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COPYRIGHT, TRESPASS, AND THE FIRST AMENDMENT: AN INSTITUTIONAL PERSPECTIVE*

By Lillian R. BeVier

I. Introduction

In this paper I discuss one facet of the multifaceted question of whether strong protection for intellectual property rights—in particular, rights in expressive works and in information in digital form—is, in principle, at odds with the First Amendment guarantee of freedom of speech. The question has assumed particular urgency in recent years because the Internet and digital technology seem to have rendered formerly serviceable legal boundaries obsolete, and doctrines that sufficed in a print-on-paper world no longer seem adequate. Vigorous debate rages about what has come to be referred to as 'propertization'. Commentators ask whether, and how, and based upon what empirical assumptions, old boundaries ought to be redrawn and doctrines modified. The academic literature tilts heavily away from endorsing strong property rights in digitized content, and toward expanded user rights and intensified First Amendment review in copyright cases. This paper tilts in a different direction. It swims against the academic tide not only in the direction of its analysis but, more importantly, in the kinds of questions it considers relevant and in its analytical focus. Readers should understand that the analysis is deliberately provisional and suggestive rather than completely developed, and the conclusions are tentative. The paper does not purport to be a definitive study that draws confident conclusions. It is offered as speculation and in the hope that readers will approach it in that spirit.

The facet of the larger question that the paper addresses is whether the principles that undergird the common law of trespass can provide useful guidance for the resolution of disputes over conflicting claims of access either to the expressive content of copyrighted works or to content on the Internet, whether copyrighted or not. At first blush, this question may not seem particularly relevant to freedom of expression. I hope to show, however, that it is completely germane. In brief summary, First Amendment rights serve a number of instrumental goals, as do the private property rights in tangible things that the action of trespass vindicates.

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The United States Supreme Court has squarely held that, despite the important instrumental goals that the First Amendment serves, there is no First Amendment right to trespass on privately owned real property, whether to engage in expressive activity there, or to acquire information, or to communicate with the property owner. Thus, if one were to conclude that the trespass analogy is helpful in resolving disputes over access to digital content, it would imply the corollary conclusion that there should be no First Amendment right of access to digital content. Hence the paper's relevance to freedom of expression.

The issue of the conflict between intellectual property and freedom of speech is far from hypothetical, and the academic literature addressing it is abundant. In 2003, the Supreme Court rejected a First Amendment challenge to the Copyright Term Extension Act (CTEA) that Congress passed in 1998.[1] In doing so, however, the Court left a number of arguments unexamined. In addition, in 1998, Congress passed the Digital Millennium Copyright Act (DMCA),[2] which made it unlawful both to circumvent technological measures installed by copyright owners to control access to their works and to traffic in devices designed to circumvent technological control measures.[3] These provisions, generally referred to as the anticircumvention and antitrafficking provisions, confer on copyright owners rights that are functionally similar—though they are not, of course, doctrinally identical—to the protection that a trespass law offers to owners of tangible property. Though Congress directed the Librarian of Congress to exempt particular classes of works from the DMCA's anticircumvention provisions if the Register of Copyrights determines that technological protection measures are diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful,[4] in its first rulemaking proceeding the Copyright Office declined to adopt significant exemptions from the DMCA's provisions.[5] The courts have applied the act with a surprisingly vigorous embrace of its goals,[6] and as of

[1] *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The Copyright Term Extension Act (CTEA), Pub. L. 105–298, §§ 102 (b) and (d), 112 Stat. 2827–2828 (1998) (amending 17 U.S.C. §§ 302, 304), extended the duration of copyrights by 20 years. The extension applied not only to future works but also to those already in existence. The act's challengers contended that the act's application to already created works exceeded Congress's power, under art. 1, § 8, cl. 8 of the Constitution, to secure authors' exclusive rights "for limited times." The Court disagreed, relying principally on the general ground that "it is . . . for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 537 U.S. at ___, 123 S. Ct. 769, 785.

[2] Pub. L. 105–304, 112 Stat. 2860 (1998).

[3] 17 U.S.C. § 1201(a)(2)(A) (anticircumvention), §§ 1201(a)(2)(A), (B), (C) (antitrafficking).

[4] 17 U.S.C. § 1201(a)(1)(C).

[5] 37 C.F.R. pt. 201. Library of Congress, Copyright Office, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," Part V, 65 FR 64556 (2000).

[6] See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *affirmed*, *Universal City Studios, Inc. v. Corley*, 273 F.3d. 429 (2d Cir. 2001); and *RealNetworks, Inc. v. Streambox, Inc.*, 2000 Wash. Laws 127311 (W.D. Wash. 2000).

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mid–2003 the anticircumvention provisions had withstood First Amendment challenge.[7] In addition, and to the dismay of many in the academy,[8] courts have sustained trespass causes of action brought by Web-site operators[9] and Internet service providers.[10] Although in the 2003 case of *Intel Corp. v. Hamidi*[11] the California Supreme Court, by a vote of 4–3, reversed the grant of relief in a trespass to chattels cause of action brought by the owner of a proprietary e-mail system against the sender of unwanted messages, the majority acknowledged that the defendant in fact had "no *right to use* [plaintiff's] personal property."[12] In the *Intel* case, the intermediate Court of Appeals had explicitly addressed, and rejected, the defendant's First Amendment claim,[13] but the California Supreme Court did not reach the First Amendment issue.

This paper's most significant departure from the perspective of most academic commentators is its focus on the institutional choices that are embedded in Congress's and the courts' decisions. The paper will suggest that answering the questions of whether and how much to propertize—that is, to recognize and enforce private property rights in—digital content and whether and how much to grant First Amendment rights of access to it requires a fundamental collective choice about whether to lodge decision-making authority, over access to digital content and to information, in private or public sector actors. Because it speculates about the allocation of decision-making authority, the paper is primarily about "who decides"—private parties or government officials—and only secondarily about "what is decided." The institutional choice perspective stems from the conviction that incentives motivate human behavior, that the design of institutions and the allocation of decision-making authority within them powerfully affect the incentives of individual actors, and, accordingly, that an adequate evaluation of constitutional doctrines, congressional statutes, and common law rules must include an effort to account for the incentives they create and for the way in which they allocate decision-making authority.

Section II outlines the institutional conception of the regime of private property that will drive the ensuing analysis. It describes private property

[7] *Corley*, 273 F.3d 429.

[8] Professor Mark A. Lemley's comment is typical of many academic commentators in tone and substance: "[R]eliance on the *cyberspace as place* metaphor [upon which courts sustaining trespass actions in cyberspace have supposedly relied] is leading courts to results that are *nothing short of disastrous as a matter of public policy*." Mark A. Lemley, "Place and Cyberspace," *California Law Review* 91 (1980): 522 (emphasis added).

[9] *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

[10] See, e.g., *America Online, Inc. v. National Health Care Discount, Inc.*, 174 F. Supp. 2d 890 (N.D. Iowa 2001); *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C–00–0724, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001); and *Register.Com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

[11] 2003 Cal. LEXIS 4205.

[12] *Id.* at *29 (Werdegar, J.) (emphasis added).

[13] *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001), *review granted*, 43 P.3d 587 (Cal. 2002), *reversed*, 2003 Cal. LEXIS 4205.

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rights as reflecting a collective choice to allocate authority to make decisions about the use, possession, and disposition of tangible resources to actors in the private sector. It specifies some of the reasons why one might endorse such a choice in preference to a regime in which such decisions are made by public sector actors, whether legislatures, bureaucrats, or courts. The reasons are principally instrumental and, of course, they reflect assumptions about how incentives work and about the differences between the incentives confronting governmental and individual—public and private—decision-makers. Specifying these reasons and their underlying assumptions will seem to some to be stating the obvious. But, though they do not couch their arguments explicitly in institutional terms, the many commentators who take a dim view of propertization in the digital world seem, in fact, also to take a dim view of the function of and instrumental justification for property rights in tangible things. Accordingly, by restating some of the reasons and assumptions that might be offered in support of a private property regime in tangible things, and by casting a property rights regime as a collective decision to delegate decision-making authority to the private sector, the paper represents an explicit, though tentative, attempt to recast the propertization debate as a debate about institutional choice, and to invite argument about the implications of taking such an approach.

Section III focuses the institutional lens on the question of propertization in the digital world. It argues that it is also useful to think of propertization in the digital world as reflecting a collective decision to allocate to the private sector rather than to government actors the authority to make decisions about who should have access to information and expressive works in digital form and on what terms. Building on Section II's perspective on how property rights function and why we have them in the tangible world, Section III both defends propertization of intangible works in digital form and offers rebuttals to some of the most frequently propounded objections to it.

Section IV summarizes current First Amendment doctrine as it applies to questions of judicially mandated access to privately owned property. This doctrine is to the effect that there is "no First Amendment right to trespass." Section IV analyzes this doctrine, too, as an allocation of decision-making authority, and suggests that the doctrine enhances liberty despite its failure to privilege access for First Amendment activity. Section V applies a similar analysis to what some regard as a conflict in principle between intellectual property rights and the First Amendment.

II. Private Property in Tangible Things

The way legal institutions assign the power to make decisions profoundly affects the incentives of decision-making actors. The most fundamental aspect of the institution of private property is that, as a baseline

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proposition, it represents a collective decision to assign to private individuals and not to government actors the authority to make enforceable decisions about how property is to be used, by whom and for what purpose it is to be possessed, and to whom and on what terms it ought to be transferred.[14] This does not mean, even as a baseline proposition, that the state has no role to play with respect to decisions about resource production and use. The state's principal role, however—its function as a "state actor"—is not to *make* decisions but to *enforce* the decisions that private actors make, and to supply rules—of property, tort, contract, and criminal law—that both render owners' rights secure and facilitate the market transactions that tend to move assets from lower- to higher-valued users.[15] Rules of trespass, for example, enforce owners' decisions to exclude, while rules of contract and conveyancing enforce their decisions to transfer.

Tangible property is intrinsically scarce, which means that its consumption is necessarily rivalrous. "It is the nature of wheat or land or any other tangible property that possession by one person precludes possession by anyone else."[16] Property rights both respond to and exploit the fact of scarcity. Legally enforceable physical boundaries serve significant economizing and internalizing functions.[17] By conjoining in one owner the exclusive right to make decisions about use, possession, and alienation of scarce goods, property rights create a link between decisions and rewards. This link encourages owners of real property, for example, to make decisions that will enhance its value, and it encourages producers of tangible things to decide to produce them to the point where the marginal revenues from an extra unit are equal to the marginal cost.

There exists widespread agreement that a system of exclusive private rights in tangible things has at least two utilitarian or consequentialist arguments to support it. Both build on strong intuitions about how individual incentives work. The first argument is that private rights prevent

[14] The qualification that the institution of private property assigns to private actors decision-making authority *as a baseline proposition* is an important one in practice, though it does not go to the heart of this paper's analysis. Since the revolution in constitutional doctrine that took place in the 1930s, when the Supreme Court interpreted the Constitution so as to remove it as a significant impediment to regulation of economic matters, the *baseline* assignment of decision-making authority has been subjected to a significant degree of legislative reassignment. Indeed, since the 1926 decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), private decisions about how to use privately owned real property have been subjected to ever-increasing collective oversight. The point of this paper, however, remains valid: as a *baseline* proposition, the distinguishing feature of a system of private property is that it assigns decision-making authority about the use, possession, and transfer of resources to actors in the private sector.

[15] For further development of the view of the state's role in the enforcement of private decisions, and of the implications of the fact that it clearly "acts" for constitutional purposes when it enforces private choices, see John Harrison and Lillian BeVier, "State Action and Its Critics" (forthcoming, 2004).

[16] Douglas G. Baird, "Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*," *University of Chicago Law Review* 50 (1983): 413.

[17] See generally Robert C. Ellickson, "Property in Land," *Yale Law Journal* 102 (1993): 1315.

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wasteful overuse of resources and stave off the tragedy of the commons. The second is that they encourage optimal investment since gains and losses "come back to the owner."[18] Both of these arguments reflect the conviction that when individual decision-makers may internalize the benefits and must internalize the costs of the decisions they make, they are systematically likely to make better, more socially optimal decisions than would individual decision-makers who are either unable to appropriate the gains or able to externalize the losses. The utilitarian case for internalization of costs and benefits reflects the belief that when decision-makers can internalize the gains from their decisions, they are more likely to make decisions that produce gains than when the gains will be enjoyed by others; and when they must internalize the losses they are more likely to avoid making decisions that decrease value. The case reflects the reasonable assumptions that people are rationally self-interested and that they generally prefer to be richer rather than poorer, to have more value rather than less.

An important reason why decision-makers who will internalize the effects of their decisions tend to make better ones than those who will not is that good decision-making requires good information, and when both the gains and losses of a decision will be internalized, the decision-maker has powerful incentives to acquire good information about what the gains and losses of alternative courses of action are likely to be. The ability to appropriate the gains from value-enhancing decisions encourages owners to gather, and continually to evaluate and act upon, relevant information. The market prices of various inputs, plus the market's predictions about the expected value of outputs or the expected return on investment, provide information about costs and benefits that is clear, transparent, and relatively responsive to changing circumstances.

