTS SKETCHED ABOVE might also illuminate a legal debate in the U.S. involving the doctrine of pre-emption. They might even serve as notes for future efforts to distinguish *ProCD v. Zeidenberg*, the case I discussed in my introduc-

tion.[22] Under the doctrine of pre-emption, which stems from the federal constitution, federal law invalidates conflicting law of a subsidiary jurisdiction (state or city). A state is not supposed to be able to enact an intellectual propertization scheme in conflict with a federal intellectual propertization scheme. For example, Delaware cannot have its own patent law. Pre-emption is a very difficult and inconsistent area of doctrine which I will not summarize here.[23] Let me just note that if we suppose that contract law, enforced by state courts, is going to undergird promulgated superseding propertization regimes that pervasively alter federally structured regimes of property rights, then the use of contract enforcement in this way could be construed as a state implementing a property regime that conflicts with the federal regime.[24]

So it could be argued. This pre-emption argument has so far failed to convince the courts, though not for want of academics trying.[25] *ProCD*, written by a judge with a Chicago economics turn of mind, held that enforcement of a shrink-wrap contract in which terms are presented only after the product is paid for (known as rolling contract, or money-now-terms-later) was not pre-empted by federal copyright law, though it essentially functioned to propertize unoriginal factual data. The main rationale he gave is that contracts are *in personam*, between two parties, and property is *in rem*, binding on all the world.[26] The judge was thus adhering to the traditional picture of contract as a two-party universe of consent. A promises to sell his car to B for $1000, and B promises to give A $1000 in return for the car. In this picture, even if contract is being used to undermine or supplant the background legal regime of property, contract itself cannot be assimilated to property. In finding the terms enforceable, the judge also was assuming that the recipient could validly waive his background entitlement under copyright law. Thus he was implicitly finding that the terms did not raise the issue of whether the recipient, operating in this traditional picture as he assumed him to be, could validly waive his background entitlements. Possible arguments for invalidating such waivers could perhaps have been market failure (unfair competition or an antitrust violation), unconscionability, or copyright misuse. The judge argued, or rather purported to explain, that the terms in this case were clearly efficient (pro-competitive). He stated in passing that unconscionability was not in issue,[27] as he saw no terms that looked onerous enough

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22. *Supra* note 10. The ruling in this case is officially law only for the Seventh Circuit, comprising a number of Midwestern states, and some other courts have disagreed with it. However, the case has been widely cited, and its reasoning is in line with what would be accomplished by the proposed Uniform Computer Information Transactions Act (UCITA). That model act has been highly controversial and is no longer being actively supported by the organization that proposed it, the National Conference of Commissioners on Uniform State Laws.

23. See Mark A. Lemley, "Beyond Preemption: The Law and Policy of Intellectual Property Licensing" (1999) 87 Cal. L. Rev. 111.

24. In the U.S., contract law is state law. There are a few exceptions, such as the federal warranty act, but by and large contract law is governed by fifty state legislatures and fifty state court systems. The Uniform Commercial Code, which has been adopted in all fifty states, is not completely uniform since its interpretation is up to state courts.

25. See for example, *supra* note 23. See also "Brief *Amicus Curiae* of American Committee for Interoperable Systems in Support of Appellees in *ProCD, Inc. v. Zeidenberg*" (1996), <http://www.law.berkeley.edu/institutes/bclt/pubs/lemley/procdbrief.html>.

26. *Supra* note 10 at 1454.

27. *Supra* note 10 at 1449.

to raise the issue of whether the recipient could be understood to have validly waived his rights.

