Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine

Tom W. Bell

FAIR USE VS. FARED USE: THE IMPACT OF AUTOMATED RIGHTS MANAGEMENT ON COPYRIGHT'S FAIR USE DOCTRINE

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In this Article, Professor Bell examines the impact of new technologies on copyright's fair use doctrine. The Article examines the prospective capabilities of automated rights management technologies to monitor and track the exchange of information in digital intermedia, such as the Internet, that would enable copyright holders to bill consumers for use of their works. Professor Bell argues that these billing capabilities will cause a transformation in copyright law: a system of "fared use" will radically reduce the scope of the "fair use" defense. Upon examination of the effects of such a transformation, Professor Bell posits that a system of fared use actually may offer freer access to expressive works. Professor Bell argues that allowing copyright owners and consumers to exit copyright law and freely contract under a fared use system in time may reveal a system more beneficial than one preempted by federal copyright law. Professor Bell concludes by urging lawmakers and academics to await the emergence of new automated rights technologies and allow experimentation in the market to dictate copyright law's adaptation to such new technologies, rather than requiring new technologies to adapt to the traditional fair use doctrine.

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I. INTRODUCTION

"Information wants to be free," claim those who decry the over-zealous enforcement of copyrights.[1] But they cannot mean what they

1. *See* David Stipp, *The Electric Kool-Aid Management Consultant*, FORTUNE, Oct. 16, 1995, at 160, 166 (characterizing "information wants to be free" as the "cyberhacker rallying cry," and attributing it to Stewart Brand). For a recent explication of this claim, see Interview by *Frontline* with Stewart Brand, founder of the WELL online service, in San Francisco, Cal. (June 15, 1995), *available at* <http://www2.pbs.org/wgbh/pages/frontline/cyberspace/brand.html> (visited Oct. 3, 1997) ("[T]he net . . . is basically a gift economy. . . . For a company or business to get into the net, they need to join that way of

say. *Information* wants nothing at all.[2] This contemporary epigram instead reveals, indirectly, what *people* want. Perhaps it originated as a mere prediction about the difficulty of enforcing intellectual property rights on the Internet and in other digital intermedia.[3] Facing newly effective means of enforcing such rights, however, those who claim "information wants to be free" increasingly give the slogan a normative spin. Its meaning then boils down to this: people want information for free.[4]

So restated, the catch-phrase still rings true. All else being equal, who would not prefer to get information—that increasingly vital good—at no cost? But, alas, information never comes for free. We can only account for its costs as fully as possible, try our best to minimize them, and allocate them fairly.

The information economy balances fixed and variable costs from several sources. On the one hand, consumers necessarily bear costs when they search for, interpret, and collect information. This holds true even when—perhaps *especially* when—the fair use defense to copyright infringement allows a consumer to avoid paying *cash* for the right to use an expressive work.[5] On the other hand, information providers necessarily bear costs when they create, package, and distribute information. They thus seek remuneration and profit through licensing fees, at least so far as the countervailing fair use defense and various practical hurdles will allow.[6]

One method in particular offers information providers a promising way to increase their licensing opportunities: automated

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doing things and so typically it means giving away software .... It means often giving away content.").

2. To hold otherwise would require one to embrace a sort of digital animism, and to attribute cognitive states to mere collections of bits, or to rely on an outmoded, scholastic notion of causation. *See, e.g.*, ARISTOTLE, PHYSICS, bk. II, ch. 3, 194a33 (R.P. Hardie & R.K. Gaye trans., c. 335-320 B.C.), *reprinted in* THE COMPLETE WORKS OF ARISTOTLE 332 (Jonathan Barnes ed., 1984) (describing final causation as "the sense of end or that for which a thing is done").

3. This Article uses "digital intermedia" to refer to the Internet, circuit-switched networks, and other interactive channels over which digital information gets distributed and through which automated rights management can function. "Digital intermedia" does not encompass such comparatively non-interactive distribution channels as CDs, CD-ROMs, and digital audio cassettes.

4. Stewart Brand actually came fairly close to this sense in an early formulation of his now-widespread aphorism: "Information wants to be free because it has become so cheap to distribute, copy and recombine—too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient." STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT M.I.T. 202 (1987).

5. *See infra* Part III.A.1.

6. *See infra* Part III.A.2.

rights management ("ARM").[7] ARM enables information providers to enforce standard copyright claims mechanically, without resort to the threat of litigation. It also allows copyright owners and others to create and enforce contracts that specify other sets of rights.[8] Although ARM may give information providers newfound power to control the use of their wares, it does not necessarily justify that control. The proper legal response to ARM thus remains an open—and vital—question.

ARM portends far-reaching and unprecedented effects on rights to information in the new digital intermedia. Specifically, ARM threatens to reduce radically the scope of the fair use defense to copyright infringement.[9] ARM will interact with existing legal

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7. This Article favors "automated rights management" as the most exact label for the processes at issue. Terminology in this new field remains in flux, however. Alternative terms, rejected here as either too broad or narrow, include "trusted systems," *see* Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, at 78, 78, *available at* <http://www.sciam.com/0397issue/0397stefik.html> (visited Nov. 5, 1997); "copyright management," *see* WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, U.S. DEP'T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS *passim* (1995) [hereinafter NII WHITE PAPER]; Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, *passim* (1996); "rights management," *see* Mary Grace Smith & Robert Weber, *A New Set of Rules for Information Commerce—Rights-Protection Technologies and Personalized-Information Commerce Will Affect All Knowledge Workers*, COMM. WK., Nov. 6, 1995, at 34, 34; Robert Weber, Digital Rights Management Technologies *passim* (Oct. 1995) (unpublished report to the International Federation of Reproduction Rights Organizations) (on file with the *North Carolina Law Review*); "copy-protection," *see Technological Solutions Rise to Complement Law's Small Stick Guarding Electronic Works*, INFO. L. ALERT, June 16, 1995, at 3, 4 [hereinafter *Technological Solutions*]; "transcopyright," *see* Theodor Holm Nelson, *Transpublishing and Transcopyright* (visited Nov. 5, 1997) <http://www.sfc.keio.ac.jp/~ted/transpub.transco.html>; and "telerights," *see* Wade Riddick, *From Copyright to Telerights*, BYTE, Feb. 1996, at 248, 248.

8. *See infra* Part II.A (describing the functions of ARM). ARM encompasses a variety of technologies, including: encryption, firewalls, and passwords to limit access to information; digital watermarks and stegonography to identify electronic documents; and micropayments and embedded applications to ensure that users pay for protected information.

9. *See* David Post, *Battle or Dance?*, AM. LAW., Jan./Feb. 1996, at 116 (observing that due to automated rights management, " 'transaction costs'—of negotiating a license fee for each use of a copyrighted work, however trivial and insignificant—are rapidly disappearing," and raising the question: "Once tracking and payment mechanisms of this kind are in place, is there still a place for fair use?"); David G. Post, *Controlling Cybercopies; Leaping Before Looking; Proposals Would Make Unsettling Changes*, LEGAL TIMES-SPECIAL REPORT; INTELL. PROP., Apr. 8, 1996, at 39, 45 [hereinafter Post, *Controlling Cybercopies*] ("[A]lthough one may retain the theoretical legal right to make fair use of material, where rights holders are permitted to use powerful technological means to control access to their works, fair use may prove illusory.").

doctrines to supplant *fair* use[10] with an analogous but distinctly different doctrine: *fared* use.[11] Part II of this Article details the causes of this transformation and closes with a worst-case scenario.

Part III, in contrast, catalogs the benefits of fared use. It describes the legal and practical scope of fared use and defends it as not only efficient, but equitable.[12] Fared use would make copyrighted works in the digital intermedia available under reciprocal quasi-compulsory licenses. Although consumers might have to pay fees that the fair use defense would excuse in other media, they would in return gain better access to better information. Fared use would not necessarily cost consumers more, however, because the fair use doctrine now imposes considerable hidden costs.[13] Though they might win increased licensing fees under fared use, copyright owners would, thanks to a diminished but still potent fair use defense, have to endure greater exposure to the objectionable reuse of their works.

A default rule of fared use would create a new public bargain between consumers and copyright owners that would largely flow from the interaction of ARM with current law. Part IV argues, however, that consumers and providers of information should have the right to shape alternative licensing systems through private agreements. Although we cannot yet discern exactly what sort of rights to information would evolve under contracts backed by ARM—an excellent reason for lawmakers to avoid premature meddling in the field[14]—a plausible accounting shows that the public,

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10. Broadly speaking, the fair use defense covers certain unauthorized uses of a copyrighted work, such as in commentary or scholarship, that do not displace the copyright owner's potential licensing fees. *See infra* note 20.

11. Very broadly speaking, fared use would require consumers to pay for the right to access and reuse information, rather than appealing to a statutory fair use exception. *See infra* Part II.A.

12. Although some aspects of fared use have yet to come to pass, we have much to gain from proactively preempting the difficult legal problems that originate with the onset of new technologies. *See* Tom W. Bell, *Virtual Trade Dress: A Very Real Problem*, 56 MD. L. REV. 384, 388 (1997).

13. Such hidden costs include the uncertainty created by the fair use doctrine's uncertain boundaries, the losses passed on to consumers by copyright owners who lose licensing revenue due to fair use, and various other costs. *See infra* Part III.A.3.

14. The *NII White Paper* has drawn exactly this criticism by calling on lawmakers to, among other things, outlaw devices that could negate copyright protection and penalize tampering with copyright management information. *See, e.g.*, Post, *Controlling Cybercopies*, *supra* note 9, at 45; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134, 136 [hereinafter Samuelson, *The Copyright Grab*]; Pamela Samuelson, Technological Protection for Copyrighted Works 22-27, 33 (Feb. 14, 1996) (unpublished manuscript, on file with the *North Carolina Law Review*) [hereinafter Samuelson, Technological Protection], *available at* <http://sims.berkeley.edu/~pam/

as well as the contracting parties, can benefit. Entrepreneurs can create a world where information costs less than it does under fair use, and perhaps even one where the public gets *paid* to consume information. To encourage experimentation, therefore, lawmakers should not flatly invalidate fared use agreements that skirt preemption. Rather, they should allow information consumers and providers to exit freely from copyright law into contract law.