The utilitarian advantages of a property rights regime of decentralized decision-making about the production, use, and disposition of resources tend to make societies that recognize strong property rights wealthier and bless their citizens with more liberty than those where the decisions are made collectively by centralized government institutions, such as legislatures, courts, and administrative agencies. These particular utilitarian advantages of assigning decision-making authority to private individuals cannot, of course, be achieved when the presence of externalities or other market failures renders market prices an unreliable signal of relative value, and hence policymakers often turn their attention to devising legal fixes to perceived market failures. Regardless of whether market failures might be thought to justify collectively modifying the decision-making authority of private actors, however, it is certain that the particular advantages of internalization of costs and benefits are inevitably sacrificed when government actors become the decision-makers. This is because a

[18] Carol M. Rose, "Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age," *Law and Contemporary Problems* 66 (2001): 90.

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most important, indeed a definitional, fact about government actors—legislators, judges, or administrators—is that they are *required not* to internalize the economic benefits and costs of their decisions. To the extent that the market value of resources affected by their decisions is a reliable indicator that the decisions were value enhancing, the inability of government actors to appropriate the gains from increased value, and their ability to escape from internalizing the losses, results in a significant attenuation of their incentives to make socially value-enhancing decisions, and to gather good information upon which to base those decisions. The problem that this fact about the incentives of government actors poses for institutional design is not met by asserting that, precisely because they are required to forgo private gain, government actors are likely to be able and motivated to make decisions in the "public interest." In the first place, it is not certain that there is a real-world analogue of the "public interest" that is different from or better than the outcome of the sum of private preferences.[19] Secondly, and more to the point, public choice theory has seriously undermined the claim that government actors are uniquely non-self-interested or public regarding. Indeed, its basic insight is that government actors act from rationally self-interested motives just as do actors in the private sector, though the self-interest that government actors pursue must be something other than their own financial gain. Because it is impossible to generalize about the nature of the self-interest that individual government actors pursue, it is rash to speculate about the nature and source of their incentives to make socially value-enhancing decisions. We may know in a very general way, for example, that the incentives of legislators are somehow "political," but this tells us almost nothing, because we know so little about "the causal relationship between social costs and benefits, financial inflows and outflows from the treasury, and the [self-interested] political incentives of government actors."[20] And we know almost nothing about the incentives of judges except that they get no personal financial reward if they craft good rules and, at least if they are federal judges, they will not be fired if they devise bad ones.[21]

III. Private Property in Intangible Things

This section considers whether the principal instrumental justification that supports assigning decision-making authority over production and

[19] Frank H. Easterbrook, "The State of Madison's Vision of the State: A Public Choice Perspective," *Harvard Law Review* 107 (1994): 1328 ("We are doomed by the logic of majority voting to aggregate private preferences rather than find a common public good.").

[20] Daryl Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," *University of Chicago Law Review* 67 (2000): 415.

[21] See, e.g., Frederick Schauer, "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior," *University of Cincinnati Law Review* 68 (2000): 615; Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," *Supreme Court Economic Review* 3 (1994): 1.

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use of tangible things to private actors also supports a similar assignment of authority over expressive works in digital form. If it does, it would supply a powerful argument in support of a regime that, as a baseline proposition, (1) grants strong property rights, such as copyright, in expressive works in digital form, and (2) permits producers of both expressive works and information to use tangible property doctrines such as actions in trespass and their anticircumvention analogue to control and thus to profit from selling access. Also, this section considers whether, functionally, the assignment of decision-making authority over expressive works and information in digital form to the private sector is consistent in principle with the legal rules similarly assigning decision-making authority in the physical world.

The view taken here stands in sharp contrast to the perspective of many academic commentators.[22] Those who have concluded that less propertization of digital content would be better than more place great emphasis on the fact that, unlike consumption of tangible things, which are inherently scarce, consumption of both expressive works and of information is nonrivalrous. In other words, *once an expressive work or a piece of information has been produced*, it is not inherently scarce: consumption by one person does not reduce the amount available to others. In this sense, information and expressive works are public goods, though it is important to recognize that they do not necessarily have the feature of inherent nonexcludability of nonpayers that is commonly thought to be part of the definition of a public good. Expressive works and information come "fixed" in tangible objects, from which it is possible to exclude nonpayers. Of course, the easier it is to copy and distribute such works—to reproduce the work without reproducing the tangible object in which it is fixed and then to distribute the reproduced work to others—the more difficult it is in practice to exclude nonpayers.[23] With expressive works and informa-

[22] The literature that these commentators have produced is so extensive that to attempt to cite any but a representative sample would swamp the available space. See, e.g., Lemley, "Place and Cyberspace," *supra* note 8; Yochai Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain," *Law and Contemporary Problems* 66 (2003): 173; Dan Hunter, "Cyberspace as Place and the Tragedy of the Digital Anticommons," *California Law Review* (2003): 441; Edward W. Chang, "Bidding on Trespass: *eBay, Inc. v. Bidder's Edge, Inc.*, and the Abuse of Trespass Theory in Cyperspace Law," *American Intellectual Property Association Quarterly Journal* 29 (2001): 445; Dan L. Burk, "The Trouble with Trespass," *Journal of Small and Emerging Business Law* (2000): 27; Seth F. Kreimer, "Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet," *University of Pennsylvania Law Review* 150 (2001): 145–47; Maureen A. O'Rourke, "Shaping Competition on the Internet: Who Owns Product and Pricing Information?" *Vanderbilt Law Review* 53 (2000): 1965; and Maureen A. O'Rourke, "Property Rights and Competition on the Internet: In Search of an Appropriate Analogy," *Berkeley Technology Law Journal* 16 (2001): 561. For additional references, see Lemley, "Place and Cyberspace," *supra* note 8, at 521, n.2 and 527, n.24.

[23] This, of course, is why control over access is so important in the digital environment.

> If one believes that the market for hard copies is likely to recede as works become ubiquitously available through audio and video streaming and downloading, then digital networks will supply the principal markets for copyrighted works. This means

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tion, however, it is possible to create excludability of nonpayers—to create scarcity, if you will—by legal rules. Indeed, this is precisely what property rights in such works do, as do rules that give their creators the right to control access to them.

The nonrivalrous aspect of consumption of expressive works and information implies that increasing access to them, whether for productive or for consumptive use, is certain to be socially beneficial. That more access by definition is better inclines some commentators to the conclusion that weaker rather than stronger property rights for their producers are, in general, to be preferred. Mark A. Lemley, for example, claims that "[t]he economic rationale underlying much privatization of land, the tragedy of the commons"[24] does not apply to expressive works and data because, since their consumption is nonrivalrous, they cannot by definition be overconsumed. Therefore, he concludes, trespass analogies are inapt in the digital world, and weaker forms of protection should be offered. As Lemley and other commentators who share his view are surely aware, however, avoiding the tragedy of the commons is not the only rationale for privatization of land. The other most commonly invoked rationale for privatization—that it encourages optimal production and investment—applies with equal force to the production of expressive works and information. Moreover, contrary to Lemley's implicit suggestion, encouraging investment would be a powerful enough rationale to justify privatization of tangible things even if there were no tragedy of the commons. Each rationale for privatization alone provides sufficient support. Thus, that intellectual property rights are supported only by the desire to encourage investment in the production of new works and not by the need to prevent the tragedy of the commons does not mean they are only half as justified as property rights in tangible things. That it is socially value-enhancing to increase access to digital content that has already been produced represents only part of the story, for it remains a fact that it is only possible to obtain access to information and expressive works *that have been produced*. The trick is to get private actors to decide to produce them, and doing this is the essential function—the reason for being—of intellectual property rights. In deciding whether to grant strong property rights to expressive and informational works in digital form, a crucial fact to remember is that, in general, it is private parties and not government actors who decide whether and how much to invest in producing such works, just as private producers of tangible goods decide whether and how much to invest in producing them and private owners of tangible property decide whether and how much to invest in putting

that control over access to digitally distributed works will become the principal way in which exclusive rights are exercised.

Jane C. Ginsburg, "Copyright and Control over New Technologies of Dissemination," *Columbia Law Review* 101 (2001): 1634.

[24] See, e.g., Lemley, "Place and Cyberspace," *supra* note 8, at 536.

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it to a permissible use. Giving producers of expressive works and information property-like protections—in the form of copyright and anticircumvention protections—reflects the same strong intuition that the decision to propertize tangible things reflects. Permitting producers to internalize the benefits of the expressive works and information that they decide to produce, by giving them the enforceable right to decide to make and sell copies and to grant access in exchange for a price, creates incentives for them to decide to invest in creating these products in the first place.

Commentators often point to the costs of propertization, in particular to the costs of allowing producers to decide to charge for access or to deny access altogether to nonpayers. In particular, commentators often cite the cost that is inherent in permitting producers to sell their works at more than the marginal cost of copying it. It is a fair bet that commentators overstate the former cost, however. As Edmund W. Kitch has observed, the focus on the marginal cost of copying tends to obscure the reality that "the marginal cost of making copies is not the relevant marginal cost for the pricing of goods; the marginal cost should include all of the costs necessary to bring the good to market, and there are many other costs than the costs of making a single copy."[25]

Commentators who disfavor propertization also imply that allowing producers to deny access altogether to nonpayers is problematic, if only because "not all people will have the coins to make the turnstiles turn."[26] The general claim seems to be that intellectual property rights *reduce* overall access to expressive works and information. These commentators usually acknowledge the need for law to create incentives for producers to produce such work, but they assert that the task of courts and legislatures confronting intellectual property questions is to "balance" the need for incentives and the benefits of (presumably free) access. They think that the needs of "the public" for access to completed works are different from and in inevitable tension with the "intertwined interests of creators, improvers, [and] competitors."[27] These commentators imply that legal rules or decisions whose *ex ante* effect is to enhance incentives by strengthening property rights have the necessary effect of reducing access precisely on account of the fact that they permit producers to price some potential users out of the market and to deny access to others altogether. In the short run, and as to expressive works and information already produced, this implication appears correct. It is worth noting, however, that the implicit baseline from which access is "reduced" is one that never existed, where access is available on demand to payers and nonpayers alike. In other words, in a world of free ac-

[25] Edmund W. Kitch, "Elementary and Persistent Errors in the Economic Analysis of Intellectual Property," *Vanderbilt Law Review* 53 (2000): 1734.

[26] L. Ray Patterson, "The DMCA: A Modern Version of the Licensing Act of 1662," *Journal of Intellectual Property Law* 10 (2002): 41.

[27] Mark A. Lemley, "Romantic Authorship and the Rhetoric of Property," reviewing James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, in *Texas Law Review* 75 (1997): 888.

cess to all works in digital form, any decision by anyone to restrict or deny access for any reason—that is, anything that limits access in any way—would constitute a "reduction in access" to such works.

On a dynamic or systemic view, and considering that we never have lived in a world in which completely free access was the baseline, and considering further that the effect of incentives is to induce the production of new works, it is difficult to discern the basis for the prediction that stronger intellectual property rights will lead to an overall reduction in access. This is because, since it is private parties who will decide whether and what quantity of new works to produce, granting them property rights is the only way we know to induce them to decide to produce them, and only if they decide to produce them can access to them be had, by anyone on any terms. With regard to copyright, for example, the point worth emphasizing is that the argument for using property rights to create incentives is not that copyright owners are likely to *deny* access but rather that they are induced by the prospect of gain to *grant* it, albeit at prices that consumers are willing to pay. In other words, if the assumptions about incentives that supply the principal rationale for intellectual property have any basis in fact, it is because producers are motivated to create by the prospect of granting—not the prospect of denying—access to those who are willing to pay the price. Thus, there is an important sense in which incentives and increased access do not need to be "balanced," for they are not in genuine tension. They go hand in hand.[28] It turns out that when commentators and courts refer to the need to "balance" incentives and access, the "access" to which they refer is only access for *non*payers, and what they have in mind are rights of "end users to open and free access to consume works of authorship."[29] It is important to realize, however, that when commentators call for "balancing" nonpayers' claims against incentives, they implicitly concede that to require objecting owners to grant access to nonpayers, either with general rules or in the application of particular doctrines to particular facts, is almost certain to reduce the incentives of future producers.[30]

[28] Indeed, in the 2000 study, mandated by Congress, of whether particular classes of works ought to be exempted from the DMCA's anticircumvention provisions, the Copyright Office concluded that control over access increased rather than decreased the availability to the public of works of authorship because protection of technological measures removed what had been a disincentive for copyright owners to disclose or distribute otherwise vulnerable works. Library of Congress, Copyright Office, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," *supra* note 5, at 64561, 64567. For an interesting argument that property rights in information are likely to increase rather than diminish the quality of open information, *see* R. Polk Wagner, "Information Wants to Be Free: Intellectual Property and the Mythologies of Control," *Columbia Law Review* 103 (2003): 995.