The argument that I have sketched so far can be used to limit *ProCD* by distinguishing future cases in two ways. One way involves circumstances in which the law might find that the recipient's waiver of entitlements is invalid. This finding could occur where the terms look too onerous so that unconscionability or another limiting doctrine—some aspect of the background regulatory dimension of contract law—can kick in, or where the assumption that the terms have arisen in a competitive market and function pro-competitively is unwarranted. The other possible distinction involves something more contested: circumstances where the traditional ideological picture of contract has become clearly inapposite, so that the *in personam/in rem* distinction is in practice obliterated or at least very much blurred. In other words, this could occur in circumstances where a regime of contracts has coalesced into a promulgated superseding propertization regime. When contract becomes property, then the public limitations on property should become relevant. This is essentially the argument put forward by legal academics but rejected in *ProCD*.[28] Because this argument involves what is happening in practice, it cannot be resolved without some characterization of what is happening on the ground. When future cases come up, we will have to make some judgment about the extent to which my hypothetical situation of superseding entitlement regimes promulgated by firms actually exists, and then evaluate how far on the continuum toward a completely superseding regime we would have to be before assimilating the regime to unauthorized over-propertization.

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5. SOME LIKELY CATEGORIES OF RIGHTS THAT CANNOT BE WAIVED

LET US NOW TURN TO A CONSIDERATION of the kinds of rules that we might place beyond the limits of waivability. It seems to me that there are three categories of rights that call out for consideration as non-waivable. These are rights of legal enforcement or redress of grievances, human rights (including both individual and cultural rights), and politically weak or vulnerable rights. Of course, the categories of waivable and inalienable rights need not be so absolute in a fully realized legal system. How difficult we make the waiver of a right is a matter that stakeholders can debate at length. A demand that any waiver of certain rights be subject to strict scrutiny in court is a starting point, and absolute inalienability is the end point.

In the category of rights related to legal enforcement, a commitment to binding arbitration as a way to frustrate rights to court action, including class action, seems to me very suspect. Also, under the U.S. rule, the losing side in court is not generally obligated to pay the other side's legal fees. Some promulgated regimes try to contract around that rule with a term establishing a loser-pays agreement. The obvious motive there is the strong financial disincentive to sue a large firm that can, as a routine matter, be expected to run up very high legal costs in an action. Terms that drastically limit available remedies are both

28. See for example, Nimmer, Brown & Frischling, *supra* note 11.

commonplace and highly suspect. It is common to see terms in promulgated contracts that limit the remedies available to the amount that the consumer has paid for a product or service. These terms attempt to rule out the possibility of consequential damages, which are well recognized in contractual law. If allowed to have legal force, then even where the firm knew of the likelihood of consequential damages and also had within its power the ability to reduce that likelihood, the traditional right of the consumer to recover for such damages will be greatly weakened.

In the category of individual human rights, I have in mind data privacy and rights of freedom of speech as primary exemplars in the information arena. Privacy concerns are but a subset of the many aspects of information important to personal identity, and personal identity is closely tied to group and cultural identity.[29] Cultural human rights include aspects of information important to cultural identity. A system that allows the allocation of control of such information to be determined by ESPERs, rather than by more dialogic means, is at a minimum not auspicious for democracy and participation of cultural groups in their own identity formation. Notice that these concerns are not concerns about informed consent. Even if we put aside the problem of determining whether there is informed consent to superseding promulgated entitlement regimes and assume for the sake of argument that the majority has made informed consent, the effects of this consent on the group as a whole might be unwanted. The minority who do not want to see control transferred may have no recourse once the majority has consented. There is also a real problem about the ability of people to properly value control of aspects of information relevant to identity. What appears to be at one time a surplus information resource may appear quite differently once control has been surrendered. And, control of information, once surrendered, generally cannot be recovered.

In the realm of privacy there are structurally similar problems. A society that affirmatively values privacy is necessary if any individual is going to have effective means of protecting her privacy. Thus majority consent to systems that undermine the value of privacy may have the unwanted effect of taking away the practical possibility of the minority's protection of their privacy. And data privacy is also an example of something for which competent valuation is difficult. Again, what appears to be, at one time, a surplus information resource may later appear to be a more valuable asset after control has been surrendered.

Rights that are politically weak or vulnerable are those that a majority may have less of an interest in maintaining and are subject to pressure by motivated minorities. A politically weak right is likely characterized by two conditions: where strong interest groups have an incentive to undermine the right, and where the right does not have a politically strong interest group of its own to defend it. In this regard, we should consider fair use rights in literary, musical and audiovisual works. The rightsholders have the incentive and possibly the power to undermine fair use rights, while on the consumer's side there has only been organization by libraries to defend the rights of fair use.