The impact of technological advances on copyright has generated a large and interrelated body of commentary. It thus bears noting what the present Article does *not* concern. It does not address how automated rights management might affect consumers' privacy.[15] Nor does it spend much time on the comparatively easier question of how ARM might interact with the first sale doctrine.[16] Despite this Article's occasional cites to the recent *NII White Paper*,[17] it leaves detailed criticism of that controversial document to others.[18] Broad questions about the justifiability and continued viability of copyright law exceed the bounds of the present inquiry.[19] The feasibility and

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courses/cyberlaw/docs/techpro.html> (visited Nov. 5, 1997).

15. For recent treatments of this important topic, see generally Cohen, *supra* note 7 (evaluating the import of digital monitoring of individual reading habits in the context of traditional notions of freedom of thought and expression); A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 486-88 (1996) (discussing business profiling of Web users).

16. The first sale doctrine, codified at § 109 of the Copyright Act, specifies that copyright law does not prevent the owner of a particular copy or phonorecord to sell or otherwise dispose of it at will. *See* 17 U.S.C. § 109 (1994). The first sale doctrine does not affect ARM transactions, however, because they more closely resemble licenses than sales. Furthermore, Congress and the courts have made it quite clear that the first sale doctrine does not preempt contracts controlling post-sale use of copyrighted works. *See* American Int'l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) (noting that the first sale doctrine does not bar contract suits); United States v. Wise, 550 F.2d 1180, 1187 (9th Cir. 1977) (same); H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675-76 (same).

17. *See supra* note 7.

18. *See, e.g.*, Post, *Controlling Cybercopies*, *supra* note 9, at 45 (criticizing the *NII White Paper* for proposing potentially revolutionary changes to online information use without providing adequate justification or allowing adequate discussion); Samuelson, Technological Protection, *supra* note 14, at 14-35 (questioning the wisdom of the *NII White Paper*'s provisions regarding protection of copyright management information).

19. For interesting treatments of this issue, see generally OFFICE OF TECH. ASSESSMENT, CONGRESS OF THE U.S., INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION (Apr. 1986), *available at* <http://www.wws.princeton.edu/~ota/ns20/alpha_f.html> (visited Nov. 5, 1997) (questioning the copyright paradigm); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (giving skeptical consideration of the instrumental need for copyrights); Negativland, *Fair Use* (visited Oct. 3, 1997) <http://www.eff.org/pub/Intellectual_property/fair_use.article>

desirability of relying solely on contracts and trade secrets to protect expressive works deserves more attention, but the scope of that particular issue demands a separate article.

Both friends and foes of copyright can find something of use in this Article. It provides the former with a defense of widespread licensing and the latter with a graceful exit to a copyright-free world. Readers who hold the middle ground, preferring fuzzy copyrights and broad fair use privileges, may find the present account a bit bracing. Ultimately, though, they will find that the fared use system described here achieves many of their most cherished policy goals.

II. THE FUTURE OF FAIR USE?

However esoteric a topic to the rest of the world, the proper scope of the fair use doctrine[20] evokes heated debate among people who peddle information for a living.[21] A confluence of recent events has especially alarmed scholars, librarians, and other parties who rely

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(questioning private ownership of mass culture's elements); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817 (1990) [hereinafter Palmer, *Patents and Copyrights*] (arguing on philosophical grounds that copyrights unjustifiably and unnecessarily rely on state sanctions); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261 (1989) [hereinafter Palmer, *Intellectual Property*] (making a similar argument on historical and economic grounds); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84 (describing alternatives to copyright based on the relationship between information providers and consumers rather than on the possession of information).

20. Codifying the common law defense of fair use, § 107 of the Copyright Act provides that

> the fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use . . . ;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion [used] . . . ; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1994). Despite the enumeration of these four factors, however, the fair use defense "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

21. *Compare generally, e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY (1994) (arguing for giving fair use a narrow scope), *with* Samuelson, *The Copyright Grab*, *supra* note 14 (arguing for a broad definition of fair use). *See also, e.g.*, Coalition for Networked Information, *Coalition CNI-COPYRIGHT Forum* (visited Nov. 5, 1997) <http://www.cni.org/Hforums/cni-copyright> (advancing various viewpoints on this topic in ongoing discussions).

on the fair use defense in conventional media.[22] From technical advances in automated rights management, described by Subpart A, and recent developments in copyright law, described by Subpart B, these parties forecast a dystopia, described by Subpart C, where fair use will have virtually disappeared from the digital intermedia.

A. Automated Rights Management

Owners of conventional sorts of property do not rely on the law alone to protect their assets. They also deploy fences, locks, and guards. Automated rights management provides the owners of intangible assets with similar defensive mechanisms, albeit ones built into computer hardware and software and implemented via firewalls, encryption, and passwords. Although ARM researchers continue to develop and experiment with a variety of approaches, the huge market for intellectual property protection virtually ensures that ARM technology will see increasingly widespread use.[23]

ARM appeals to information providers because it stands to give them the power to accomplish two things that hitherto seemed impossible in digital intermedia. First, ARM will make it possible and cost-effective for information providers to enforce standard copyright or trade secret claims. Second, ARM will empower them to enforce contracts that define different or additional rights.[24] Additionally, ARM promises to perform these functions cleanly and effectively, without resort to uncertain and wasteful litigation.

Until very recently, the promise of automated rights management remained just that: a mere promise. With so much to

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22. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285-87 (1996) (describing the debate between "neoclassicists," who regard expressive works as commodities, and "copyright minimalists," who argue that new technologies render copyright irrelevant, and advocating as an alternative a "democratic paradigm" under which copyright advances political and social discourse). Readers intent on applying Professor Netanel's labels to the current work will find that it borrows "neoclassical" methods to preserve values shared with the "democratic paradigm" while opening a voluntary exit to the "copyright minimalist" world.

23. *See* Christine Hudgins-Bonafield, *Selling Knowledge on the Net*, NETWORK COMPUTING, June 1, 1995, at 102, 102, *available at* <http://techweb.cmp.com/nwc/607/607feature2.html> (visited Nov. 6, 1997); Otis Port, *Copyright's New Digital Guardians*, BUS. WK., May 6, 1996, at 62, 62; Riddick, *supra* note 7, at 248; Ira Sager, *IBM's Tollbooth for the I-Way*, BUS. WK., May 13, 1996, at 114, 114; Smith & Weber, *supra* note 7, at 34; Stefik, *supra* note 7, at 78-79; *Technological Solutions*, *supra* note 7, at 3-4; Weber, *supra* note 7, at 9.

24. It also gives information providers new-found power to "profile" consumer behavior, a development that threatens consumers' privacy. *See* Cohen, *supra* note 7, at 985-87.

gain at stake, however, researchers worldwide have been striving to perfect ARM technology.[25] A wide variety of ARM systems already have left laboratories and entered the marketplace.[26] IBM has convinced thirty companies, including America Online, Yahoo!, and Xerox, to employ its ARM technology.[27] Competitor Electronic Publishing Resources, Inc. ("EPR") has signed agreements with National Semiconductor and the Copyright Clearance Center.[28] As typically occurs with a new networking technology, these and other ARM providers have struck up a variety of shifting consortia.[29] Such activity indicates that copyright owners and information providers soon will have access to robust ARM technology from one or more sources.[30]

Subscription services, which charge for access to proprietary databases by the hour or month, currently account for most of the intellectual property sold through digital networks.[31] Although even

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25. *See generally* Hudgins-Bonafield, *supra* note 23 (discussing research in ARM); Imprimatur, *Issues: Monitoring and Managing Use* (visited Nov. 5, 1997) <http://www.imprimatur.alcs.co.uk/imprimatur/IRM/xrmonuse.htm> (discussing various ARM proposals); Smith & Weber, *supra* note 7, at 34 (discussing research in ARM); Stefik, *supra* note 7, at 79-80 (same).

26. *See* Port, *supra* note 23, at 62 (discussing products offered by Digimarc Corp., DICE Co., Electronic Publishing Resources Inc., and Release Software Corp.); Sager, *supra* note 23, at 114 (discussing IBM's InfoMarket); Smith & Weber, *supra* note 7, at 36 (discussing Electronic Publishing Resources Inc.'s InterTrust architecture and IBM's InfoMarket); *Technological Solutions*, *supra* note 7, at 3-4 (discussing Infosafe Systems' Design Palette and National Semiconductor's iPower unit); Custom Innovative Solutions, *Web Copyright Management System* (visited Nov. 6, 1997) <http://www.cisc.com/bin/webright.cgi?fle=cprt/main.html> (describing, demonstrating, and offering for sale "WebRight" ARM system).

27. *See* Sager, *supra* note 23, at 114. For an introduction to IBM's InfoMarket, see *InfoMarket* (visited Oct. 7, 1997) <http://www.infomarket.ibm.com>.

28. *See* Hudgins-Bonafield, *supra* note 23, at 108; *Technological Solutions*, *supra* note 7, at 4.

29. *See* Sager, *supra* note 23, at 114; Smith & Weber, *supra* note 7, at 37; *Technological Solutions*, *supra* note 7, at 4. *See generally* Hudgins-Bonafield, *supra* note 23 (discussing agreements between ARM providers).

30. *See* Weber, *supra* note 7, at 9-12, 19-21 (discussing factors influencing the development of a standard for ARM). Some commentators claim that IBM's early entry into the ARM field, and the superiority of its Cryptolope technology, ensure that it will set the standard for later developments. *See* Sam Albert, *Surprise! IBM May Crash the Internet Party*, COMPUTERWORLD, June 10, 1996, at 41, 41. Others bet that EPR's comprehensive patents give it an edge. *See Technological Solutions*, *supra* note 7, at 3. At any rate, it looks unlikely that federal authorities will mandate a particular type of ARM system. *See* NII WHITE PAPER, *supra* note 7, at 233 ("Copyright owners should be free to determine what level or type of protection (if any) is appropriate for their works, taking into consideration cost and security needs, and different consumer and market preferences.").

31. *See* Hudgins-Bonafield, *supra* note 23, at 105-06 (describing the operation of

this sort of electronic tollbooth qualifies as "automated rights management" in a broad sense,[32] most ARM technicians aspire to something more sophisticated. At a minimum, they aim at permitting information providers, and perhaps even individual owners of proprietary data, to sell access on a document-by-document basis.