[29] Jane C. Ginsburg, "Authors and Users in Copyright," *Journal of the Copyright Society of the U.S.A.* 45 (1997): 3.

[30] Note, too, that any decision, by a court or a legislature, to compel owners to grant access—either for free or at a collectively determined price—is in effect a decision to replace private decision-making about how much access should be granted and on what terms with that of public sector actors.

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In making their arguments for reduced copyright protection, commentators frequently refer pejoratively to the copyright "monopoly." They thus imply that there is systematic failure in the market for copyrighted works, and, therefore, that there is reason to decide collectively to replace copyright owners' access and pricing decisions with decisions made by government actors. The rhetorical momentum gained by invocation of the monopoly bugaboo is, however, analytically unhelpful, if not positively misleading. In fact, as Kitch points out, "it seems likely that . . . almost all copyrights . . . are *not* monopolies."[31] Casual empiricism—admittedly not particularly reliable, though perhaps more trustworthy than unverified claims of impending disaster[32]—reveals that expressive works of all kinds compete intensely with one another for the favor of consumers. Indeed, the range of choice from competing works in the multiplicity of intellectual property markets—among works of fiction, non-fiction, and poetry, as well as among cookbooks, gardening books, self-help books, movies, "films," documentaries, pop music, country music, classical music, dramatic plays, musicals, modern dance, classical dance, painting, sculpture, computer software, and computer games, not to mention the hundreds of offerings available simultaneously every minute of the day and night on cable television—seems to this observer, at least, to put the lie to the claim that copyrights as a rule confer monopoly power. The fact that they confer exclusive rights in original works of expression on their owners does make it appropriate to call copyrights 'property rights', and it is true that these property rights may have value because consumers will pay more to obtain copies than the marginal cost of making them, even when the marginal cost is accurately calculated. But this fact does not mean that all copyrights are monopolies.[33] Thus, to invoke the pejorative "monopoly," even rhetorically, as a reason for conferring weaker rather than stronger property rights—that is, as a reason to displace private with public decision-making—is to wield a red herring. Moreover, if monopoly is or becomes a problem with regard to any particular copyright owner's market power, antitrust law ought to be adequate to fix it. If antitrust law is not adequate, then it is antitrust law that should be tweaked, not copyright law.

I turn now to the question of control over access to works in digital form, and to the anticircumvention provisions of the DMCA, as well as the use of trespass analogies in the digital context. Because digital tech-

[31] Kitch, "Elementary and Persistent Errors," *supra* note 25, at 1737. See also Mark A. Lemley, "The Economics of Improvement in Intellectual Property Law," *Texas Law Review* 75 (1997): 996 n.26 (emphasis added); and William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18, no. 2 (1989): 325, 361.

[32] *See, e.g.*, Hunter, "Cyberspace as Place," *supra* note 22, at 442 ("Down one road lies a future of completely propertized and privatized ownership of intellectual activity. Down the other road is a future where the interests of society at large are fostered, which at times leads to private ownership . . . and at other times demands that some public intellectual space be kept as commons for all.").

[33] Kitch, "Elementary and Persistent Errors," *supra* note 25, at 1735.

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nology has made it so easy and so cheap to produce perfect copies, and because in a networked environment distribution of copies is the mere matter of the click of a mouse, those who wish to profit from the expressive works they create and the information they produce must be able to control access. This they have attempted to do by both technological and legal devices. The DMCA's anticircumvention provisions provide legal backing for technological access controls with respect to copyrighted works. Think of a technological access control, such as a password requirement or encryption, as the cyber-equivalent of a doorbell or a lock, which in physical space would function to permit a property owner to identify and exclude unwelcome visitors. Think of technological circumvention of an access control as entering without ringing the doorbell or by forcing the lock. Understand, then, that the anticircumvention provisions are to copyrighted content in digital form as trespass laws are to physical space: both enforce the owner's decision regarding the terms on which and the persons to whom access should be granted.[34] Similarly, trespass doctrines enforce occasional decisions to exclude by private Web-site proprietors and operators of proprietary e-mail networks. Thus, in virtual space these doctrines perform the same function that they do in real space; namely, they delegate to private actors decision-making authority regarding access, with the state's role being limited to enforcing the private decision.[35]

One aspect of both the anticircumvention provisions and the use of trespass claims to protect virtual space that has particularly troubled critics is the fact that they permit private control over work that could not be protected by copyright. Anticircumvention devices foreclose even 'fair users'[36] from obtaining unauthorized access, and Web-site operators can use trespass laws to control access to uncopyrightable facts, as eBay was able to do when it successfully pursued a trespass claim against Bidder's

[34] The Second Circuit made this point in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 452–53 (2d Cir. 2001), in which it sustained the anticircumvention provisions of the DMCA:

> [W]e must recognize that the essential purpose of encryption code is to prevent unauthorized access. Owners of all property rights are entitled to prohibit access to their property by unauthorized persons. Homeowners can install locks on the doors of their houses. Custodians of valuables can place them in safes. Stores can attach to products security devices that will activate alarms if the products are taken away without purchase.

[35] Note that the claim in the text is not a claim about doctrine. It is not a claim, in other words, that the DMCA's anticircumvention provisions are doctrinally identical to trespass laws. Nor is it a claim that the cyberspatial metaphor is an apt one or that cyberspace is "really" a place. Rather, the claim that drives the analysis is the claim that both the DMCA and trespass laws represent collective decisions to allocate decisions with respect to access—to virtual and to physical things respectively—to private producers and owners rather than to make such decisions collectively.

[36] 'Fair users' are those who would be able successfully to defend a copyright infringement action not on the ground that their conduct was not otherwise infringing but, rather, on the ground that it was excused under § 107 of the Copyright Act, which is to the effect that "fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107.

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Edge for the latter's access to, and robotic collection of, electronic auction price data on eBay's Web site.[37] The fair-users problem worried Congress, and it delayed implementation of the anticircumvention provisions of the DMCA for two years while directing the Librarian of Congress to determine classes of works that should be exempt because the implementation of the anticircumvention provisions would diminish "the ability of individuals to use copyrighted works in ways that are otherwise lawful."[38] Concluding, however, that "in most cases thus far the use of access control measures has sometimes enhanced the availability of copyrighted works and has rarely impeded the ability of users of particular classes of works to make noninfringing uses,"[39] the Librarian, acting upon the recommendations of the Register of Copyrights, exempted only two relatively trivial classes of works.[40]

Regarding the use of trespass laws to control access to uncopyrightable facts, critics repeatedly point approvingly to the holding in *Feist Publications, Inc. v. Rural Telephone Service*.[41] In *Feist*, the Court held that facts are both constitutionally and by statute uncopyrightable, the reason being that they lack originality. In so holding, the Court explicitly rejected the possibility that a producer's "sweat of the brow" might support copyright in facts even in the absence of originality. *Feist* raises a number of complex and interesting issues that are beyond the scope of this paper. Contrary to what many critics of the DMCA imply, however, the case neither holds nor suggests that facts once discovered and information once produced fall automatically into the public domain. Nor did the Court suggest that the Constitution prohibits information producers from invoking legal doctrines other than copyright to control access. In this connection, it becomes relevant that private producers of information have always had the enforceable power to decide whether, on what terms, to whom, and under what circumstances to disclose it. Trade secret law, for example, enforces promises to keep information confidential, thus protecting the trade secret owner's ability to control access to the information without regard to whether it is copyrightable or not. Contract law enforces agreements not to disclose information, as well as agreements to pay for disclosure. Moreover, by enforcing their rights to control access to the physical location of information, trespass law has always provided ancillary protection to information producers who want to control access

[37] *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Calif. 2000).

[38] Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 1–5–551, pt. 2, at 37 (1998).

[39] Library of Congress, Copyright Office, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," *supra* note 5, at 64563.

[40] The Librarian determined exemptions for "[c]ompilations consisting of lists of websites blocked by filtering software applications," and for "[l]iterary works, including computer programs and data bases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsoleteness." *Id.* at 64561.

[41] 499 U.S. 340 (1991).

to it. Thus, with regard to access to facts, providing a functional equivalent to the action of trespass to real or personal property in the virtual world neither departs in principle from, nor significantly expands, the kind and scope of protection that has always been available to information producers.

What remains to be addressed is the most vexing aspect of the question of whether to continue to authorize private parties to make decisions about the production and terms of access to expressive works and information in digital form or to collectivize such decisions: there exists no reliable empirical data about any of the factors that might usefully guide the analysis. We do not know, for example, what incentives are "enough" to prod producers to create the socially optimal number, quality, and diversity of works. While it may be the case, for example, that "many works would be created and disseminated even without copyright protection,"[42] it is no doubt also true that many works, and in particular those whose production requires a substantial up-front investment of resources—works that Jane C. Ginsburg calls "sustained works of authorship"[43]—would not be created without such protection. It is impossible to calculate either the costs, in terms of works not created, of collectivizing the access decision or the benefits, in terms of works that would not otherwise have been produced, of privatization.

Even more fundamentally, we do not know nor could we know what the "socially optimal" amount of works would be. We do not know whether producers will be systematically inclined to abuse their private power, either by denying access altogether or by charging exorbitant prices. We do not have anything like a reliable estimate of what the social costs are of denying access to nonpayers, nor do we know what the incentive effects of mandating access would be. We have no idea what mix, both in quantity and quality, of expressive works and information private producers would produce were decision-making authority over access to be assumed by government actors. "[T]here is no factual study that shows how much incentive is enough to further creative activity, or what kinds of incentives work: money, control, or time."[44] What George Priest observed about the literature on the scope of the patent right is

[42] Neil Weinstock Netanel, "Locating Copyright within the First Amendment Skein," *Stanford Law Review* 54 (2001): 28. For the classic argument that the basic case for copyright protection is weak, *see* Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84 (1970): 322–23; *but cf.* Barry Tyerman, "The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer, *U.C.L.A. Law Review* 18 (1971): 1100.

[43] Jane C. Ginsburg, "Putting Cars on the 'Information Superhighway': Authors, Exploiters, and Copyright in Cyberspace," *Columbia Law Review* 95 (1995): 1499.

[44] Marci A. Hamilton, "An Evaluation of the Copyright Term Extension Act of 1995: Copyright Duration Extension and the Dark Heart of Copyright," *Cardozo Arts and Entertainment Law Journal* 14 (1996): 656.

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equally true of the literature on propertization of digital works: "The ratio of empirical demonstration to assumption in [the] literature must be very close to zero."[45] We "know almost nothing about the effect on social welfare of . . . systems of intellectual property."[46] Thus, when commentators make assertions such as "[w]ith the enactment of the DMCA . . . copyright, in the sense of protection intended primarily to serve the public interest, will surely have died,"[47] their conclusions are grounded not on facts but on assumptions—and on remarkably dire assumptions at that. Similarly, when advocates express fear that recognizing a trespass theory with regard to Web-site access will cause "many of [the] benefits of e-commerce" to disappear,[48] or when they claim that "[if] mere 'unauthorized use' of a web site is actionable, then millions of Americans are turned into lawbreakers for doing what they do every day—namely, surfing the Internet for information,"[49] their fears and claims are based not on fact but on dire assumptions. Sometimes, though not often, commentators articulate the assumptions upon which their predictions are based, in which case it becomes possible to evaluate a particular assumption's plausibility. Glynn S. Lunney, for example, has predicted that allowing free private copying will not "threaten copyright's public purpose." He bases the prediction on the explicit assumption that private copying increases as a work's popularity increases and thus will reduce revenue most substantially for the most popular works, which "typically receive an economic return far in excess of that *necessary to ensure their creation*."[50] The assertion that I have italicized here renders Lunney's prediction—that free private copying will not threaten copyright's public purpose—implausible, for the straightforward reason that producers simply cannot know *ex ante* what the economic return for any particular work will be.[51] And, of course, contrary assertions—to the effect that property-like rules that leave decisions regarding access to private producers are more likely to be socially value-enhancing than rules that collectivize such decisions—are similarly grounded on assumption and not on fact. All we know with any certainty is that we do not know, and cannot know, what the actual effects of various legal regimes are going to turn out to be.

[45] George L. Priest, "What Economists Can Tell Lawyers about Intellectual Property: Comment on Cheung," *Research in Law and Economics* 8 (1986): 19.

[46] Ibid., 21.

[47] Glynn S. Lunney, Jr., "The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act," *Virginia Law Review* 87 (2001): 814–15.

[48] Brief of Mark A. Lemley et al. as *Amici Curiae* in Support of Bidder's Edge, *eBay, Inc. v. Bidder's Edge, Inc.*, 9th Cir. No 00–15995 (2000), at 6–7.

[49] Appellant's Reply Brief, *Intel Corp. v. Hamidi*, California No. S103781 at 8–9.

[50] Lunney, "Death of Copyright," *supra* note 47, at 825 (emphasis added).

[51] *Cf.* Tad Friend, "Letter from California: Remake Man," *The New Yorker*, June 2, 2003, 41. (The movie industry's "besetting inefficiency, of course, is that studios never know what moviegoers will want to buy.")