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29. See *e.g.* Madhavi Sunder, "Cultural Dissent" (2001) 54 Stan. L. Rev. 495, <http://lawreview.stanford.edu/content/vol54/3/Sunder.pdf>.

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6. THE RISE OF THE MACHINES

WORKING AGAINST THE DEVELOPMENT of ESPERs in the near term, we are likely to see case-by-case review of contractual terms, and their occasional invalidation and limitation.[30] The review can only be haphazard, and is likely to vary in intensity by jurisdiction. It is possible, of course, for legislative systems to impose proactively certain rules of inalienability, or at least strict scrutiny, in order to bolster the balance of current intellectual property regimes. I would surely favour that. States have taken similar action in the realm of real property, so there is reason to think it is possible for regimes of intellectual property.

The relevance of these considerations, however, is threatened from a different quarter. Besides contractual alternatives to the existing intellectual property regime, we are developing technological alternatives. This brings us to the topic of regulation by machine. As a general term for technologies of machine control of content, I will use DRMS—Digital Rights Management System.[31] If widely deployed, such systems would attempt to accomplish, by technological fiat, even greater restructuring of the existing intellectual property regime than the restructuring by contract I have so far been discussing.

The aim of a DRMS is to replace the legal force of a contractual term stating that all copying is forbidden with a technological "force" (i.e, a program) that makes all copying impossible. Or, a contractual term that states that my licence to use a piece of software will be terminated if I attempt to copy it can be replaced by a technological system that simply erases my copy of the software if I attempt to copy it. Terms that limit the time of authorized use in a licence can be replaced by a system that simply destroys the functionality of the product after a certain period of time.

This technological development raises plenty of questions for the traditional legal regime of intellectual property. In the present context I have space to address only one, whether the spread of DRMSs would enable the ESPERs I have been envisioning or act as a substitute. It is arguable, perhaps, that because the content protected by a DRMS comes with a license specifying rights of use, the "terms" enforced by technological measures are still a kind of contract. But I do not think that machine-enforced use parameters can be assimilated to contract. I think that DRMSs are better understood as a different kind of attempt to supersede the official intellectual property regime.

First, the use of a DRMS removes important options for the end-user. Under either a statutory rights scheme, such as copyright or a licence regime, the user has the ability to violate or breach if she so decides. Although that ability may incur legal liability, it is an important practical alternative. This ability is central for fair use in the copyright regime and for so-called efficient breach in con-

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30. See *e.g. Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), <http://www.ca2.uscourts.gov/>.

31. A common alternative is TPM—Technological Protection Measure.

tract law.[32] We could characterize both these legal phenomena as recognizing the need for "safety-valves" in the regime of intellectual property. But a DRMS can remove all safety-valves.

Moreover, in the US the *Digital Millennium Copyright Act*[33] makes it illegal to circumvent a DRMS to gain access to a work protected by copyright; there are also penalties for trafficking in tools that enable such circumvention. These statutes are designed to drastically reduce the ability to opt-out of the technologically enforced regime and to drastically increase the costs of anyone who manages to do so.[34] Therefore, while the rise of DRMSs threatens to restructure the practical balances of intellectual property just as I have argued that ESPERs do, DRMSs do so by removing the protection of content from the realm of rights and responsibilities altogether. DRMSs bypass the legislatively and judicially fashioned contours of intellectual property, and the legal infrastructure of contract as well. They replace the legal regime of the state with the technological regime of the firm.

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32. These issues have been raised in court, though not with success. See *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000), 55 U.S.P.Q.2D (BNA) 1873, aff'd, 273 F.3d 429 (2d Cir. 2001).

33. *Digital Millennium Copyright Act*, 17 U.S.C. § 1201 (1998), <http://www4.law.cornell.edu/uscode/17/1201.html>.

34. Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised" (1999) 14 Berkeley Tech. L.J. 519, <http://www.law.berkeley.edu/journals/btlj/articles/vol14/Samuelson/html/reader.html>.