The simplest such pay-per-use systems offer encrypted documents for sale, or rather the keys to those documents, one at a time. The purchaser of a key gets access to a single locked document.[33] This approach still leaves the purchased information subject to subsequent copying in its original medium, however.[34] More sophisticated ARM systems thus employ methods such as steganography,[35] micropayments,[36] and imbedded applications[37] to give information providers exact and continuous control over proprietary information.[38]

At its most powerful, ARM supports the "superdistribution" of

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services such as Lexis-Nexis); *see also* I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶ 9 (1995), *available at* <http://www.urich.edu/ ~jolt/v1i1/hardy.html> (visited Nov. 5, 1997) (discussing satellite signal scramblers); Richard Rapaport, *In His Image*, WIRED, Nov. 1996, at 172, 175 (describing how Corbis uses passwords and watermarks to sell images through its online digital gallery).

32. After all, subscription services rely on automated processes (dedicated lines and passwords, for example) to manage rights to proprietary information.

33. *See* Port, *supra* note 23, at 62; Smith & Weber, *supra* note 7, at 34; *Technological Solutions*, *supra* note 7, at 3; Weber, *supra* note 7, at 3-4.

34. *See* Smith & Weber, *supra* note 7, at 34 ("Once the information is unlocked, customers can do whatever they wish with it, including making digital copies, redistributing it to friends and colleagues, printing many copies and so on."); Weber, *supra* note 7, at 3-4.

35. Using steganography, an information provider can firmly fix its digital signature, sort of an electronic watermark, on the documents it sells. *See* Port, *supra* note 23, at 62. Steganography also has cryptographic applications—it can hide "secret writings" in other documents—that relate to ARM only indirectly.

36. A micropayment is simply a very small payment, perhaps even on the scale of a fraction of a penny. Retail micropayments appeal to information providers because they lower consumer resistance to paying for information and yet can generate considerable revenues in the aggregate. *See* Hudgins-Bonafield, *supra* note 23, at 106; Smith & Weber, *supra* note 7, at 37; Weber, *supra* note 7, at 19-20.

37. Imbedded applications attach to and travel with the documents protected by ARM. These mini-programs can thus continue to control how consumers use the information that they purchase—even past the point of sale. *See* Hudgins-Bonafield, *supra* note 23, at 106-07; Sager, *supra* note 23, at 114, 116; Smith & Weber, *supra* note 7, at 36-37; *Technological Solutions*, *supra* note 7, at 3; Weber, *supra* note 7, at 5-6.

38. *See* Hudgins-Bonafield, *supra* note 23, at 106, 108; Port, *supra* note 23, at 62; Riddick, *supra* note 7, at 248; Sager, *supra* note 23, at 114, 116; Smith & Weber, *supra* note 7, at 36-37; Stefik, *supra* note 7, at 81; *Technological Solutions*, *supra* note 7, at 3; Weber, *supra* note 7, at 3-7.

proprietary information. In other words, it allows information providers to market documents that disallow certain types of uses (e.g., copying) and provide continuing revenue (e.g., charging 2¢ per access) regardless of who holds the document (e.g., including someone who obtained it post-first sale).[39] Superdistribution thus offers information providers a rather daunting compendium of powers. In practice, of course, no ARM system can guarantee absolute control over information, especially after it escapes digital media.[40] By accident or design, documents inevitably will fall outside the reach of ARM. Even if only partially effective, however, ARM will radically improve the efficiency of licensing practices in the digital intermedia. Consequently, it will have a radical impact on the fair use doctrine.

B. Fair Use Shrinks as Licensing Grows

1. *American Geophysical* and *Princeton University Press*

Current case law makes it harder for defendants to benefit from the fair use defense to the extent that plaintiffs make it easy to pay licensing fees. The Second Circuit in *American Geophysical Union v. Texaco, Inc.*,[41] expressly supported this view.[42] The Sixth Circuit panel in *Princeton University Press v. Michigan Document Services, Inc.*,[43] rendered a holding to the contrary, until vacated and subjected to an en banc rehearing. The Sixth Circuit's final, binding opinion strongly endorsed the reasoning of the *American Geophysical* court.[44]

In *American Geophysical*, eighty-three publishers of scientific and technical journals joined in a class action copyright infringement suit against Texaco, alleging that the defendant had made unauthorized photocopies of individual articles from their

39. *See* Hudgins-Bonafield, *supra* note 23, at 106, 108; Port, *supra* note 23, at 62; Riddick, *supra* note 7, at 248; Sager, *supra* note 23, at 114, 116; Smith & Weber, *supra* note 7, at 37; *Technological Solutions*, *supra* note 7, at 3; Weber, *supra* note 7, *passim*.

40. "There are always limitations to rights management and content control technologies. Nothing will prevent someone from scanning a printed page of a protected document (although fingerprinting or digital watermarking techniques may make it easier to trace and prosecute such infringements)." Weber, *supra* note 7, at 11-12; *see also* Stefik, *supra* note 7, at 80 ("A computer user can always print a digital page and then photocopy it. A digital-movie pirate can sit in front of a screen with a camcorder.").

41. 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

42. *See id.* at 930-31 (holding that copying journal articles is not fair use where payment and licensing opportunities existed through Copyright Clearance Center).

43. 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 1336 (1997).

44. *See id.* at 1387 ("The approach followed by Judges Newman and Leval in the *American Geophysical* litigation is fully consistent with the Supreme Court case law.").

publications.[45] Among other defenses, Texaco cited fair use.[46] It lost in the district court,[47] appealed to the Second Circuit, and lost yet again.[48]

The outcome of the case turned on the crucial fourth factor of the fair use defense,[49] which requires a court to consider "the effect of the use upon the potential market for or value of the copyrighted work."[50] Citing the district court's findings of fact, the court of appeals held that the publishers had, with the help of the Copyright Clearance Center, created "a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying."[51] This made it difficult for Texaco to claim that its unauthorized copying had no impact on revenue the plaintiffs might have earned from their copyrights. As the court of appeals explained, "the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier."[52]

Because he disputed whether the plaintiffs had created a workable market for licensing copies of individual articles, Judge Jacobs dissented. Absent such a market, he opined, the majority's reasoning ran in circles: "[T]he market will not crystallize unless courts reject the fair use argument that Texaco presents; but, under

45. *See American Geophysical*, 60 F.3d at 914-15.

46. *See id.*

47. *See id.* at 914.

48. *See id.*

49. *See id.* at 926-32.

50. 17 U.S.C. § 107(4) (1994); *see also supra* note 20 (listing the four factors for fair use established in § 107). The Supreme Court has described this fourth factor as "undoubtedly the single most important element of fair use." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Id.* at 568 (emphasis added) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)). Notably, however, the *American Geophysical* court seemed more impressed by the Supreme Court's refusal in *Campbell v. Acuff-Rose Music, Inc.*, to reiterate the importance of the fourth factor, quoting that case's instruction that " '[a]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.' " *American Geophysical*, 60 F.3d at 926 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994)). The court in *Princeton University Press v. Michigan Document Services, Inc.*, disagreed with such a reading: "We take it that this factor, 'the effect of the use upon the potential market for or value of the copyrighted work,' is at least *primus inter pares* . . . ." 99 F.3d 1381, 1385 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997).

51. *American Geophysical*, 60 F.3d at 930.

52. *Id.* at 930-31.

the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed."[53]

The majority opinion rebutted this accusation, explaining that "[t]he vice of circular reasoning arises only if the availability of payment is *conclusive* against fair use."[54] The majority thus tested Texaco's copying against all of the fair use factors set forth in § 107 of the Copyright Act, and limited consideration of the fourth factor to the impact on "traditional, reasonable, or likely to be developed markets."[55] In this case, the court found, the market in question already existed. Therefore, "[w]hatever the situation may have been previously, before the development of a market for institutional users to obtain licenses," the *American Geophysical* court reasoned, the development of such a market made it "now appropriate to consider the loss of licensing revenues."[56] The court determined that congressional intent supported its decision.[57]

The majority might have added that, so far as the dissent's accusation of circularity applies, it applies equally well to the presumed alternative of freezing fair use in the face of technological advances. If the law refuses to allow copyright owners to benefit from reduced transaction costs, they will not pursue the technological innovations that would make such reductions possible.[58] Failure to

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53. *Id.* at 937 (Jacobs, J., dissenting).

54. *Id.* at 931 (emphasis added). *But cf.* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973) (holding that in the absence of convincing proof of a viable market, "one cannot assume at the start the merit of the plaintiff's position, i.e., that plaintiff had the right to license," but that "[t]hat conclusion results only if it is first determined that the photocopying is 'unfair' "), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

55. *American Geophysical*, 60 F.3d at 930; *see also* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) (rejecting the fair use defense for copying that unfavorably impacted on plaintiffs' ability to collect permission fees through an existing licensing system).

56. *American Geophysical*, 60 F.3d at 930. The court thus distinguished *Williams & Wilkins Co.*, where no such market had existed and, thus, no right to license fees had arisen. *See id.* at 930-31 (citing *Williams & Wilkins Co.*, 487 F.2d at 1357-59).

57. *See id.* at 931. The court noted that first, § 108 of the Copyright Act "narrowly circumscribes the conditions under which libraries are permitted to make copies," which "implicitly suggests that Congress views journal publishers as possessing the right to restrict photocopying." *Id.* (citations omitted). Second, Congress's prompting of the development of the Copyright Clearance Center, *see* S. REP. NO. 93-983, at 122 (1975); S. REP. NO. 473, at 70-71 (1975); H.R. REP. NO. 90-83, at 33 (1967), suggests its belief "that fees for photocopying should be legally recognized as part of the potential market for journal articles." *American Geophysical*, 60 F.3d at 931.

58. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 358 (1989) ("[F]air use, if too broadly interpreted, might

upgrade the fair use doctrine would thus ensure that neither producers nor, notably, consumers enjoy all the benefits that the digital intermedia might otherwise offer.[59]

Princeton University Press v. Michigan Document Services, Inc.[60] presented the Sixth Circuit with a copyright infringement case strongly reminiscent of *American Geophysical.* Princeton University Press and other publishers jointly sued the defendant copy shop for reproducing excerpts from their copyrighted works in course packs it sold to university students.[61] Here, as in *American Geophysical*, the defendant bypassed a mechanism for paying licensing fees and instead pleaded the fair use defense.[62] In the Sixth Circuit's first attempt at resolving *Princeton University Press*, the panel reversed the district court's ruling in favor of the defendant.[63] Like the dissent in *American Geophysical*, the judges found the plaintiff's argument circular.[64] The panel failed to convince its colleagues on the Sixth Circuit, however; sitting en banc, the Sixth Circuit vacated the panel's decision.[65]

In reconsidering the issue, the Sixth Circuit in *Princeton University Press* closely followed *American Geophysical* and held that "[w]here . . . the copyright holder clearly does have an interest in exploiting a licensing market—and especially where the copyright holder has actually succeeded in doing so—'it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis.' "[66] The court similarly agreed with *American Geophysical* that "[o]nly 'traditional, reasonable, or likely to be developed markets' are to be considered in this connection."[67]

Indeed, the court in *Princeton University Press* arguably did even more than the *American Geophysical* court did to ensure that the fair use defense will shrink as licensing opportunities expand. In *American Geophysical*, the court downplayed the significance of the

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sap the incentive to develop innovative market mechanisms that reduce transaction costs and make economic exchanges between copyright holders and users feasible.").

59. *See supra* Part II.A.

60. 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 1336 (1997).

61. *See id.* at 1383.

62. *See id.* at 1384. This mechanism could take up to four weeks to clear a request to copy the protected works, *see id.*, which strengthens the case for ARM. Because ARM can clear rights instantly, it offers users a more workable alternative to fair use.

63. *See id.* at 1381.

64. *See id.* at 1407 (Merrit, J., dissenting) (discussing the panel's vacated decision).

65. *See id.* at 1383.

66. *Id.* at 1387 (quoting American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995)).

67. *Id.* (quoting *American Geophysical*, 60 F.3d at 930).

one fair use factor that most strongly supports the rise of fared use—the factor that requires a court to consider "the effect of the use upon the potential market for or value of the copyrighted work"[68]—by interpreting the Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, as an indication that the Court was "abandoning the idea that any factor enjoys primacy."[69] The *Princeton University Press* court, however, read the precedents differently, stating that "[w]e take it that this factor, 'the effect of the use upon the potential market for or value of the copyrighted work,' is at least *primus inter pares*."[70] By emphasizing that fair use should not cut into licensing revenues, the *Princeton University Press* court helped to ensure that fair use will wither as the use of ARM grows.

2. The *NII White Paper* and the NIICPA

Taken together, *American Geophysical* and *Princeton University Press* demonstrate that courts considering the question have concluded that the fair use defense should give way when copyright owners can conveniently collect licensing fees. The executive branch addressed this same question in the *NII White Paper*[71] and reached the same conclusion.[72] The *NII White Paper*'s statutory proposals have, moreover, drawn support in the legislative branch as the National Information Infrastructure Copyright Protection Act ("NIICPA").[73]

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68. 17 U.S.C. § 107(4) (1994).

69. *American Geophysical*, 60 F.3d at 926. The *Campbell* Court held that "all [four fair use factors] are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

70. *Princeton Univ. Press*, 99 F.3d at 1385 (quoting 17 U.S.C. § 107(4) (1994)) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)). As *Harper & Row Publishers* predates *Campbell*, however, *American Geophysical* may very well have the better argument.

71. *See* NII WHITE PAPER, *supra* note 7. The *NII White Paper* represents the final report of the Clinton administration's Working Group on Intellectual Property of the Information Infrastructure Task Force. It surveys how current intellectual property law might (or might not) work on the Internet and in other digital media, and it proposes amendments to the U.S. Copyright Act.

72. The *NII White Paper* first raises the possibility that "technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine," *id.* at 82, then observes that "the fair use doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work," *id.* at 231, and concludes that "[c]opyright owners should be free to determine what level or type of protection" they want, *id.* at 233.

73. S. 1284, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995). Although these bills stalled in the 104th Congress, international developments make them likely to resurface, with better prospects, in the 105th. *See* John B. Kennedy & Shoshana R. Dweck, *WIPO Pacts Go Digital*, NAT'L L.J., Jan. 27, 1997, at C1.

The *NII White Paper* predicts not only the advent of comprehensive ARM systems,[74] but also that such systems may "lead to reduced application and scope of the fair use doctrine."[75] Moreover, it encourages this trend. Following the lead of *American Geophysical*, the *NII White Paper* would empower copyright owners to use any "process, treatment, mechanism, or system" to deny access to their works.[76] In response to claims that this would violate the public bargain implicit in fair use, the *NII White Paper* responds that the doctrine "does not require a copyright owner to allow or to facilitate unauthorized access or use of a work."[77]

To give effect to its arguments on how best to regulate digital communications, the *NII White Paper* suggests particular amendments to the Copyright Act of 1976.[78] These amendments already have surfaced in Congress, taken word-for-word from the *NII White Paper*, and proposed in the NIICPA.[79] Rather than expressly requiring that courts limit the fair use defense insofar as opportunities to pay licensing fees expand, the NIICPA merely aims to protect—and thus encourage—ARM systems. It would do so by adding to the Copyright Act a new Chapter 12, entitled "Copyright Protection and Management Systems," including proposed §§ 1201-04.

The NIICPA's proposed § 1201 prohibits devices or services "the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent ... any process, treatment, mechanism or system which prevents or inhibits violation of any of the exclusive rights of the copyright owner under section 106" of the Copyright Act.[80] In effect, § 1201 almost certainly would prohibit anti-ARM systems. The proposed § 1202 bars tampering with

74. *See* NII WHITE PAPER, *supra* note 7, at 191 ("Systems for managing rights in works are being contemplated in the development of the NII. These systems will serve the functions of tracking and monitoring uses of copyrighted works as well as licensing of rights and indicating attribution, creation and ownership interests.").

75. *Id.* at 82.

76. *Id.* at 230. Some have argued, however, that *American Geophysical* does not support giving copyright holders such powers. *See* James V. Mahon, Note & Comment, *A Commentary on Proposals for Copyright Protection on the National Information Infrastructure*, 22 RUTGERS COMPUTER & TECH. L.J. 233, 258-59 (1996) ("*American Geophysical* only applies to a narrow set of facts and cannot be relied upon to address broad questions of fair use application.").

77. NII WHITE PAPER, *supra* note 7, at 231.

78. *See id.* at App. 1.

79. *See* S. 1284, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995).

80. S. 1284 § 4 (proposed § 1201 of the Copyright Act); H.R. 2441 § 4 (same).

"copyright management information,"[81] including "terms and conditions for uses of the work,"[82] that copyright owners attach to their digital works. Section 1202 thus also aims to make the world safer for ARM systems. The NIICPA's proposed §§ 1203-04 give teeth to these protections by imposing civil and criminal penalties, including up to $500,000 in fines and five years in jail, for their violation.[83]

The *NII White Paper* and the NIICPA so far represent mere aspirations—not law. But they powerfully indicate that the current administration intends to give the *American Geophysical* holding broad effect. Though the intent of Congress remains uncertain, it has not of late shown very much independence in matters relating to digital communications.[84] At any rate, as the holdings in *American Geophysical* and *Princeton University Press* indicate, the judicial branch will not need the NIICPA to ensure that the fair use doctrine shrinks in accord with the growth of ARM licensing schemes. Indeed, the *NII White Paper* and the NIICPA have justly drawn criticism for doing far more to promote ARM than is necessary—or wise.[85]

C. *The Dystopian View*

Parties who directly benefit from appeal to the fair use doctrine in conventional media tend to fear the loss of those benefits in digital intermedia. They thus regard with alarm the technical and legal developments described above,[86] and argue that automated copyright

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81. S. 1284 § 4 (proposed § 1202 of the Copyright Act); H.R. 2441 § 4 (same).

82. S. 1284 § 4 (proposed § 1202(c) of the Copyright Act); H.R. 2441 § 4 (same).

83. *See* S. 1284 § 4 (proposed § 1203-04 of the Copyright Act); H.R. 2441 § 4 (same).

84. Consider, for example, that the ill-fated Communications Decency Act of 1996 (codified in relevant part at 47 U.S.C. § 223 (1994)), was a product of wide, bipartisan support. For judicial analysis of that statute, see *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa.) (enjoining enforcement of several sections of the Act on grounds of unconstitutionality), *aff'd*, 117 S. Ct. 2329 (1997).

85. *See* Cohen, *supra* note 7, at 990-91; Ann Okerson, *Who Owns Digital Works?*, SCI. AM., July 1996, at 80, 84; Post, *Controlling Cybercopies*, *supra* note 9, at 45; Samuelson, *The Copyright Grab*, *supra* note 14, at 191; Samuelson, Technological Protection, *supra* note 14, at 33.

86. *See, e.g.*, OFFICE OF TECH. ASSESSMENT, *supra* note 19, at 207 (describing scenario wherein "the public is dependent on the information provider for each and every access made to a work, and the provider may be the sole source for the work"); SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY, U.S. HOUSE OF REPRESENTATIVES, EXECUTIVE SUMMARY OF STATEMENT OF THE NATION'S LIBRARIES ON H.R. 2441, "NII COPYRIGHT PROTECTION ACT OF 1995," (Feb. 8, 1996), *available at* <gopher://ala1.ala.org:70/00/alagophwashoff/executive.summary> (visited Nov. 6, 1997) (stating that in the stead of "society's currently balanced regime of shared

management, combined with the doctrine that licensing can supplant fair use, creates the prospect of a copyright dystopia.[87] This section describes, in two related portraits, what friends of conventional fair use fear. Section 1 describes a world in which the fair use doctrine no longer forgives the refusal to pay licensing fees in digital intermedia. Section 2 takes the same scenario a step further, describing a world in which the fair use doctrine does not protect such uses as the copyright holder finds objectionable. Critical analysis of these scenarios follows in Part III.