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This brings us to perhaps the hardest and most unrelentingly difficult question of all: Which way does our intractable ignorance about the consequences of private versus government control cut? Does it cut in favor of private or government control over access to digital works? Intractable ignorance being what it is—intractable—the answer one is inclined to give to this question doubtless is a function of one's more general views about the relative merits of private versus public decision-making. Many academic commentators, for example, view markets as relatively coercive compared to collective decision-making[52] and entertain deep suspicions about the way private actors tend to behave.[53] Not surprisingly, they argue against lodging substantial control over access in private hands.[54] In arguing in favor of more government-mandated access, they display a touching faith in the ability of legislatures and courts to gather sufficient information about the likely effects of their decisions to make it appropriate for them to substitute their judgment about whether access should be granted and on what terms for that of Web-site operators, copyright owners, or information producers.[55] They suggest, for example, that nuisance rather than trespass principles would permit judges to set the "optimal regulatory standard" for each case, by allowing "computer owners on the Net to exclude unreasonably costly uses of their servers, while allowing access for socially beneficial uses,"[56] implying, of course, that judges in fact possess the capacity to discern the "optimal regulatory standard."

For reasons having to do principally with my assessment of the incentives that are in play, I do not share the commentators' relatively greater distrust of actors in the private sector as compared to actors in the public

[52] *See, e.g.*, C. Edwin Baker, "First Amendment Limits on Copyright," *Vanderbilt Law Review* 55 (2002): 902–3 ("[M]arket transactions are exercises of power over other people. . . . These transactions are presumptively subject to legislative control [which by implied contrast is not an exercise of power over other people], which properly determines the socially desirable forms of private instrumental power.").

[53] *See, e.g.*, Hunter, "Cyberspace as Place," *supra* note 22, at 446 ("Private interests are reducing the public ownership of, and public access to, ideas and information in the online world . . . . [and will] move us towards a digital anticommons where no one will be allowed to access others' cyberspace 'assets' without using some form of licensing or some other form of transactionally expensive permission mechanism.").

[54] Lemley, "Place and Cyberspace," *supra* note 8, at 533–35 (suggesting that on the Internet, there are good reasons to think that the balance should be tilted in favor of public space in many contexts, and we should be more worried about the consequences of privatization in online space than we are in real space.)

[55] *See, e.g.*, Netanel, "Locating Copyright," *supra* note 42, at 69 (arguing in behalf of rigorous judicial scrutiny of copyright in order to "ensure that the copyright law is narrowly tailored to burden no more speech than is essential to furthering the legitimate objectives and purposes of the Copyright Act [and] make certain that copyright enforcement leaves 'open ample alternative channels' for communication of the burdened speech," and seeming to assume that it is within the judicial capacity both to gather the information and to make the evaluative judgments entailed by the obligation to engage in such rigorous scrutiny).

[56] Burk, "The Trouble with Trespass," *supra* note 22, at 30–31.

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sector. Among other things, I worry that the incentives confronting public sector decision-makers make it quite unlikely that they will be moved to gather and accurately to assess the kind of information about the relative values of various alternatives that will enable them reliably to discern the socially optimal course. I am inclined to believe that our ignorance about the incentive effects of collectivizing access decisions cuts in favor of continuing to allocate authority over access to the private actors who produce the content. The principal reason is that I assume—though I acknowledge that I cannot prove it—that collectivizing access decisions will have negative incentive effects, and I fear that in the long run these will swamp the potentially negative effects of individual decisions either to deny access or to charge "too much" for it. Putting the decisions both about production and about access in private hands, and enforcing those decisions by legal rules such as copyright, trespass, and anticircumvention provisions, is, of course, no guarantee that the effects of the substantive decisions that private actors make will be socially optimal. Some of the naysayers' predictions of doom and gloom may in fact come to pass, in which case it would then be appropriate to consider increasing collective control over access. It is important to recognize, however, that putting the access decision in the hands of government actors carries no guarantee of optimality either. In addition, if the government actors get it wrong and require "too much" free access, so that the flow of new works and the rate of information production decrease significantly, it will be difficult to reverse course. As Judge Frank H. Easterbrook observed,

> [w]hen free distribution is socially optimal, people will not enforce their property rights in such a way that they try to hold up other people for money. If you start from property rights, you can negotiate for distribution at zero cost. If you start from a world of no property rights, it is extremely difficult, if indeed it is possible at all, to work to a world of compensation for intellectual property.[57]

Finally, I believe that producers of expressive works and information respond positively to the incentives generated by their control over access to the works they decide to produce. So long as the decision to produce expressive works and information is left to the private sector, and so long as we are not certain that the present configuration of incentives induces producers to create "too many" such works and "too much" information, and so long as we remain ignorant about how precisely to reconfigure the legal rules so that we maintain a level of incentives that is "just right," we reduce incentives at our peril.

[57] Frank H. Easterbrook, "Comment on Property Rights in the 21st Century," *Intellectual Property News* 3, no. 1 (E. L. Wiegand Practice Groups, 1999): 4.

IV. The First Amendment and Private Property in Tangible Things

Sections II and III described and defended an institutional conception of tangible and intangible property rights that regards a private property rights regime as reflecting a collective decision to allocate the authority to make decisions about investment, production, and access to actors in the private sector rather than to government officials. With regard to access, actions in trespass, either to real property or to chattels, and the DMCA have been the principal vehicles for collective enforcement of individual decisions to exclude. This section begins to address the constitutional aspects of the institutional choice to enforce private owners' decisions to deny access. In particular, it asks whether the First Amendment requires a reversal of that institutional choice. Subsection *A* summarizes current First Amendment doctrine on the issue of whether individuals have a constitutional right of access to private property contrary to the wishes of the property owner for the purpose of engaging in expressive activity. Subsection *B* describes First Amendment doctrine as it concerns the rights of persons who wish to communicate with a property owner who does not wish to receive their message.

A. Access for expressive activity

The first time the Court addressed the question of the First Amendment rights of those who wish to engage in expressive activity against the wishes of a private property owner was in the 1946 case of *Marsh v. Alabama*.[58] *Marsh* suggested that the Court was inclined to be receptive to the First Amendment claim, for it reversed the trespass conviction of a Jehovah's Witness who had attempted to distribute religious literature on the streets of a privately owned company town. Defending the conviction, the state argued that the owner corporation's "right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests."[59] Though it implicitly acknowledged that a guest in a private home would have no First Amendment right to stay and speak if the owner wished to exclude him, the Court nonetheless held that

> the circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental

[58] 326 U.S. 501 (1946).
[59] *Id.* at 506.

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> liberties and the enforcement of such restraint by the application of a state statute.[60]

In other words, in *Marsh* the Court attributed the private owner's decision to exclude to the state, and held that the state was not free to make such a decision consistent with the First Amendment.

Marsh has never been overruled, but it has had virtually no impact as a First Amendment precedent. During the Civil Rights movement of the 1960s, for example, the Court was frequently asked—and just as frequently refused—to hold that the First Amendment protects protestors and demonstrators on private property that the owner has opened to the public for purposes of commerce.[61] *Marsh* seemed to have suggested an affirmative answer to the question, but the Court's refusal to rely on it in the sit-in cases—indeed, its positive disinclination even to confront the issue that the cases presented—strongly implies that the Court intended to confine *Marsh* strictly to its own particular facts. The inference that this continues to be the Court's intention is supported by the fact that the Court first backtracked from and then explicitly overruled the only case in which it had relied on *Marsh*, namely its 1968 holding in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*.[62] The Court in *Logan Valley* held that, in a shopping center that was "the functional equivalent of the business district of Chickasaw involved in *Marsh*," the state could not enforce its trespass laws to support the decision of the owner to exclude "members of the public wishing to exercise their First Amendment rights."[63] However, just four years later, in *Lloyd Corporation v. Tanner*[64] the Court sustained a private shopping center's ban on the distribution of handbills. The center had invoked its ban to exclude antiwar leafleteers. Though purporting to distinguish *Logan Valley* on the ground that it involved First Amendment activity that was related to the shopping center's operations, Justice Lewis Powell's opinion in *Lloyd* expressed a view quite at odds both with *Logan Valley* and with the impulses that had led the Court to decide as it had in *Marsh*:

> Although accommodations between [speech and property values] are sometimes necessary, and the courts properly have shown a special solicitude for the First Amendment, this Court has never held

[60] *Id.* at 509.

[61] See Monrad G. Paulsen, "The Sit-In Cases of 1964: 'But Answer Came There None,' " *Supreme Court Review* (1964): 137 (describing the Court's refusal to reach the central question of the extent to which the Fourteenth Amendment forbids states to support private choices that could not constitutionally be made by the judiciary, the executive, or the legislature).

[62] 391 U.S. 308 (1968), *overruled by Hudgens v. NLRB*, 424 U.S. 507 (1976).

[63] 391 U.S. at 318–20.

[64] 407 U.S. 551 (1972).

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> that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned.[65]

And four years after *Lloyd*, in *Hudgens v. NLRB* (1976),[66] the Court expressly overruled *Logan Valley* (though it left *Marsh* at least formally intact). As had *Logan Valley*, *Hudgens* involved labor picketers. But, wrote Justice Potter Stewart unequivocally, "the constitutional guarantee of free expression has no part to play in a case such as this."[67] He noted, "if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike."[68]

The upshot of these cases, and in particular of *Hudgens* since it is both the most recent and the most unequivocal, is that the enforcement of trespass laws at the behest of private property owners who wish to exclude persons who want to engage in expressive activity on the owner's property does not violate the First Amendment. Even if the access seekers could not constitutionally be excluded from otherwise similar but publicly owned property, state law may permit a private property owner to enlist the aid of a court to exclude them.

Notice what this means in institutional terms. It means that the First Amendment permits the decision whether to exclude or not to rest with the property owner. It means that courts may enforce that decision without regard either to the message the access seekers wish to convey or to the property owner's reasons for wishing to exclude. It means, in other words, that insofar as the content of the speech is concerned—its ideas or the message it conveys—the courts (i.e., the government) will not take sides.

In several cases the Court has analyzed claims of compelled access to private property for speech by asking whether being required to grant access violated the property owner's *First Amendment* rights as opposed to the owner's *property rights*. In most of these cases the access seekers did not claim that the First Amendment of its own force guaranteed them a right of access. Instead, they invoked one or another statutory or regulatory scheme that purported to grant them access to the property of others. The results of these cases are somewhat evenly divided between those sustaining the compelled access claim and those sustaining the First Amendment challenge to it. However, the facts, as well as the rhetoric and tone, of two of the most significant opinions sustaining compelled access suggest that the Court regarded them as exceptional cases that

[65] *Id.* at 567–68 .
[66] 424 U.S. 507.
[67] *Id.* at 521.
[68] *Id.* at 520–21.

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required departures from the mainstream of First Amendment doctrine. The 1969 case of *Red Lion Broadcasting Co. v. FCC*,[69] for example, sustained the FCC's 'fairness doctrine', which required licensed broadcast stations to present discussions of both sides of public issues and to provide free reply time to those seeking to respond to personal attacks and political editorials. The holding followed from the Court's belief that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[70] In particular, the opinion stressed the "scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to acquire access to those frequencies for expression of their views."[71] Commentators have long challenged both the conceptual and the empirical validity of the 'spectrum scarcity' rationale that provided the underpinning for *Red Lion*;[72] and the Supreme Court, acknowledging the criticism, has hinted that it might be prepared to reconsider the rationale if it were directly challenged in a relevant case.[73] Perhaps more interesting still is that the FCC itself repealed the fairness doctrine in 1987 because it found that compelled access in practice worked not to enhance diversity but to inhibit the presentation of controversial issues of public importance.[74]

The other case in which the Court departed from the mainstream of First Amendment doctrine to sustain a compelled access claim was the 1980 case of *PruneYard Shopping Center v. Robins*,[75] in which high school students sought access to a private shopping center for the purpose of protesting a UN resolution against Zionism. The California Supreme Court interpreted the California state constitution to guarantee access for speech to privately owned shopping centers. The U.S. Supreme Court concluded that "state constitutional provisions, which permit individuals to exercise free speech and expression rights on the property of a privately owned

[69] 395 U.S. 367 (1969).

[70] *Id.* at 386.

[71] *Id.* at 400.

[72] *See, e.g.*, Thomas G. Krattenmaker and Lucas A. Powe, Jr., *Regulating Broadcast Programming* (Boston, MA: MIT Press and Washington, DC: AEI Press, 1994), 204–19 ("Because the [scarcity] rationale is so untenable, its continued existence demonstrates that there is *something* about broadcasting that leads people to know that it may be regulated without regard to the First Amendment. That 'something' is the reason for continued regulation. We await its revelation. We only know it is not scarcity."); see also David Lange, "The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," *North Carolina Law Review* 52 (1973): 1.

[73] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 637–39 (1994) (*Turner I*) ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so" in a case in which "*the broadcast cases are inapposite*.") (emphasis added).

[74] Syracuse Peace Council, 2 FCC Rec. 5043 (1987); FCC Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 143 (1985).

[75] 447 U.S. 74 (1980).

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shopping center to which the public is invited" do not violate the center owner's "First Amendment right not to be forced by the state to use his property as a forum for the speech of others."[76] As the Court described its view, three key facts saved the access requirement from constitutional invalidity: because of the public availability of the center the views expressed would not be identified with the owner; the state did not dictate a specific message; and the owner could expressly disavow any connection with the petitioners.

The only case in which the Court has sustained compelled access using its customary First Amendment analytical tools is *Turner Broadcasting System v. FCC* (1994) (*Turner I*).[77] *Turner I* involved the "must-carry" provisions of the Cable TV Consumer Protection and Competition Act of 1992, which require cable operators to carry the signals of a certain number of local broadcast stations. Cable operators challenged the provisions on First Amendment grounds, claiming that they were content-based regulations that could not survive strict scrutiny. Justice Anthony Kennedy's opinion for the Court acknowledged that at the First Amendment's core "lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[78] In addition, he conceded that "[g]overnment action . . . that requires the utterance of a particular message favored by the [g]overnment, contravenes this essential right."[79] Nevertheless, the Court concluded that the must-carry provisions were "content-neutral," not "content-based," and thus they were subject to only intermediate scrutiny.[80] On rehearing the case in 1997, the Court ultimately concluded that the provisions passed constitutional muster because they furthered important governmental interests in competition and diversity.[81]

Two cases squarely rejected the government's effort to compel access for speech purposes. In *Miami Herald Publishing Co. v. Tornillo*,[82] decided in 1974, the Court invalidated Florida's right of reply law, which required newspapers to give political candidates a right to equal space to reply to editorial criticism. The opinion vividly illustrates the difference between the First Amendment rights of broadcasters, who lost their challenge to right of reply requirements in *Red Lion*, and print publishers, who re-

[76] *Id.* at 76, 85.
[77] 512 U.S. 622 (1994)(*Turner I*).
[78] *Id.* at 641.
[79] *Id.*
[80] On one hand, when a government regulation is aimed directly at the content of speech, the Court will subject it to 'strict scrutiny', and will generally invalidate it unless it serves a compelling state interest by the least restrictive means. On the other hand, when a regulation restricts speech but is not aimed directly at its content—when, in other words, it is 'content neutral'—the Court will subject it to 'intermediate scrutiny', and will generally sustain it if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of the speech.
[81] *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) (*Turner II*).
[82] 418 U.S. 241 (1974).

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soundingly won theirs. It also illustrates how the First Amendment, like private property rights, functions to allocate to private property owners and not to government officials decision-making authority about what resources shall be used to communicate what messages. Whereas the upshot of *Red Lion*, *PruneYard*, and the *Turner* rulings was to lodge decision-making authority in government actors—courts, legislatures, the FCC—the upshot of *Tornillo* was to lodge it in private owners and editors.

The 1986 case of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[83] is to the same effect, though the context was different. The California Public Utilities Commission adopted a requirement that PG&E allow a private advocacy group to use the "extra space"[84] in its billing envelopes four times a year. Relying heavily on *Tornillo*, and distinguishing *PruneYard*, the Court sustained PG&E's challenge to the requirement on the ground that being compelled to include in its billing envelope speech of a third party with which it disagreed violated its First Amendment rights. Again, the institutional upshot of the holding is that decision-making authority regarding access to private property for speech purposes resides in the hands of private owners.

B. Access for communication with the property owner

The Supreme Court has been steadfast if occasionally somewhat oblique in recognizing property owners' right to decline to grant access to those who wish to communicate with them. The flagship case, decided in 1970, is *Rowan v. United States Post Office Dept.*,[85] in which the Court upheld a federal statute that permitted a person who "in his sole discretion" has determined that certain advertisements are "erotically arousing or sexually provocative" to insulate himself from such advertisements by requesting the Postmaster General to order the sender to refrain from further mailings. The Court interpreted the relevant statutory provision to remove "'the right of the Government to involve itself in any determination of the content and nature of these objectionable materials.' "[86] It then addressed the plaintiff mail order businesses' argument that the statute violated their constitutional right to communicate. The plaintiffs' brief had broadly asserted that "'[t]he freedom to communicate orally and by written word and, indeed, in every manner whatsoever is imperative to a free and sane society."[87] The Court conceded that "[t]o make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, in-

[83] 475 U.S. 1 (1986).
[84] The "extra space" was the difference between the maximum weight mailable with a postage stamp and the weight of the monthly bill.
[85] 397 U.S. 728 (1970).
[86] *Id.* at 733 (citation omitted).
[87] *Id.* at 735.

formation, and argument that, ideally, he should receive and consider."[88] It concluded, nevertheless, that "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit."[89]

Rowan relied on *Martin v. City of Struthers*,[90] a 1943 case that invalidated an ordinance prohibiting door-to-door solicitation, drawing a distinction between the city government's right to protect homeowners from unwanted solicitations and the enforceable right of an individual homeowner to protect himself. This distinction explains the results in a number of cases in which legislatively enacted bans on or permit requirements for certain types of communication have been invalidated even though a majority of the jurisdiction's homeowners probably would not have wanted to receive or be bothered by the material.[91] The distinction warrants emphasis. It helps to bring the "who decides" aspect of the First Amendment access issue into focus. In *Rowan* the Court sustained the statute because it put the decision whether to reject mail in the hands of the individual citizen. The Postmaster General's job was merely to enforce the private decision. In *Martin*, by contrast, the town did more than simply enforce individual owners' decisions to exclude. The ordinance that town officials passed attempted "to make this decision for all [the town's] inhabitants,"[92] but the Constitution does not generally allocate decision-making authority regarding access for purposes of communication with private property owners to local legislators or other government officials. Instead it allocates it to the private property owner.

It remains to justify these outcomes, a task made more difficult by the fact that the Court itself has done little to explain them. In addition, at first glance the decisions seem to run counter to the frequently invoked rhetorical commitment to the "principle that debate on public issues should be uninhibited, robust and wide-open."[93] Those who seek access to *any* place, public or privately owned, for the purpose of engaging in First Amendment activity invoke this principle as a sword to compel the property's unwilling proprietor either to let them in or to require him to satisfy a court that his reasons for not doing so have merit. The access seekers in

[88] *Id.* at 736.
[89] *Id.* at 737.
[90] 319 U.S. 141 (1943).
[91] *See, e.g.*: *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530 (1980)(invalidating an order prohibiting the inclusion in monthly electric bills of inserts that discussed controversial issues of public policy); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)(invalidating a federal law barring the mailing of unsolicited advertisements for contraceptive products); *Staub v. City of Baxley*, 355 U.S. 313 (1958)(invalidating an ordinance prohibiting the solicitation of membership in dues-paying organizations without a permit from city officials); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976)(invalidating an ordinance requiring advance notice to police in writing by persons desiring to canvass, solicit, or call from house to house for a recognized charitable or political campaign or cause).
[92] 319 U.S. at 141.
[93] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

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effect make the claim that mandating property owners to grant them access will result in more speech, and more speech is presumptively better. They assert that compelled access achieves the purpose of the Free Speech Clause, which they imply is to *assure* the widest possible debate about matters of concern to the community.[94] But this view, as Charles Fried has pointed out, "mistakes an effect of the principle for the principle itself. The First Amendment protects a liberty—liberty of expression—and it is an effect of this liberty that there is wide and uninhibited discussion of political matters."[95] In other words, the fact that wide and uninhibited discussion occurs when private citizens have liberty to speak should not be taken to imply that the Constitution directly guarantees that the widest possible debate must occur. It would be impossible for the Court to administer such a guarantee, if for no other reason than that the Court would have to make factual determinations in particular cases that it would be impossible for it honestly or confidently to make. The Court could not possibly hope to discern how much access for what kinds of speech activity on what kinds of property would provide the "widest possible debate," and it is certain that the Constitution contains no criteria in terms of which the Court could evaluate when granting a particular claim of access would be required in order for there to be "enough" speech.[96]

There are at least two additional explanations for the Court's refusal to grant First Amendment rights of access to private property in addition to the fact that the Constitution does not actually purport to assure that debate will be uninhibited, robust and wide open. One is that the refusal to grant access rights is grounded in the Court's understanding that the Constitution itself has very little—indeed, almost nothing—to say about either the substance of laws that resolve disputes between private individuals or about the reasons why private actors invoke the aid of courts. The Constitution takes as given that states supply certain generally applicable background rules—the rules of property, contract, and tort, for example—for the resolution of private disputes. The extent to which legislatures or courts are constitutionally free to change those rules, and, in particular, to modify them so as to transfer decision-making authority

[94] See, e.g., Owen Fiss, "State Activism and State Censorship, *Yale Law Journal* 100 (1991): 2100–01.

[95] Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, eds., *The Bill of Rights in the Modern State* (Chicago, IL: University of Chicago Press, 1992): 226–27.

[96] *Cf.* Lillian R. BeVier, "Rehabilitating Public Forum Doctrine: In Defense of Categories," *Supreme Court Review* (1992): 115–21 (noting the difficult fact-finding and evaluative issues lurking in case-by-case determinations of whether in particular instances a " 'fair accommodation of the individual's interest in effective expression . . . , the public's interest in receiving the communication, and legitimate countervailing interests of the state' " has been achieved) (quoting Geoffrey R. Stone, "Fora Americana: Speech in Public Places," *Supreme Court Review* [1974]: 253–54).

from private to public actors, is the subject of intense debate both on the Court[97] and off.[98] With regard to access, for example, the Supreme Court has squarely held that legislatures may not authorize an unwanted "permanent physical occupation" of private property without paying just compensation.[99] On other occasions, the Court has sustained collective modifications of the property owner's right to exclude in certain circumstances: the public accommodations title of the Civil Rights Act of 1964,[100] for one example, and *PruneYard* for another. And, though the decision has not gone unchallenged by commentators,[101] the New Jersey Supreme Court has interpreted its state common law and the "public trust doctrine" to grant to the general public a right to use privately owned land for recreational purposes.[102] But so long as the background rule is that the property owner has the right to exclude, and the state merely enforces the property owner's decision to exercise that right, the Constitution is indifferent either to the reason access is desired or to the reason it is denied.

A second justification for the refusal to read the First Amendment as a guarantee of access to private property is that enforcing the right to exclude does not entail any risk of deliberate government discrimination among viewpoints. That trespass laws may, in particular cases and from time to time, fall more heavily on particular viewpoints does not signal deliberate viewpoint discrimination. Trespass laws are neutral as to the points of view of both the access seeker and the property owner. Enforcing trespass laws does not put judges in a position to censor or punish particular speakers, or to manipulate public debate by selectively denying speech opportunities to disfavored views or granting them to favored ones. As the Court itself noted in *Rowan*, vesting decision-making authority in individuals with regard to what communications come onto their private property is a way to avoid "vesting the power to make any discretionary evaluation of the material in a government official,"[103] including in a judge.

[97] *See, e.g.*: *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (mere enactment of temporary moratoria against all viable economic use of property does not constitute a per se taking of property); *Lucas.* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) (where the state seeks to sustain regulation that deprives land of all economically beneficial use, it may resist paying compensation only if the right to make the proscribed use was not part of the title to begin with.)

[98] The literature is far too voluminous to cite. Examples of two prominent opposing views are Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Boston, MA: Harvard University Press, 1985); and Cass R. Sunstein, *The Partial Constitution* (Boston, MA: Harvard University Press, 1994).

[99] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[100] 42 U.S.C. §§ 2000a-a-6 (2000).

[101] *See* Barton H. Thompson, Jr., "Judicial Takings," *Virginia Law Review* 76 (1990): 1541 (arguing that "there is no justification for exempting the judiciary from those property protections that are necessary where other branches of the government are concerned.").

[102] *Matthews v. Bay Head Improvement Ass'n.*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984).

[103] *Rowan v. United States Post Office Dept.*, 397 U.S. 728, at 737.

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V. The First Amendment and Private Property in the Digital World

Continuing to deploy an institutional conception of property rights in tangible and intangible things, this section addresses the First Amendment implications of the choice to enforce private decisions to deny access by copyright owners, digital information producers, and Web-site and proprietary e-mail system operators.

A. Copyright and the First Amendment

This subsection considers whether, as several academic commentators have recently argued, copyright law in principle is in significant tension with the First Amendment. For example, Mark Lemley and Eugene Volokh regard copyright as facially problematic because "[c]opyright law restricts speech: it restricts you from writing, painting, publicly performing or otherwise communicating what you please. If your speech copies ours, and if the copying uses our 'expression,' not merely our ideas or facts that we have uncovered, your speech can be enjoined and punished . . . ." [104] For another example, Jed Rubenfeld claims that copyright ignores three basic principles of free speech jurisprudence, namely, the principles that content-based restrictions of speech command strict scrutiny, that prior restraints on speech (which are routinely granted in copyright infringement cases) are deeply disfavored, and that speech restrictions that are based on the speaker's viewpoint are practically unconstitutional per se.[105] For a third example, Yochai Benkler maintains that, because they prevent some people from using or communicating information, "*all* property rights in information conflict with the 'make no law' injunction of the First Amendment." [106]

The Supreme Court has directly confronted the question of copyright's compatibility with the First Amendment on two occasions in the last two decades. In neither case was the Court receptive to the idea that copyright infringers have serious claims to First Amendment sympathy. In both cases, the Court focused almost exclusively on copyright's incentive effects and seemingly regarded the restrictions it places on the speech of infringers as for all practical purposes irrelevant to the First Amendment

[104] Mark A. Lemley and Eugene Volokh, "Freedom of Speech and Injunctions in Intellectual Property Cases," *Duke Law Journal* 48 (1998): 147. See also Eugene Volokh and Brett McDonnell, "Freedom of Speech and Independent Judgment Review in Copyright Cases," *Yale Law Journal* 107 (1998): 2431 ("Copyright law restricts speech.").