1. The End of Unbilled Use in Digital Intermedia

Parties who make frequent appeal to the fair use doctrine fear that they will not enjoy in digital intermedia the sort of immunity from licensing fees that fair use provides in traditional media.[88]

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information resources, ... a new, commercially grounded philosophy will 'trump' the Copyright Act and all information, no matter how small the unit, can and will be licensed or otherwise accessed only pursuant to contract"); Group of 100 Law Professors, *An Open Letter to Senator Hatch, Senator Leahy, Representative Carlos Moorhead, the Honorable Ron Brown and Vice-President Al Gore, Regarding Legislative Implementation of the NII White Paper*, [hereinafter *An Open Letter*], *available at* <http://www.clark.net/pub/rothman/boyle.htm> (visited Nov. 5, 1997) (same); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 513 (1997) ("In the digital future, access to many works may be available only to people who 'contract' in advance, for example, ... not to further distribute the work or anything contained in the work, ... not to quote from the work, and so forth. If these 'licenses' are uniformly enforceable, all of the users' rights of copyright will soon disappear."); Netanel, *supra* note 22, at 285 ("[S]uch technological fences would raise the specter of all-consuming copyright owner control."); Okerson, *supra* note 85, at 82-83 (noting that cash-strapped library and education groups foresee a "nightmare future" where "nothing can be looked at, read, used or copied without permission or payment"); Samuelson, *The Copyright Grab*, *supra* note 14, at 136 ("[A] user who has copied even a paragraph from an electronic journal to share with a friend will be as much a criminal as the person who tampers with an electrical meter at a friend's house in order to siphon off free electricity."); Stefik, *supra* note 7, at 78 ("Some legal scholars believe ... that publishers will be left with too much power, undercutting the rights and needs of consumers and librarians."); *Technological Solutions*, *supra* note 7, at 7 (same); Samuelson, Technological Protection, *supra* note 14, at 24 (worrying whether "the public domain is a viable concept in the electronic environment").

> Professor Goldstein, at least, offers a notably different take on the issue:
> The capacity of the celestial jukebox to post a charge for access, and to shut off service if a subscriber does not pay his bills, should substantially reduce the specter of transaction costs. As these costs dissolve, so, too, should the perceived need for safety valves such as fair use.

GOLDSTEIN, *supra* note 21, at 224.

87. *See* Margaret Jane Radin, *Regulation of Computing and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 513-14 (1996) (discussing the utopian and dystopian models of cyberspace).

88. *See* SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY, *supra* note 86 ("The browsing, non-commercial sharing, and limited reproduction of works for

Because a copyright does not give its owner the right to require licensing fees for uses falling within the scope of § 107,[89] parties availing themselves of *fair* use typically regard it as *free* use.[90] The prospect of paying in digital intermedia for what apparently comes free elsewhere thus evokes contempt, if not horror, from those who re-work information for a living.[91] It seems certain, however, that the

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educational and scholarly purposes now protected by statute will be available only to those able to pay for access to information. Such a regime threatens to make America a nation of information haves and have-nots."); *An Open Letter*, *supra* note 86 ("[The *NII White Paper*'s] inversion of fair use doctrine and its maximalist stance toward intellectual property rights seem to presage a country divided among information 'haves' and 'have-nots' in which the Clinton Administration's promise of universal access would be lost."); *see also* Okerson, *supra* note 85, at 82-83 (describing a "nightmare future" envisioned by libraries and education groups); Samuelson, *The Copyright Grab*, *supra* note 14, at 136 (describing a future where "a user who has copied even a paragraph from an electronic journal . . . will be as much a criminal as the person who tampers with an electrical meter . . . to siphon off free electricity").

89. *See* 17 U.S.C. § 107 (1994) (codifying the fair use defense). For discussion of this point, see *supra* Part II.B.

90. Given that producers bear costs to produce copyrighted material, and that consumers bear search and other transaction costs for even unbilled access, fair use does not in fact qualify as free use. *See infra* Part III.A.1. Whether fair use qualifies as *subsidized* use poses a more difficult question.

On one view, § 107 sets forth fair use as a conspicuous exception to the comprehensive rights granted to copyright owners under § 106, expressly excusing certain parties from making normally required payments. The subsidy thus appears in the form of a statutorily mandated transfer of wealth from copyright owners to those who claim the fair use defense. *See* NII WHITE PAPER, *supra* note 7, at 84 (rejecting an interpretation of fair use that implies "that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of 'universal access' "); *see also* 2 PAUL GOLDSTEIN, COPYRIGHT § 10.1, at 10:1 (2d ed. 1996) ("Courts have for more than a century excused certain otherwise infringing uses of copyrighted works as 'fair' uses.").

On another view, the property right defined by the Copyright Act never includes fair use, so refusing to enforce fees for such use does not redistribute wealth from copyright owners, or the public at large, to those engaging in fair use. Thus, never having had the right to bill for fair use, the copyright owner loses nothing to its exercise. *See, e.g.*, Peter Jaszi, *Taking the White Paper Seriously, Part 2* (visited Nov. 6, 1997) <http://lcweb.loc.gov/nac/nac30/jaszi-2.html> (Library of Congress Network Advisory Committee, Network Planning Paper No. 30) (criticizing the *NII White Paper* for its "novel description of 'fair use' as a 'tax' on the defined preexistent content of proprietary rights—rather than an inherent part of the definition of those rights themselves"); Samuelson, Technological Protection, *supra* note 14, at 27 (same).

91. However, not all of them share this contempt. *See, e.g.*, GOLDSTEIN, *supra* note 21, at 236 ("[C]opyright's historic logic [is] that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works."); Stefik, *supra* note 7, at 78-79. And even those who regard the spread of licensing fees with apprehension sometimes admit that they can only guess at the actual impact. *See, e.g.*, Netanel, *supra* note 22, at 295 ("Expanded control may increase the private cost of reading, viewing, and listening to authors' expression to such an extent that, in some cases and for some people, access becomes prohibitively expensive. [But] digital technology may make possible highly refined price discrimination that could, in theory, alleviate this problem . . . ."); *see also, e.g.*, *id.* at 295

combination of automated rights management and the legal doctrines set forth in *American Geophysical*,[92] *Princeton University Press*,[93] the *NII White Paper*,[94] and the NIICPA[95] will have just such an effect.

The sort of copyright nightmare that friends of fair use fear unfolds something like this:[96] Imagine that you download some quotes from text on the Church of Technolism's web page, incorporate them in an essay critical of the Church, and publish it on your own web page without seeking the Church's permission. The Church of Technolism objects to your comments and demands that you cease republishing quotes from its online document. You refuse. Although the Church sues for copyright infringement, you rest easy in your faith that the fair use defense will excuse your copying. But it does not.

The court finds not that you have *quoted too much*, but rather that you have *paid too little*. Although you quoted no more than what your critique required, you neglected to pay the Church of Technolism for your republication of its copyrighted materials. Citing *American Geophysical*, *Princeton University Press*, the *NII White Paper*, and the recently enacted NIICPA, the court holds that the advent of convenient and cheap means of making licensing payments forecloses your claim that paying for your use would have proven too burdensome. In short, as automated rights management has grown in scope, your fair use defense has shrunk.

As this scenario illustrates, the near future may hold some changes for the fair use doctrine. Whether these changes qualify as beneficial or detrimental will come under consideration in the next Part. The next section will first show, however, that fair use faces something more worrisome than ubiquitous licensing fees. The same events that conspire to end the unbilled use of copyrighted works in digital contexts, together with related factors, threaten to constrain

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n.39 ("The extent to which copyright may pose significant barriers to ... access will depend on a number of factors .... Much theoretic and empirical work needs to be done ....").

92. 60 F.3d 913 (2d Cir. 1994) (holding that reproduction of copyrighted works is not fair use where convenient payment and licensing schemes exist), *cert. dismissed*, 116 S. Ct. 592 (1995).

93. 99 F.3d 1381 (6th Cir. 1996) (holding that reproduction of copyrighted works is not fair use where payment and licensing schemes exist), *cert. denied*, 117 S. Ct. 1336 (1997).

94. NII WHITE PAPER, *supra* note 7.

95. S. 1284, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995).

96. This scenario owes more than a little to the facts underlying *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

severely the sorts of critical commentary and parodies that copyright owners so often find offensive.

2. Private Censorship by Copyright Owners

Increasingly, consumers in all probability will find that access to information in digital intermedia comes subject to contractual provisions that aim to secure rights more broad than those provided by the Copyright Act.[97] Consumers will find, in particular, that such contracts inhibit or forbid uses that would otherwise arguably fall within the scope of the fair use defense. IBM's entry into the market for ARM services, for example, specifies that consumers signing onto its InfoMarket Service "may not copy, modify, adapt, reproduce, [or] translate . . . any information delivered or accessed via the Service."[98] This proposed agreement clearly aims to foreclose appeals to the fair use defense.

Despite their vocal concerns about losing unbilled use in digital contexts, champions of fair use have made comparatively little noise about the potential impact of such contracts.[99] To bring that impact into focus, let us briefly return to the hypothetical nightmare in progress:[100] The court holds not only that you have no right to use the Church of Technolism's copyrighted materials without *paying*, but that you have no right to use them without *permission*. The Church

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97. Legal scholars have already encountered such restrictions in the form of limitations that Lexis and Westlaw impose on use of their services; they routinely limit how long users can electronically store downloaded documents. For a more recent example directly tied to an ARM system, consider *Registered User Agreement for IBM InfoMarket Service* (visited Nov. 6, 1997) <http://www.infomarket.ibm.com/ht3/tc.htm>.

98. *Id.* (describing limits under "General"). A fuller quote reads: "IBM or its Suppliers own or have licenses to the intellectual property rights to all components of the Service. Unless IBM specifies otherwise, you may not copy, modify, create derivative works based upon, adapt, reproduce, [or] translate . . . any aspect of the Service." *Id.*

99. *But see Technological Solutions*, *supra* note 7, at 7 ("A deeper problem is how to insure that consumers can gain access to works under the fair-use doctrine . . . if owners keep them under cryptographic lock and key. Many publishers have historically viewed fair use as a necessary evil . . . ."); Netanel, *supra* note 22, at 294-95 (expressing a similar concern about the impact of ARM on fair use); *see also* Cohen, *supra* note 7, at 1003-19 (discussing the impact on First Amendment values of access contracts that violate readers' privacy).