[105] Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," *Yale Law Journal* 112 (2002): 1.

[106] Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain," *New York University Law Review* 74 (1999): 393 (emphasis added).

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analysis. In 1985, in *Harper & Row Publishers v. Nation Enterprises*,[107] the magazine *The Nation* sought to excuse on First Amendment grounds its use of verbatim excerpts from President Gerald Ford's copyrighted but not-yet-published memoirs. *The Nation* argued that the ordinary rule, which is to the effect that "the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use,"[108] should be relaxed in view of "the substantial public import of the subject matter of the Ford memoirs."[109] Deploying what Melville B. Nimmer had described in an influential law review article fifteen years earlier[110] as a "definitional balancing" methodology, the Court firmly rejected the magazine's claim. The methodology relied for the accommodation of First Amendment values on doctrines internal to the Copyright Act, namely, the "Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."[111] More importantly, the Court did not regard the Copyright Act as in any way fundamentally inconsistent with the First Amendment. To the contrary, the Court said, by "supplying the economic incentive to create and disseminate" works, "the Framers intended copyright itself to be the engine of free expression."[112]

More recently, in the 2003 decision of *Eldred v. Ashcroft*,[113] the Court rejected a facial First Amendment challenge to the Copyright Term Extension Act (CTEA).[114] Despite the recent outpouring of academic commentary and several amicus briefs urging the Court to reconsider, the Court showed no hesitation in continuing to embrace *Harper & Row*'s analytical underpinnings. "Copyright's purpose is to *promote* the creation and publication of free expression,"[115] the Court said. The *Eldred* challengers had argued that, because it "bars unauthorized use or dissemination of copyrighted works, copyright law restricts speech."[116] They claimed that congressionally enacted copyright law "must be justified under intermediate review."[117] The Court disagreed, affirming that "uncommonly strict scrutiny" is not necessary for "a copyright scheme that incorporates its own speech-protective purposes and safeguards."[118] Distinguishing CTEA from the Telecommunications Act's must-carry provisions, to which the challengers had analogized it and to which the Court

[107] 471 U.S. 539 (1985).
[108] *Id.* at 555.
[109] *Id.* at 556.
[110] Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" *UCLA Law Review* 17 (1970): 1180.
[111] *Harper & Row*, 471 U.S. at 560.
[112] *Id.* at 558.
[113] 537 U.S. 186 (2003).
[114] Pub. L. 105–298, § 102(b) and (d), 112 Stat. 2827–2828 (amending 17 USC §§ 302, 304).
[115] *Eldred*, 537 U.S. at ___, 123 S. Ct. 769, 788.
[116] Brief for Petitioners Eric Eldred, et al., No. 01–618, at 37.
[117] *Id.*
[118] *Eldred*, 537 U.S. at ___, 123 S. Ct. at 788.

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did give intermediate scrutiny in *Turner I* (1994),[119] Justice Ruth Bader Ginsburg's opinion concluded that restricting the speech of copyright infringers is generally not to be regarded as an "abridgement" for First Amendment purposes:

> CTEA . . . does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. . . . [W]hen . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.[120]

Eldred is striking in several respects. Most significant was the Court's affirmation of *Harper & Row*'s focus on copyright's incentive effects on producers of original works of authorship in the face of the increasing scholarly attention to the fact that the law restricts the speech of infringers. The Court was brusque in dismissing the CTEA challengers' First Amendment arguments, and it paid the academic literature virtually no heed whatsoever. While its decision to regard copyright as generally not problematic for First Amendment purposes, and its determination to focus almost exclusively on copyright's incentive effects is clear, its failure seriously to engage the arguments that emphasize copyright's speech restrictive effects is unfortunate.

From the point of view of preserving its institutional capital, the Court's indifference to the commentators' arguments is understandable. Had the arguments been found persuasive, the Court would have had not only to redraw a long-standing First Amendment boundary, but also to adumbrate its parameters in completely uncharted territory. The latter task might well have seemed particularly daunting. It is difficult to envision how heightened First Amendment scrutiny in copyright cases would or should or could actually work in practice, and equally hard to imagine how it would be possible to keep the doctrine from becoming just one more multifactored but essentially rootless, unprincipled pocket of First Amendment jurisprudence.[121] Still, the arguments in favor of heightened

[119] 512 U.S. 622 (1994)(*Turner I*).

[120] *Eldred*, 537 U.S. at ___, 123 S. Ct. at 774.

[121] *Cf.* Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," in Lee Bollinger and Geoffrey R. Stone, eds., *Eternally Vigilant: Free Speech in the Modern Era* (Chicago, IL: University of Chicago Press, 2002): 153 ("Doctrine becomes confused when the requirements of theory make little sense in the actual circumstances of concrete cases, or when doctrine is required to articulate the implications of inconsistent theories. First Amendment doctrine has unfortunately suffered from both these difficulties.").

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scrutiny have sufficient prima facie appeal to merit a more considered rebuttal than the cold shoulder they received from the Court. In what follows, I shall try to put the case that the result in *Eldred* stands on firmer ground than the Court's rather offhand analysis might imply.

The first strand in the argument points to the awkward fact that copyright and the First Amendment have coexisted practically since the United States' founding,[122] and until fairly recently the alleged First Amendment anomaly of copyright law struck few people as problematic. Before the recent avalanche of scholarly interest, there was little important scholarly literature that even raised the issue. The literature that did exist neither discerned profound conflict between copyright and First Amendment values nor regarded the speech of copyright infringers as having significant First Amendment worth.[123] Ironically, the conclusion of one of the few early commentators, Melville B. Nimmer, that copyright law itself contained the appropriate "definitional balance" between copyright owners and First Amendment values, provided the touchstone for the Court's analysis in *Harper & Row* and was reaffirmed in *Eldred*, though without reference to the fact that Nimmer himself had thought that the "reasons . . . justifying first amendment subordination to copyright [do not] justify [an] extension of an existing copyright term." [124] And there exist few cases in which First Amendment claims have been seriously considered.[125]

The historical pedigree and stubborn persistence of copyright's immunity to a successful First Amendment assault seems something of a puzzle today. Many scholars argue that the immunity is anomalous. They do not seem to think there exists a satisfactory explanation for it, and they cer-

[122] Congress proposed the Bill of Rights in 1789. It passed the first Copyright Act in 1790 (Act of May 31, 1790, ch. 15, 1 Stat. 124). The Bill of Rights was ratified in 1791.

[123] The principal literature essentially consisted of four articles: Robert C. Denicola, "Constitutional Limitations on the Protection of Expression," *California Law Review* 67 (1979): 283 (concluding that internal rules of copyright doctrine generally operate to avoid conflict with the First Amendment, but recommending narrow First Amendment privilege when necessary to enable users to contribute their ideas effectively to the public dialogue); Paul Goldstein, "Copyright and the First Amendment," *Columbia Law Review* 70 (1970): 983 (concluding that copyright law itself advances First Amendment values, but recommending that it should be subject to two accommodative principles in order to protect infringing uses that "independently advance the public interest" [at 988] and to require plaintiffs to demonstrate actual damages); Nimmer, "Does Copyright Abridge the First Amendment?" *supra* note 110 (concluding that in the idea-expression dichotomy, copyright law contains its own definitional balance that, for the most part, comports adequately with the underlying rationale for freedom of expression); and Lionel S. Sobel, "Copyright and the First Amendment: A Gathering Storm?" *Copyright Law Symposium* 19 (American Society of Composers, Authors and Publishers, 1971): 43 (since the First Amendment was designed to encourage and protect the communication of diverse ideas, and since copyright law protects only particular expressions, copyright does not conflict with any of the First Amendment's purposes). An exception to the statement in the text is Diane Leenheer Zimmerman's "Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the First Amendment," *William and Mary Law Review* 33 (1992): 665 (arguing that intellectual property claims are unlikely to take adequate account of speech values).

[124] Nimmer, *supra* note 110, at 1194–95.

[125] For a summary of the case law since 1970, see Netanel, "Locating Copyright," *supra* note 42, at 10–12.

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tainly do not regard its longevity as posing a legitimate impediment to change.

Some commentators contend that developments in copyright law and the profound technological innovations of recent years have brought about a copyright regime that differs in kind and not just in degree of protection from that which obtained earlier. At the time of the founding, only literal copying was prohibited and printing and copying were in their infancy. During the mid-twentieth century, the decades in which First Amendment doctrine as we know it today was being forged, technological change had not yet become transformative.[126] The claim appears to be that copyright has become a fundamentally different legal animal, with fundamentally different consequences, from what it was at the time of the founding. Those who make this claim regard the seemingly endless outward thrust of copyright protection—which has come to include derivative works, "substantially similar" as well as literal copies, and anticircumvention rights—as significant because it has expanded the extent of the copyright owner's control and thus put in private hands power over more speech than formerly. They also regard technological innovations as significant because digital technology makes it so easy and so cheap for individuals to make perfect copies of works. Anyone with a computer can do it, and just about everyone does. Computers make more copying possible than ever before, critics claim, and, therefore, enforcing copyright restricts more speech than ever before.

Commentators are correct to point out that Congress has responded to technological innovations—in particular to the ever-advancing technology of copying—and to changes in the market for copyrighted works by continually adjusting, indeed by steadily expanding, copyright owners' exclusive rights. Commentators are also correct to note that the anticircumvention provisions of the DMCA enhanced copyright owners' legal control over easily copied works in digital form. Refuting the inferences they draw from these facts will bring us to the second strand in the argument to demonstrate that the result in *Eldred* stands on firm ground, at least insofar as it denies heightened First Amendment scrutiny in run of the mill copyright cases: the continual adjustments of copyright owners' rights do not alter a previously immutable copyright balance, for there never was such a thing. In fact, as Jane Ginsburg has demonstrated, the history of copyright's evolution has been one in which each significant development of technology—the printing press, movable type, photography, motion pictures, audio recording, Xerography, digitization and digital networks—has willy-nilly altered the balance of control between

[126] *See, e.g.*, L. Ray Patterson and Judge Stanley F. Birch, "Copyright and Free Speech Rights," *Journal of Intellectual Property Law* 4 (1996): 3 ("New technology provides new means of mass communication that . . . enables the copyright owner to control access."); L. Ray Patterson, "Free Speech, Copyright, and Fair Use," *Vanderbilt Law Review* 40 (1987): 48 (The "copyright owner's right to control access to the work far exceeds what could have been imagined in 1841.").

authors and users, and each has eventually prompted "a new legal calibration" of the proper balance.[127] Moreover,

> [a]lthough the DMCA's regulation of technological measures may endeavor to ensure greater control for copyright owners over new markets created by new technology than in the past, the logic underlying this legislation is consistent with earlier approaches to copyright/technology conflicts.[128]

More to the point from this paper's perspective, the expansions of copyright owners' rights do not so alter the nature of copyright as a restriction on speech as to render the founders' understanding of the First Amendment implications of copyright no longer pertinent. The reason is that the Copyright Clause of the Constitution authorizes Congress "to secur[e] to authors . . . the *exclusive right* to their . . . writings.[129] Since the very definition of a property right is that it is an "exclusive right," the Copyright Clause explicitly contemplates propertization. Beginning with the first copyright statute, and continuing to the present day, Congress has granted what are and always have been the functional equivalent of property rights (regardless of what they were called) to authors of original works. Though their scope has been altered and expanded from time to time, and the degree of protection they afford has been adjusted to reflect both significant developments in intellectual property markets and revolutionary changes in the technology of copying, these property rights have since the founding given copyright owners the power to call upon the courts for enforcement by restricting expression that infringes. Since Congress passed the first copyright statute granting property rights in 1790, and the Bill of Rights was proposed by Congress in 1789 and ratified in 1791, and since the fundamental legal nature of copyright has remained unchanged, it seems that Justice Ginsburg was correct in *Eldred* when she concluded that the Bill of Rights' proximity in time to the first copyright statute "'indicates that, in the Framers' view, copyright's limited monopolies [i.e., property rights] are compatible with free speech principles."[130]

Some scholars who support expanded First Amendment review in copyright cases seem to suggest that, whatever the historical reality, expanded review would correct what has become an obvious and unjustified doctrinal error.[131] They maintain that copyright as it is presently enforced is simply not compatible with First Amendment doctrine as it is currently

[127] Jane C. Ginsburg, "Copyright and Control over New Technologies of Dissemination," *Columbia Law Review* 101 (2001): 1614.