100. In addition to facts from *Netcom*, this scenario draws inspiration from comments in *Princeton University Press v. Michigan Document Services, Inc.*, 855 F. Supp. 905, 907 (E.D. Mich. 1994) ("Sometimes, plaintiffs will grant permission to copy an excerpt at no charge; other times they may deny permission altogether . . . ."), *aff'd in part, vacated in part on reh'g*, 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 1336 (1997). Under the actual facts in *Princeton University Press*, however, the only refusal to license arose where a publisher preferred to sell a whole book rather than the right to reproduce portions of it. *See Princeton Univ. Press*, 99 F.3d at 1388.

has cited not only its rights under copyright law—a claim weakened by the policies underlying the fair use defense—but a contract arising out of your willing use of the particular service that controls access to the Church's web page. That contract gives the Church of Technolism the right to prevent any and all quotations of the text from its web page. Thanks to that contract, you find that you cannot buy your way out of copyright infringement. The Church of Technolism thus wins as its remedy not payment of the lost licensing fees, but rather an injunction on your unauthorized use.

Chilling though this scenario may sound, it remains technically and legally plausible. Copyright owners often evince a desire to prohibit the critical, blasphemous, or satirical reuse of their works.[101] In *Campbell v. Acuff-Rose Music, Inc.*,[102] the Supreme Court forbade employing copyright law to achieve such censorship, of course. It did not, however, expressly rule out using contract law to similar effect.

Though thin-skinned copyright owners might have it otherwise, mass distribution in conventional media does not lend itself to the imposition and enforcement of such anti-criticism contracts. The digital intermedia, in contrast, deliver information through channels ready-made to impose contracts limiting or forbidding fair use. Moreover, automated rights management makes enforcing those contracts wholly viable from a technical point of view.

As discussed more fully below, however, courts will probably hold that the fair use defense gives consumers the right to engage in limited critical reuses, ARM or not.[103] Fair use will thus continue to play a vital role, albeit a diminished one, in a world of otherwise pervasive fared use. Contracts that interfere with the fair use defense

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101. For example, after evangelist Jimmy Swaggart publicly confessed to having purchased a prostitute's services, he tried to use his copyright in the confession to stop the Cincinnati Opera from quoting him in an advertisement for its opera "Susannah." Swaggart's attorney bluntly claimed: "They don't have the right to use material that we've copyrighted." Chuck Conconi, *Personalities*, WASH. POST, June 17, 1988, at D3; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (involving an infringement suit arising out of use of copyrighted music in a parody); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980) (involving an infringement suit arising out of the use of a competitor's magazine cover in a comparative advertisement); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978) (involving an infringement suit arising out of a politician's use of an opponent's copyrighted material); Rapaport, *supra* note 31, at 283 (noting that museums that granted permission to Corbis to sell copies of their works have retained "veto power over 'inappropriate' digital uses").

102. 510 U.S. 569 (1994) (recognizing parody as a fair use).

103. *See infra* Part III.B.

might risk federal preemption.[104] Before addressing that particular issue, however, the next Part examines how the fair use doctrine will interact with the pre-contractual self-help measures that ARM will make available to copyright owners in digital intermedia.

III. THE FUTURE REVISITED: FROM "FREE USE" TO FARED USE

This Part critically evaluates the dystopian future of fair use described above and describes fared use as a better and more likely alternative. Subpart A finds that those who decry the end of unbilled use in digital intermedia get the facts largely right but the valuation wrong. The combination of ARM and existing law will indeed make it easier for owners of copyrights in digital works to demand and enforce licensing fees. Consumers have no sound reason to object to paying such fees, however, and they have good reasons to welcome the systemic effects of the resulting market for expressive works.

Subpart B argues that, absent contractual provisions to the contrary, the fair use doctrine will continue to provide some protection to critics, satirists, and others who offend copyright owners. Subpart C explains how this, combined with the ubiquitous license of such uses, will put the digital intermedia under a reciprocal quasi-compulsory licensing scheme. In this spontaneously generated fared use system, information providers license online expressive works comprehensively but endure greater exposure to the offensive reuse of their works.

Because ARM will enable information providers and consumers to contract around this initial version of fared use, it may well end up as no more than the default rule for defining rights to information in the digital intermedia. Considering the likelihood and desirability of that outcome must wait for Part IV, however. Re-evaluating traditional fair use doctrine, and projecting how it will evolve into fared use, merits attention first.

A. Fair Use Versus "Free Use"

Predictions that consumers will not generally enjoy unbilled access to copyrighted works in digital intermedia appear to assess the future accurately. For reasons set forth above, the advent of sophisticated automated rights management will sharply lower transaction costs for regulating the use of copyrighted materials. The legal doctrine set forth in *American Geophysical* and *Princeton*

104. *See infra* Part IV.B.3&4.

University Press, with or without the *NII White Paper*'s broad interpretation of these cases, will limit the applicability of the fair use doctrine online. New technology and current law will thus end up partially supplanting the fair use defense in the digital intermedia. For reasons set forth below, however, even parties who currently benefit from applying the fair use defense in conventional media should welcome this change.

1. Fair Use Is Not Free Use

Despite gross misconceptions to the contrary, fair use never comes for free.[105] One way or another, consumers using conventional media must pay to browse magazines at newsstands, to photocopy and distribute newspaper stories for spontaneous classroom use, to search for quotes and type them into articles, and to otherwise avail themselves of the fair use doctrine. Although such acts do not entail paying licensing fees, they inevitably impose a variety of transaction costs—for personal transport, manipulating paper and ink, searching card catalogs, and so on—that follow from the very nature of conventional media.[106] It makes no difference that consumers pay licensing fees in cash whereas they pay fair use's transaction costs in lost opportunities. Economically speaking, a cost is a cost.[107]

The digital intermedia allow consumers to avoid or reduce such transaction costs. Bits flow directly to homes and offices, copy easily into RAM or magnetic storage, forward instantly to destinations worldwide, and submit easily to electronic searches. Transaction costs remain even here, of course. The burgeoning growth of the Internet and other digital intermedia indicates, however, that consuming bits very often costs less than consuming atoms. The increasing reliance of legal academics on commercial online services, CD-ROMs, and the Internet confirms this observation.[108] Those who

105. The author credits Professor Jane C. Ginsburg, Columbia University School of Law, for bringing this argument to his attention during a conversation in the winter of 1996.

106. *See* NICHOLAS NEGROPONTE, BEING DIGITAL 11-17 (1995) (discussing the differences between "the world of atoms" and "the world of bits").

107. Posner describes as "one of the most tenacious fallacies about economics" the notion "that it is about money. On the contrary, it is about resource use, money being merely a claim on resources." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (3d ed. 1986).

108. *See generally* M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989) (discussing the impact of new information technologies on the practice of law); Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9 (1994) (same).

decry the advent of fared use[109] thus err when they imply that it must impose a *net* cost on consumers.[110] To the contrary, fared use offers a considerable likelihood of providing more and better verified, organized, and interlinked information, at less cost, than fair use does now.[111]

2. Fixing Market Failure

Scholars have explained fair use in at least three ways: (1) as a proxy for a copyright owner's implied consent;[112] (2) as part of a bargain between authors and the public, struck on their behalf first by courts and then by Congress;[113] and (3) as a response to a market failure in private attempts to protect authors' expressions from undue copying.[114] The first of these three explanations has fallen into

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109. *See, e.g.*, Okerson, *supra* note 85, at 82-83 (discussing the negative responses by libraries and education groups); Samuelson, Technological Protection, *supra* note 14, at 26-27 (describing a "maximalist strategy for shifting power away from consumers and toward publishers").

110. One ought, of course, to try to include all relevant costs in assessing the displacement of fair use with fared use. It thus bears noting that some commentators have claimed that a reduction in the scope of fair use would impose costs on society at large by reducing public access to and reuse of copyrighted works. *See, e.g.*, Netanel, *supra* note 22, at 297 (claiming that the impact of expanded copyright enforcement on "democratic discourse ... carries a social value far in excess of the aggregate price that consumers would pay for personal access to transformative works"). Frustratingly, however, these same commentators fail to support their claims with hard—or even soft—numbers. Indeed, their arguments typically deny that the claimed costs even admit objective evaluation. *See, e.g., id.* at 339 ("[C]opyright's constitutive role in underwriting the conditions for a democratic society [is] a social benefit that can neither be measured nor reflected in terms of consumer purchasing decisions."(footnote omitted)). In fact, the costs and benefits of the fair use doctrine do resist objective measurement—and this provides yet another reason to welcome its reduced influence. *See infra* Part IV (discussing the impossibility of calculating copyright's quid pro quo and why this supports private in lieu of public ordering).

111. *See* Stefik, *supra* note 7, at 78-79 ("[C]onsumers' needs can be served even as this transformation progresses. As technology brings more security, better-quality works will reach the Net.... Although information might not be free, it will most likely cost less because of lower expenses to publishers for billing, distribution and printing. These savings could be passed on to consumers.").

112. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13-151 (1997) (citing the notion disapprovingly).

113. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works...."); 1 GOLDSTEIN, *supra* note 90, § 1.14 (discussing how U.S. copyright law strives to achieve a balance between incentives and access); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 20 (1995) ("The constitutional goals of copyright are the advancement of learning and knowledge. The means to achieve those ends is the incentive system which induces authors to create and disseminate their works.").

114. *See generally* 2 GOLDSTEIN, *supra* note 90, § 10.1.1, at 10:4 to 10:7 (discussing

disfavor because it does not explain why fair use protects parody and other uses of copyrighted material that owners find disagreeable.[115] The second explanation receives due consideration below.[116] The present subsection addresses the third explanation of fair use and argues that, as a response to market failure, the fair use doctrine can and should give way in the face of the effective enforcement of authors' rights through automated rights management.

Lawmakers enacted the Copyright Act to cure an alleged case of market failure: creating a work can cost authors a good deal, whereas copying a work costs free riders very little.[117] Absent special protection from such copying, the argument goes, authors will underproduce and the public will suffer. Copyright, as Justice Holmes explained, therefore "restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit;"[118] namely, copying others' expressions at will. Perhaps

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examples in which transaction costs prohibit the formation of private licensing agreements); Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 *passim* (1982) (arguing that fair use enables socially desirable transfers that the market would not otherwise effectuate).

115. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) (finding fair use despite "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions"); *see also* 4 NIMMER & NIMMER, *supra* note 112, § 13.05, at 13-151 ("It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction ...." (footnote omitted)); Richard P. Adelstein & Steven I. Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L REV. L. & ECON. 209, 228 (1985) ("[L]inking fair use to the copyright owner's consent, implied or otherwise, to the infringement is a serious and unwarranted departure from well-settled notions of private property." (endnote omitted)).

Defenders of the implied consent approach might argue that copyright holders need not consent to particular fair uses, but only to the copyright system as a whole. *See, e.g.*, Landes & Posner, *supra* note 58, at 358-59 (explaining why publishers as a class benefit by allowing even unfavorable reviewers to quote their books). But unless authors have a real alternative to copyright's supposed bargain, which automatically grants protection and allows fair use, attributions of consent look suspect. Part IV, *infra*, describes how fared use might give rise to such an alternative.

116. *See infra* Part III.A.3.

117. *See* Gordon, *supra* note 114, at 1610-13; Landes & Posner, *supra* note 58, at 326. This exploration of the Copyright Act admittedly relies on a post facto interpretation of legislators' often confused and impenetrable motives. Rather than deflating the dubious notion that the Copyright Act embodies a natural rights view of copyright, however, it suffices here to observe that free rider problems explain legislators' desire to protect even copyrights qua natural rights, and that a natural rights view of copyright would, at any rate, leave even less room for fair use.

118. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring); *see also* Jane C. Ginsburg, *Copyright Without Walls?: Speculations on Literary Property in the Library of the Future*, 42 REPRESENTATIONS 53, 59 (1993) (noting that copyright law "has traditionally presumed a world in which, but for copyright,

in the digital intermedia automated rights management will cure this market failure by protecting authors' works through technological and contractual means.[119] ARM's other curative effects interest us here, though.

Markets, like squeezed balloons, bulge outward where unconstrained. In its attempt to protect authors from the discouraging effects of unfettered copying, copyright law has thus created market failure elsewhere. The costs of avoiding infringement by obtaining permission to use a copyrighted work, and thus avoiding infringement claims, often exceed the benefits of the desired use. Such transaction costs threaten to prevent many socially beneficial uses of copyrighted works from taking place. The doctrine of fair use attempts to cure this particular market failure by excusing as non-infringing a limited (though poorly defined) class of uses of copyrighted works.[120] As Professor Gordon describes it, "courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market."[121]

Understanding fair use as a response to market failure does much to explain the vagaries of its development in the case law.[122] More to the point, it lends support to the holding in *American Geophysical.* Consistent with the market failure theory of fair use, the court reasoned that "a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use."[123] In other words, the scope of the fair use defense rises and falls with the transaction costs of licensing access to copyrighted works.

Automated rights management radically reduces the transaction costs of licensing access to copyrighted works in digital intermedia. Indeed, as its name suggests, it makes licensing automatic. Insofar as

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unauthorized reproductions would be pervasive and unremediable").

119. *See supra* Part II (supporting this claim); *see also infra* Part IV.C (exploring how ARM presages an exit from copyright law).

120. *See* Gordon, *supra* note 114, at 1614; Landes & Posner, *supra* note 58, at 357-58.

121. Gordon, *supra* note 114, at 1601 (footnote omitted).

122. *See id.* at 1605 (arguing that "the presence or absence of the indicia of market failure provides a previously missing rationale for predicting the outcome of fair use cases"); *see also* Landes & Posner, *supra* note 58, at 357 ("The conventional view is that no general theory can explain the cases that invoke the doctrine.").

123. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994), *cert. dismissed,* 116 S. Ct. 592 (1995); *see also* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1387 n.4 (6th Cir. 1996) (en banc) (quoting *American Geophysical,* 60 F.3d at 931), *cert. denied,* 117 S. Ct. 1336 (1997).

it responds to market failure, therefore, fair use should have a much reduced scope when ARM takes effect. Should fair use disappear entirely? Were ARM to abolish transaction costs, Coase's theorem would suggest that the market would internalize all costs and permit only value-maximizing transfers.[124] ARM does not wholly negate search and exchange costs, however, thus perhaps leaving contractual gaps for fair use to fill. Furthermore, Congress employs fair use to redistribute rights in accord with its particular notions of equity. The defense thus excuses certain "socially beneficial" uses, such as criticism and parody,[125] that copyright owners might prefer not to license.[126] Fair use thus remains relevant, even given ARM. Exactly how the two will interact to create a fared use system, and how well that system accommodates the concerns that drive fair use, receives consideration below.[127]

First, though, a cautionary reminder: no forecast of the probable impact of ARM can overlook the fact that, just as ARM technology may shape the law, the law will shape the development of ARM. Although robust and sophisticated ARM technology would likely curtail application of the fair use doctrine, unduly aggressive application of the fair use doctrine might thwart creation of the necessary technology.[128] This risk should concern not only computer scientists and information providers, but artists and audiences, too. Stifling ARM would stifle the wide variety of new expressions and experiences that the digital intermedia promise to inspire, promote, and provide.[129]

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124. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 193 (1960).

125. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."); *see also* Gordon, *supra* note 114, at 1633 ("Because the owner's antidissemination motives make licensing unavailable in the consensual market, and because the free flow of information is at stake, a strong case for fair use can be advanced in these cases." (footnote omitted)).

126. As Professor Gordon stresses, however,

> refusals to grant permission to license should ordinarily be honored.... When an owner refuses to license because he is concerned that defendant's work will substitute for his own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest.... Unfortunately, some courts seem to have viewed even some legitimate refusals as justifying fair use treatment.

Gordon, *supra* note 114, at 1634 (footnotes omitted).

127. *See infra* Part IV.

128. *See supra* Part I.B.1.

129. *See* Gordon, *supra* note 114, at 1621 ("If copyright protection is denied because of an otherwise curable market failure, then the additional revenues that would have flowed

3. Maintaining Copyright's Quid Pro Quo

As courts and commentators often have noted, the Constitution demands a public benefit as the price for the limited statutory privileges that copyright creates.[130] In contrast to the view that the fair use doctrine represents a second-best response to pervasive market failure, therefore, some commentators regard the doctrine as an integral part of this constitutional quid pro quo.[131] On this view,

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from the new technological use will not appear. If the authors' revenues fail to reflect the additional value that new technology gives to such works, then insufficient resources may be drawn into their creation.").

130. The Copyright Clause states that "Congress shall have Power ... To promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings." U.S. CONST. art. I, § 8, cl. 8. Courts and commentators have given a variety of formulations as to what sort of *quid* will balance the *quo* of copyright's statutory monopoly. *See generally* 1 GOLDSTEIN, *supra* note 90, § 1.14, at 1:40 to 1:42 (discussing how U.S. copyright law strives to achieve a balance between incentives and access). *Compare* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the *ideas and information conveyed by* a work." (citations omitted) (emphasis added) (quoting U.S. CONST. art. 1, § 8, cl. 8)), *with* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant ... is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius *after the limited period of exclusive control* has expired." (emphasis added)), *and* Kreiss, *supra* note 113, at 20 ("The constitutional goals of copyright are the advancement of learning and knowledge. The means to achieve those ends is the incentive system which induces authors *to create and disseminate their works*." (emphasis added)).

131. *See* Laura N. Gasaway et al., *Amicus Advocacy: Brief* Amicus Curiae *of Eleven Copyright Law Professors in* Princeton University Press v. Michigan Document Services, Inc., 2 J. INTELL. PROP. L. 183, 203 (1994) (claiming that "fair use [is] ... required by [the] ... Copyright Clause"); Karjala, *supra* note 86, at 521 ("The free use of unprotected elements of ... [authors'] works, ... and the fair use of even protected elements by consumers and later authors are the quid pro quo that benefit the public in exchange for the public's recognition of the exclusive rights of copyright."); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) (arguing fair use is "necessary for the partial fulfillment of the constitutional purpose of copyright—the promotion of learning"); Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (describing fair use as "a necessary part" of the copyright monopoly).

These scholars arguably read too much into the quid pro quo of the Copyright Clause, however. The plain language of that provision does not require fair use. *See, e.g.*, Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1141 (1990) ("[The] utilitarian approach to copyright generally is supported by the constitutional text and is accepted by most scholars. There is, however, nothing in the Constitution ... to support ... extension of that approach to fair use in particular.").

Nor do the origins of the Copyright Clause support the view that it mandates limited unlicensed access to copyrighted works. Early formulations of the Copyright Clause did not allude to *any sort* of public quid pro quo, much less fair use. James Madison initially

fair use provides a public benefit—unbilled access to copyrighted works—to balance the State's grant of a limited monopoly.

Automated rights management at first appears to threaten this bargain. It seems as if ARM restricts the public's access to copyrighted works in digital intermedia without offering a benefit in return. As this subsection's consideration of the issue shows, however, friends of fair use should not assume that ARM will leave the public worse off. To the contrary, it appears likely to provide a net benefit to the public.

By reducing transaction costs throughout the market for copyrighted expressions, ARM benefits the public both directly and indirectly. Having emanated from an intentionally vague statute[132] and developed in various, occasionally contradictory cases,[133] the fair

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suggested that the Constitution provide Congress with the power "[t]o secure to literary authors their copy rights [sic] for a limited time." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 477 (Ohio Univ. Press 1966) (1893). Simultaneous with Madison, Charles C. Pinckney moved, with unanimous consent, for the following copyright clause: "To secure to Authors exclusive rights for a certain time." *Id.* at 478. Both Madison and Pinckney treated the subject matter of patents separately. *See id.* at 477-78.

Prudential reasons for granting Congress the power to create copyrights, as well as patents, first appeared in David Brearley's report from the Committee of Eleven, which suggested giving Congress the power "[t]o promote the progress of Science and useful arts by securing for limited times to authors & inventors, the exclusive right to their respective writings and discoveries." *Id.* at 580 (footnote omitted). The nearly identical, final version followed immediately thereafter. *See* U.S. CONST. art. I, § 8, cl. 8. *See generally* Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929) (discussing which individual first introduced the idea to the Convention).

Because nothing in this legislative history indicates what the Founders regarded as the best means of promoting "the progress of Science," the Copyright Clause does not require that the fair use defense assume any particular form. For that matter, strictly speaking, it does not require a fair use defense *at all.* Courts and Congress have created fair use in their discretion and in response to wholly contingent matters of fact. Though this does not obviate the desirability of showing that ARM largely satisfies the particular goals of fair use, it does reduce the issue to less-than-constitutional dimensions.