[128] Ibid., 1617.

[129] U.S. Const., art. I, § 8, cl. 8 (emphasis added).

[130] *Eldred v. Ashcroft*, 537 U.S. at ___,123 S. Ct. at 788.

[131] *See, e.g.*, Volokh and McDonnell, "Independent Judgment Review in Copyright Cases," *supra* note 104, at 2446 (copyright laws must be seen as a speech restriction because they ban people from "saying a particular thing," and are thus speech restricting by definition).

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enunciated.[132] Their analysis implies (and sometimes it explicitly avers) that the success of a copyright plaintiff involves a *government* decision to restrict speech. They do not specify whether the reason they characterize it as the government's decision is because Congress passed the Copyright Act or because copyright owners invoke the aid of courts for the enforcement of their rights. Viewing the matter as a "who decides" question, however, the point is of no particular importance. We can assume *arguendo* that Congress acted when it passed successive versions of the Copyright Act, and that when courts rule in plaintiffs' favor in copyright cases they do so in their capacity as state actors. The assumption does not compel the conclusion that a judgment for a plaintiff in a copyright case represents the *government's* decision to restrict speech. Just as property rights in tangible things reflect a collective decision to allocate enforceable decision-making authority regarding use, possession, and disposition to private owners, property rights in original works of authorship reflect a collective decision to allocate decision-making authority regarding reproduction, derivative works, distribution, and the like, to private owners. In other words, when Congress decided to grant property rights in authors' original works, and from time to time revised the boundaries of and expanded the available enforcement mechanisms for such rights, Congress in effect allocated to *copyright owners* the decision whether to "restrict speech." As we have seen, in making this allocation, Congress acted consistently with the First Amendment and pursuant to the Copyright Clause of the Constitution. When a judge enjoins or awards damages for an infringement of copyright, though she is a government actor acting in her official capacity, she is not "deciding to restrict speech." Rather, pursuant to Congress's direction to put the decision whether to restrict speech in the hands of the private copyright owner, she is merely ascertaining the boundaries of the plaintiff's property right, determining that the defendant has trespassed upon it, and, enforcing the *copyright owner's* "decision to restrict speech."[133]

From an institutional perspective, there is a close analogy between what a court does in a copyright case and what a judge does who enforces a trespass law at the behest of an owner of real property who

[132] *See, e.g.*, Netanel, "Locating Copyright," *supra* note 42, at 4 ("As copyright law has evolved over recent decades, copyright owner prerogatives have steadily become more bloated. . . . In parallel, even if free speech law might have presented little ground for subjecting copyright to First Amendment scrutiny in the past, the evolving precepts and analytic framework of First Amendment doctrine now fully support, if not demand, such scrutiny.")

[133] The use of the word 'merely' in the text ought not to be taken to imply that the decisions that a judge makes in a copyright infringement suit are easy, or that they are uncontroversial, or that they raise no questions of policy regarding where the boundary of the plaintiff's property right ought to be located, for such is very far from being the case. The point being made in the text is, rather, that however difficult the decision about where the boundary should be located in a particular case, what the judge is attempting to do in institutional terms is to determine where the copyright owner's decision-making authority ends and the judge's authority begins.

seeks to exclude someone who would use the owner's property for First Amendment—speech—purposes. In the trespass case, of course the government is "acting," but for constitutional purposes its action is reflected in its anterior decision to enforce private owners' decisions to exclude. Having decided to enforce such decisions via the law of trespass, the government cannot meaningfully be said to have endorsed the particular (speech-restrictive) consequences of any particular owner's decision. By a parity of reasoning, the government "acts" in a copyright case too, but the constitutional significance of its action is contained in its anterior decision to enforce private copyright owners' decisions to exclude infringers who wish to use any particular owner's property—his "original work of authorship"—for speech purposes. True, the trespass cause of action will lie regardless of whether the trespasser was speaking and without regard to what he wanted to say, whereas deciding that there has been a copyright infringement will require the fact-finder to look at the content of both the plaintiff's and the defendant's speech. Because the inquiry into content is limited to determining the boundaries of the plaintiff's property right and whether the defendant's speech infringes, it raises none of the risks that the prohibition on restricting speech "because of its content" is designed to forestall. The judge in the copyright case will not inquire, for example, into either the infringer's or the copyright owner's point of view, nor will she ask about the effects their substantive messages are likely to have on the audience. I develop these points in the analysis that follows.

Jed Rubenfeld is among the commentators who reject the copyright-trespass to real property analogy, and his argument provides a good platform from which to assess more thoroughly the analogy's soundness. Rubenfeld presents three main objections. First, he observes, the law of trespass to real property does not make speaking an element of the offense. Copyright law, in contrast, makes people liable not only because they are speaking but also because of what they say. Second, he claims that the relevant comparison is not between copyright and the First Amendment-trespass case of *Hudgens v. NLRB*, but between copyright and the First Amendment-libel case of *New York Times v. Sullivan*.[134] Third, he claims that the reasons why state enforcement of trespass laws do not violate the First Amendment "disappear when we turn to copyright."[135]

Consider the first objection, which is based on Rubenfeld's observation that copyright law makes people liable not only because they are speaking but also because of what they say, whereas trespass does not make speaking an element of the offense. The observation seems to imply that copyright law necessarily conflicts with the canonical doctrine, enunci-

[134] 376 U.S. 254 (1964).
[135] Rubenfeld, "Copyright's Constitutionality, *supra* note 105, at 29.

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ated *in dictum* in the 1972 case of *Police Department of Chicago v. Mosley*,[136] that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[137] In response, it is important to emphasize that, because it aims at speech *that infringes*, and restricts a defendant's expression only if it reproduces the plaintiff's, copyright liability does not represent a genuine threat to the implementation of the First Amendment strategies embodied in the *Mosley* dictum.

In fact, it is plausible to argue that copyright infringement liability neither punishes nor deters *speech* on account of its content. Instead it aims at *conduct* that infringes: unauthorized reproduction, preparation of derivative works, distribution, public performance, and the like. Viewing copyright infringement as behavior that combines speech and nonspeech elements would require the Court to subject copyright law to First Amendment review, but it would be the lenient scrutiny prescribed by the Court in the draft-card burning case of *United States v. O'Brien*.[138] In *O'Brien* the Court held that a regulation of behavior that combines speech and nonspeech elements will be sustained if it is

> within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[139]

The most significant part of the *O'Brien* test is the determination whether the government's interest in the regulation is "unrelated to the suppression of freedom of expression," because the answer is likely to be outcome determinative. If the Court determines that the government's interest is unrelated to the suppression of freedom of expression, then it is likely in practice to subject the regulation, both on its face (as discerned from the terms of the regulation itself) and as applied (as evidenced from the particular application at issue), to extremely lenient review, which means that the regulation is very unlikely to be found to violate the First Amendment. Though the cases applying the test for whether a regulation is "unrelated to suppression of free expression" are not entirely uniform, it is possible to discern a consistent theme: where the harm that the statute (or its application) is seeking to avert is one that is independent of the message being regulated—that is, the harm arises from something other than a fear of how people will react to what the speaker is saying—the

[136] 408 U.S. 92 (1972).
[137] *Id.* at 95.
[138] 391 U.S. 367 (1968).
[139] *Id.* at 377 (Warren, C.J.).

government's interest is "unrelated to suppression."[140] Application of this test to copyright law on its face, or as it is applied in an infringement judgment in any particular case, yields the conclusion that copyright is regulation unrelated to suppression of freedom of expression. The reason is that the harm the copyright statute (or its application in a particular case) seeks to avert—the harm to the copyright owner's property that unauthorized reproduction, preparation of derivative works, distribution, and the like create—is independent of the infringer's message that is being regulated and arises from something quite other than a fear of how people will react to the ideas the infringing speaker is attempting to convey.

Rubenfeld's implication that copyright law is at odds with the First Amendment's aversion to content regulation takes no account of a very important fact: even if the question of whether the defendant has infringed turns in every case on the "content" of both the plaintiff's and the defendant's work, the nature of the inquiry into content will not bring into play any of the reasons for the aversion to content regulation. The Court's express distrust of content-based regulations is more than a convenient knee-jerk doctrinal guideline. It reflects a number of concerns that emerge from consideration of the First Amendment's animating values.[141] For example, it reflects a concern for equality—that particular categories of speech be treated equally so as to deflect the government from attempting to manipulate public discourse. Second, it reflects a concern to prevent government from regulating speech based on its communicative impact, thus forestalling restrictions of speech that surreptitiously rely on constitutionally disfavored justifications. It reflects a concern to foreclose the possibility that government will deliberately distort debate by preventing the communication of particular disfavored ideas, viewpoints, or items of information. Finally, it reflects a concern with improper legislative motivation. But a judgment that a copyright defendant's work reproduces the plaintiff's, or is based upon it, or distributes or publicly performs it, though it will of course be based on the content of both the plaintiff's and the defendant's speech, simply raises none of these concerns. It does not jeopardize the equality of treatment of particular categories of speech so as to enable government to manipulate discussion. It does not turn on the speech's communicative impact. And it does not raise the risk of an improper government motivation to prevent the dissemination of particular ideas, viewpoints, or items of information that the government disfavors. In fact, the predicate for copyright liability is not the communicativeness of an infringer's speech at all. It is, rather, its similarity to the plaintiff's—

[140] See generally John Hart Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," *Harvard Law Review* 88 (1975): 1482.

[141] See generally Geoffrey R. Stone, "Content Regulation and the First Amendment," *William and Mary Law Review* 25 (1983): 217.

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and even then it is only its similarity to the plaintiff's expression, not to the ideas or facts therein.

Rubenfeld analogizes the Copyright Act to the flag-burning statute that prohibited "defacing or destroying an American flag in a fashion that intentionally communicates disrespect" and that the Court declared unconstitutional in 1989 in *Texas v. Johnson*.[142] In fact, the two statutes are very unalike. The flag-burning statute was held unconstitutional, to be sure, but not as Rubenfeld claims "because it [made] the *communicativeness* of the defendant's actions an element of the offense."[143] Instead, the problem with the statute was that defendant's liability "depended on the likely *communicative impact* of his conduct.[144] More particularly, liability depended on the fact that the message he communicated "would cause serious offense to others."[145] A copyright defendant's liability does not turn on the communicative impact of his conduct, nor on the fact that his message might cause offense to his audience. It turns only on the form his expression takes and on whether it copies the plaintiff's.[146]

Next consider Rubenfeld's second objection to the copyright-trespass analogy, which is based on the claim that the appropriate comparison is not between copyright and *Hudgens v. NLRB* but between copyright and *New York Times v. Sullivan*,[147] the 1964 case in which the Supreme Court for the first time subjected libel law to First Amendment scrutiny. Ruben-

[142] 491 U.S. 397 (1989).

[143] Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 26 (emphasis added).

[144] *Texas v. Johnson*, 491 U.S. at 411–12 (emphasis added).

[145] *Id.* at 411.

[146] This observation is also relevant to another of Rubenfeld's claims, namely, that copyright law is in significant tension with the line of First Amendment cases that he says "systematically rejects the notion that a regulation of speech is constitutional if it 'merely' prohibits particular forms of expressing ideas, rather than the ideas themselves." Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 14. In *Cohen v. California*, 403 U.S. 15 (1971), the Court overturned the disturbing the peace conviction of a man whose jacket bore the inscription "Fuck the Draft" on the back. In Rubenfeld's view, "if the First Amendment protected only ideas, and not particular expressions thereof, Cohen should have gone to jail." Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 15. A careful reading of *Cohen*, however, suggests that the reason the Court protected the expression in that case was, in fact, that the Court perceived that "excising as offensive conduct one particular scurrilous epithet" from the language carried too great a risk of permitting censorship of *ideas*. Indeed, the Court was explicit about this: "[W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." 403 U.S. at 26. In other words, in *Cohen*, the Court was convinced that the idea and the expression effectively merged, so that to suppress the particular expression amounted to suppression of the particular idea. Copyright law's idea-expression dichotomy, however, assumes that most ideas can be adequately expressed in a wide variety of ways; when courts are convinced that there are but one or a few ways of expressing an idea, they will apply the copyright merger doctrine and leave the expression unprotected. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (holding that when the subject matter is very narrow, so that the topic necessarily requires only a limited number of forms of expression, the merger doctrine will apply so as to deny copyright to the subject matter at all). In any case, copyright law does not proscribe particular expressions, as the state argued that the California statute did in *Cohen*. Rather, copyright law proscribes copying of particular expressions.

[147] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

feld is not alone in regarding *Sullivan* as analogous,[148] but he puts the argument most succinctly: "Copyright stands to property law as libel stands to tort law; copyright makes speech property, as libel makes speech a tort."[149] The conclusion that since libel must conform to First Amendment constraints, so must copyright, is said to follow. The conclusion does not, however, necessarily follow, though the reasons are complicated and thoroughly to explore them is beyond the scope of this paper, as they raise surprisingly profound issues of First Amendment theory. I shall attempt, however, to give the reasons in broad outline.

My reasons begin with a restatement of the First Amendment implications of the fact that "copyright makes speech property." As I have demonstrated, the argument is straightforward (though, as I hope I have made clear, I do not claim it is uncontroversial): the Copyright Act confers the functional equivalent of property rights on authors, and infringement of copyright is thus the functional equivalent of trespass. According to *Hudgens*, there is no First Amendment right to trespass on tangible property, and by a parity of reasoning there is no First Amendment right to "trespass" on intangible property, that is, there is no First Amendment right to infringe copyright. This, in a nutshell, is why the copyright-trespass analogy is apt. Rubenfeld rejects this analogy in favor of the copyright-libel analogy, but he does so not because copyrights are not property rights. Rather, he thinks that what matters is that copyrights differ from "ordinary" property rights in the crucial respect that copyrights, like libel laws, render "speaking an element of the offense."[150] And he asserts that it was "precisely because libel . . . makes speech as such illegal [that] courts were eventually obliged to address and redress its First Amendment consequences."[151] This assertion, in my view, mischaracterizes the reason why courts—in particular, the Supreme Court—undertook to constitutionalize the law of libel, and it is this mischaracterization that renders Rubenfeld's equation of copyright and libel problematic. It was not a concern with "speech as such" that moved the Court in *Sullivan*. It was, instead, the concern to prevent the punishment of seditious libel, to protect those who criticize government and the conduct of government officials. On account of this focus, and not on account of the supposed importance of "speech as such", the *Sullivan* case was hailed for having discerned the "central meaning" of the First Amendment.[152] True enough, defamation juris-

[148] *See, e.g.*, Benkler, "Free as the Air to Common Use," *supra* note 106, at 393–94 (arguing that copyright doctrine is "no different" from libel law); and James Boyle, "The First Amendment and Cyberspace: The Clinton Years," *Law and Contemporary Problems* 63 (2000): 340–48 (arguing that *New York Times v. Sullivan* provides an apt analogy for resolving copyright/First Amendment conflicts).

[149] Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 26–27.

[150] Ibid., 25.

[151] Ibid., 26.

[152] Cf. Harry Kalven, "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment,'" *Supreme Court Review* 1964 (1964): 191.

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prudence in the Supreme Court soon detached itself from its seditious libel roots,[153] and by now the First Amendment has been held to apply to false statements of fact about private figures whether or not the speech is even about matters of public concern.[154] In addition, recent case law provides some support for the claim that the Court may have become persuaded that "speech as such" is worth protecting,[155] but there is case law that points in quite the opposite direction.[156] Thus, the fact that copyright, like libel, "renders speaking an element of the offense" does not provide unequivocal support for the conclusion that the First Amendment constrains copyright, as it constrains libel. Nor is it reason enough to reject the conclusion that, as the First Amendment does not constrain the law of trespass, so it does not constrain the law of copyright.

Consider next Rubenfeld's third objection to the copyright-trespass analogy, which he discusses under the heading "Private Power over Public Speech." He claims that the reasons why state enforcement of trespass laws do not violate the First Amendment "disappear when we turn to copyright."[157] One of those reasons, he says, is that property owners lack general power to block the speech of the public at large, whereas a "copyright owner's power applies to the public at large, anywhere and everywhere."[158] The argument fails to account for the fact that a copyright owner's power over the speech of the public at large exists only with regard to particular expression and not with regard to ideas. Thus, the important implication of this aspect of copyright law, which is known as the 'idea-expression dichotomy', is that, though it is notoriously difficult to apply in practice, *in principle* it embodies a significant limitation on a copyright owner's power to "block the speech of the public at large." Just

[153] *See, e.g.*: *Curtis Publishing Co. v. Butts*, decided together with *Associated Press v. Walker*, 388 U.S. 130 (1967) (holding the *New York Times* standard of liability for defamation applicable to libel actions brought by "public figures" as well as by "public officials.")

[154] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that strict liability for defamation is not compatible with the First Amendment, but that so long as they do not impose liability without fault, the states may define the appropriate standard of liability for false statements of fact about private individuals).

[155] *See, e.g.*, Robert Post, "Recuperating First Amendment Doctrine," *Stanford Law Review* 47 (1995): 1249 (arguing that contemporary First Amendment jurisprudence seeks to protect the abstract fact of communication, but that in doing so it has become deeply incoherent). See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that the application of a federal statute prohibiting the disclosure of material that the disclosing party had reason to know had been illegally and intentionally intercepted violated the First Amendment); and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that public figures and public officials may not recover for intentional infliction of emotional distress by publication without showing that the publication contained a false statement of fact that was made with "actual malice," that is, with knowledge of its falsity or with reckless disregard of its truth).

[156] *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that the First Amendment does not protect a publisher from damages for revealing confidential sources); and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that the First Amendment does not protect a broadcaster from damages for broadcasting a performer's entire act without his consent).

[157] Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 29.

[158] Ibid.

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as trespassers who are denied access to a particular parcel of real property may communicate their ideas or messages in an almost infinite variety of alternative forums, so, too, may infringers who are denied the right to copy particular expressions communicate the same ideas or messages in an almost infinite variety of alternative formulations. The continual outpouring of new expressive works—books, movies, songs, and plays—that do not infringe existing works would seem to testify to the narrowness of a copyright owner's rights to control the speech of the public at large, not to its breadth.

Rubenfeld thinks it matters that when ordinary property owners invoke their right to exclude, we "tend to" regard them as "exercising First Amendment rights of their own,"[159] but when copyright owners exercise their statutory rights to prevent infringement, we do not so regard them. To be sure, there are cases where compelled access to property for the purposes of speech has been held to have violated the property owners' First Amendment rights,[160] but these holdings have not applied in the cases in which First Amendment claims of access to private property have failed on property rights grounds, and the soundness of the copyright-trespass analogy therefore does not depend on them. *Hudgens v. NLRB*[161] is, of course, the principal case in which the Court held that there is no First Amendment right to trespass on real property. Its holding rests unequivocally on the owner's property right to exclude. The opinion makes no mention of the owner's First Amendment rights. Rubenfeld points out that "no one has a First Amendment right to be the only speaker of certain words,"[162] but the relevance of this fact to the copyright-trespass analogy is not as obvious as he thinks. Copyright does not grant authors exclusive rights in "certain words." Rather, it grants them rights in their expressions, that is, in words arranged in particular sequence, conveying ideas in particular ways. Moreover, and more importantly, copyright ownership does not purport to give copyright owners *First Amendment* rights to prevent infringement; instead, it gives them property rights in their original expressions, rights that are purely creatures of statute—products of Congress's collective judgment to lodge decision-making power regarding the exploitation of original works of authorship in the hands of those who create them.

B. Trespass in virtual space and the First Amendment

This subsection considers the conformity to the First Amendment of the anticircumvention provisions of the DMCA, such as those that were litigated in *Universal City Studios, Inc. v. Corley*,[163] as well as the trespass

[159] Ibid., 28.
[160] See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
[161] 424 U.S. 507 (1976).
[162] Rubenfeld, "Copyright's Constitutionality," *supra* note 105, at 29.
[163] 273 F.3d 429 (2d Cir. 2001).

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claim that was sustained by the California district court of appeal decision in *Intel Corp. v. Hamidi*.[164] In institutional, "who decides," terms, the effect of the anticircumvention provisions is to lodge control over access to copyrighted works in the hands of copyright owners and the effect of the court decision sustaining the trespass claim is to lodge control over communication with persons on proprietary networks in the hands of their private proprietors. Thus, the way to frame the inquiry pursued in this section, consistent with this paper's institutional perspective, is to ask whether the Constitution forbids Congress or state common law rules to vest in private hands substantively unreviewable authority to control access. The more conventional way to frame the inquiry, and to make it more specific, is to ask whether access seekers have First Amendment rights to compel private owners to let them in, either for purposes of using, copying, or disseminating content on a Web site or for the purpose of communicating content to those on an e-mail network. If the question is framed in this conventional way, and the conclusion is that access seekers do have First Amendment rights, this means that the Constitution lodges in government decision-makers—namely judges—the ultimate power to make substantive judgments about when, and on what terms, and for what purposes access shall be granted to privately owned Web sites or e-mail networks. The anticircumvention provisions present the question whether compelled access for the purpose of digitally gathering content is constitutionally required, while *Intel* raises the question whether the Constitution mandates access for the purpose of communicating.

Given the First Amendment results canvassed in Section IV, if the trespass to tangible property analogy developed in Section III is sound, then the answer to the question posed in this section is virtually a foregone conclusion: the First Amendment neither requires that access be granted to digital content nor commands that proprietary networks receive communications they do not welcome. It is worthwhile, nevertheless, to summarize the cases that have addressed the issues.

Take first *Universal City Studios, Inc. v. Corley*,[165] in which the U.S. Court of Appeals for the Second Circuit dismissed a First Amendment challenge to the anticircumvention provisions of the DMCA. The defendant had posted a decryption computer program on his Web site. The program circumvented encryption technology that motion picture studios use to prevent unauthorized viewing and copying of their movies. Eight studios sought injunctive relief against the defendant, relief that the district court granted and the Second Circuit affirmed. The defendant argued that, because computer code is "speech," and the DMCA regulates it, the DMCA must be subjected to strict scrutiny. Judge Jon O. Newman's opinion for the Second Circuit first concluded that, because of what computer code is

[164] 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001), *review granted*, 43 P.3d 587 (Cal. 2002), *reversed*, 2003 Cal. LEXIS 4205.

[165] 273 F.3d 429.

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and what its normal functions are, it should be treated as combining nonspeech and speech elements, and that "the causal link between the dissemination of circumvention computer programs and their improper use is more than sufficiently close to warrant selection of a level of constitutional scrutiny based on the programs' functionality."[166] The court analogized the decryption code to "a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store's products,"[167] but because computer code is a form of communication and thus has a claim to being "speech," the court declined to hold that "Congress has as much authority to regulate the distribution of computer code . . . as it has to regulate distribution of skeleton keys."[168] Therefore, the court applied the intermediate scrutiny that the *Turner I* case prescribes for content-neutral regulation, and concluded that the DMCA and the provisions of the injunction that prohibited the defendant from posting the decryption code on the Internet or from linking to other sites that contained it were targeted at the nonspeech element of computer code, namely, at the code's capacity to instruct a computer to decrypt the studios' encryption code and at the capacity of linking "instantly to enable anyone anywhere to gain unauthorized access to copyrighted movies."[169] Accordingly, the court held that these provisions of the injunction survived scrutiny.

In *Intel Corp. v. Hamidi*,[170] the defendant, a former employee whom Intel had fired, flooded Intel's internal e-mail system on a number of occasions with grievances about the company. He sent thousands of copies of the same message on six occasions over a period of twenty-one months, ignored Intel's requests to stop, and was able to evade its efforts to block his messages. Intel brought a trespass to chattel claim, the California trial court granted an injunction, and the intermediate appellate court affirmed. After canvassing treatises and cases regarding the necessity of showing actual damage in order to recover damages for trespass to chattels, the court determined that the availability of damages was irrelevant: "Intel seeks no damages."[171] The important fact was that "Hamidi's conduct was trespassory,"[172] and "[j]udicial enforcement of neutral trespass laws has been held *not* to constitute state action."[173] Though the court addressed the issue principally as though the result were a function of the formal absence of "state action," it relied equally on the more substantively realistic claim that it was not the absence of state action that justified the result, but, rather, the fact that the Supreme Court "has never

[166] *Id.* at 452.
[167] *Id.* at 453.
[168] *Id.*
[169] *Id.* at 457.
[170] 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001), *review granted*, 43 P.3d 587 (Cal. 2002), *reversed*, 2003 Cal. LEXIS 4205.
[171] *Id.* at 249.
[172] *Id.*
[173] *Id.* at 253–54.

held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." [174]

Thus, both the U.S. Court of Appeal for the Second Circuit and the California Court of Appeal for the Third Appellate District implicitly embraced the trespass rationale for resolving access claims in the digital world. The courts did not reason in terms of the institutional analysis offered here, and they did not frame their conclusions as having been driven by "who decides" considerations. Nevertheless, it is possible to understand both cases as applications of the principle that the Constitution permits the government to allocate enforceable decision-making authority about production and use of resources, including intangibles and including the resources' use for speech purposes, to private actors.

VI. Conclusion

This essay addressed the question of whether the institutional choices that are reflected in the common law of trespass can provide useful guidance for resolving conflicting claims of access either to the expressive content of copyrighted works or to Internet content and proprietary e-mail systems. It described the principal instrumental justification for adopting a system of private property rights to control access to tangible things, and suggested that the justification applies with equal force to intellectual property. It analyzed the First Amendment dimensions of the access question and concluded that there is no First Amendment right to compel a private owner to grant access either to tangible or to intangible property.

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[174] *Id.* at 254, quoting *Lloyd v. Tanner*, 407 U.S. 551, 568 (1972).

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