132. Section 107 of the Copyright Act of 1976 specifies that courts "shall include" its non-exhaustive list of factors in weighing the fair use defense. *See* 17 U.S.C. § 107 (1994). As Congress explained in codifying fair use in § 107, "the endless variety of situations and combinations of circumstances that can rise [sic] in particular cases precludes the formulation of exact rules in the statute." H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

133. As Judge Learned Hand once observed, the fair use doctrine "is the most troublesome in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). Far from an outdated dictum, this quotation has been found "in nearly every major treatise, casebook, or law review article on the subject of fair use." Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544 n.58; *see also* 4 NIMMER & NIMMER, *supra* note 112, § 13.05[A], at 13-154 (noting that neither the case law nor § 107 "offer[s] any firm guide as to when" the fair use

use doctrine necessarily blurs the boundary between valid and invalid copyright claims. High risks of "theft"—here, infringement—increase the insecurity of copyright's protection. Though the resultant uncertainty obviously harms producers and sellers of copyrighted works, it also harms consumers. Academics, artists, commentators, and others desirous of reusing copyrighted works without authorization must borrow at their peril, consult experts on fair use,[134] or, sadly, forego such reuse altogether. ARM's clarifying power directly benefits those who would reuse copyrighted works—and through them their public audiences—by creating harbors safe from the threat of copyright litigation.[135]

Moreover, ARM benefits the public indirectly by increasing the transactional efficiency of the market for expressive works.[136] Like other markets, the market for expressive works does not constitute a zero sum game. And, as Coase observed of markets in general,

> [i]t is obviously desirable that rights should be assigned to those who can use them most productively and with incentives that lead them to do so. It is also desirable that, to discover (and maintain) such a distribution of rights, the costs of their transference should be low, through clarity in the law and by making the legal requirements for such transfers less onerous.[137]

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defense applies).

134. Consider, for example, that consumers and academics confused about the scope of the fair use doctrine routinely bombard the CNI-Copyright listserve with pleas for guidance. *See* Coalition for Networked Information, *Coalition CNI-COPYRIGHT Forum* (visited Nov. 5, 1997) <http://www.cni.org/Hforums/ cni-copyright>.

135. Indeed, only by escaping the fair use doctrine's uncertainty can those who administer ARM systems build in room for certain unbilled charitable and educational uses. ARM can

> respect the type of fair-use provisions that currently apply to libraries and *some* other institutions, allowing a reasonable number of free copies or quotations to be used. Members of the public with special needs—librarians, researchers and teachers—could receive . . . licenses that let them make a certain number of free or discounted copies of a work . . . .

Stefik, *supra* note 7, at 81 (emphasis added).

Why not, then, simply use ARM to build *all* of fair use into the digital intermedia? Because no one can define fair use with the required level of exactitude. *See infra* Part III.A.4 (discussing the uncertainty inherent in the fair use doctrine); *supra* Part II.A (same). " 'If the legal community and government can agree on what fair use means we can put it in place,' " an ARM expert observed. *Technological Solutions*, *supra* note 7, at 7 (quoting David Van Wie, chief technology officer at Electronic Publishing Resources, Inc.). The legal community and government do not currently understand fair use, however, in terms neat enough to fit into any programming language.

136. *See supra* Part II.A.

137. Ronald H. Coase, *The Institutional Structure of Production*, *in* COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 3, 11 (1994).

ARM, by its systemic improvement of copyright's transactional efficiency, helps us discover and maintain a distribution of rights to expressive works that will increase net social wealth.[138] ARM thus stands to benefit both producers and consumers.

In particular, because it increases the *value* of expressive works, ARM will put deflationary pressure on the *price* of accessing them. In general, an asset's current price internalizes the value of its future income stream.[139] Copyrights therefore commonly lose present value because, with the passage of time and their wider distribution, they prove increasingly vulnerable to uncompensated uses.[140] Because it reduces such risks, ARM tends to increase the value of copyrights. But although this windfall might initially accrue to copyright owners, competition among information providers would force access prices downward, toward the marginal costs of obtaining and distributing expressive works.[141] Directly or indirectly, such price pressure would similarly affect the prices that copyright owners can demand.[142] Gains

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138. *See generally* Coase, *supra* note 124, at 15-16 (discussing the effect of reduced transaction costs on the optimal distribution of resources).

139. *See* EDGAR K. BROWNING & JAQUELINE M. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 118-20 (1983) (discussing how to calculate the present value of future income); DAVID D. FRIEDMAN, PRICE THEORY 265-67 (1986) (same).

140. This reflects the general rule: as property rights to an asset grow more uncertain, the discounted present value of the income stream derived from the asset decreases. *See, e.g.*, FRIEDMAN, *supra* note 139, at 271-72 (describing the effects of insecure property rights on the market for oil). *But see* Lacey, *supra* note 133, at 1558 (arguing that immortal copyrights in some works of fine art would continue to appreciate over time).

141. Current theories of microeconomics commonly predict such an equilibrium. *See* PAUL A. SAMUELSON, ECONOMICS 445-46 (11th ed. 1980); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1981) ("Under perfect competition, price equals marginal cost, so if a firm's price is above its marginal cost, the implication is that . . . it has at least some market power.").

142. One might respond that, because copyrights constitute statutory monopolies, copyright owners will price access above their marginal costs. This criticism confounds two distinct uses of "monopoly," however. Regardless of how one characterizes their statutory rights, copyright owners do not necessarily enjoy monopoly power in the market for expressive works. *See* DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 1C, at 1-7 (1992) ("Giving exclusive rights to an author or inventor is no more a monopoly or anticompetitive than other species of real or personal property."); Note, *Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values*, 104 HARV. L. REV. 1289, 1299 (1991) ("The fact that copyright prevents . . . works from being copied does not mean that . . . authors and composers enjoy market power."). Substitutability across copyrighted works presents would-be monopolists with frustratingly flat demand curves, forcing access prices back down toward marginal costs. *See* William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1702-03 (1988) ("The degrees of market power enjoyed by different copyright holders . . . vary considerably."); Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1128 (1986) (hypothesizing that courts disallow copyright misuse defenses because

that ARM provides to copyright owners would thus pass on to consumers in the form of reduced access fees.[143]

Because ARM will increase the value of copyrighted works, moreover, it will encourage their greater production and improved distribution.[144] Consumers will thus benefit from better access to information.[145] Access providers will improve the information itself, too, increasing its quantity and making it better organized, verified, interlinked, diverse, up-to-date, and relevant.[146] Although this

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of "an appreciation that works of literature, art and music are highly substitutable and that, in the usual case, copyright will not confer the degree of market power that the patent-misuse cases presuppose"). Monopoly rents hardly pervade the market for expressive works. Even if a few copyright owners enjoy monopoly rents, therefore, ARM can still improve the efficiency of the market for expressive works so as, on balance, to benefit the public.

Moreover, ARM increases the likelihood that copyright owners who really *do* have monopoly power will exercise it in a manner that promotes the policy goals of fair use. ARM will allow such copyright owners to accrue monopoly rents through price discrimination rather than the relatively crude device of merely reducing supply. *See* Netanel, *supra* note 22, at 293 n.30 ("Digital technology significantly enhances copyright owner ability to engage in price discrimination."); Hardy, *supra* note 31, ¶¶ 18-21 (same); *see also* GOLDSTEIN, *supra* note 21, at 8, 178-79, 224 (describing how copyright owners already price discriminate, advocating such practices, and predicting that technology will improve them). This means that ARM will give monopolists a powerful incentive to make their works widely available at a price that reflects each individual consumer's willingness to pay. *See* Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 328 n.500 (1988) ("[P]rice discrimination by copyright owners can improve the economic efficiency of copyright incentives without decreasing that of dissemination and use ...."); *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) ("If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—.... all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market."). Copyright law appears to condone letting copyright owners enjoy at least *some* monopoly rents. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) ("[T]he monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value."). ARM helps to ensure that copyright owners do not earn such rents at the expense of the substantive goals of the fair use doctrine.

143. *See* NII WHITE PAPER, *supra* note 7, at 231 (noting that "the price of legitimate copies of copyrighted works may be higher due to infringement losses suffered by copyright owners"); Stefik, *supra* note 7, at 79 ("[I]nformation will most likely cost less .... [T]hese savings could be passed on to consumers.").

144. *See* Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL'Y 867, 880 (1990); Stefik, *supra* note 7, at 78-79, 81.

145. "[U]nless the intellectual-property rights of publishers are respected and enforced, many desirable items may never be made digitally available, free or at any price." Stefik, *supra* note 7, at 81.

146. Consider, for example, how competition between Lexis and Westlaw has driven rapid advances in user interfaces and data availability. Similar forces have led to well-

cornucopia of information may at first come only for a fee, some of it eventually will fall into the public domain.[147] To judge from current implementations of ARM, copyright owners might very well offer limited free access to their wares in an attempt to draw more extensive (and expensive) uses.[148] Entrepreneurs will undoubtedly create other services, at present utterly and inevitably unforeseen, to attract and satisfy consumers of information.

As such considerations demonstrate, "strict copyright enforcement doesn't necessarily mean people would pay more for viewing copyrighted material."[149] Because automated rights management creates well-defined and readily transferable property rights to information, it puts the power of the market in the service of consumer demand. As Professor Goldstein explains, "there is no better way for the public to indicate what they want than through the price they are willing to pay in the marketplace. Uncompensated use inevitably dilutes these signals."[150] Fared use therefore probably will provide better public access to copyrighted works in digital intermedia than fair use does or could. At any rate, no one can plausibly claim that fared use necessarily would serve the public interest any less well than the existing quid pro quo.

4. Calculation and Experimentation

For lawmakers to calculate which intellectual property rights best suit the new digital intermedia would require them to accurately

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touted improvements to web search engines, such as AltaVista (available at <http://www.altavista.digital.com/>), Lycos (available at <http://www.lycos.com/>), Yahoo! (available at <http://www.yahoo.com/>), and Excite (available at <http://www.excite.com/>). *See* Steve G. Steinberg, *Seek and Ye Shall Find (Maybe)*, WIRED, May 1996, at 108 *passim* (discussing how competition between web search engines drives innovation in search techniques).

147. But note that commentators have observed that some information will not fall into the public domain easily or at all due to technological barriers, contracts established under fared use, or tort doctrines like trade secret. *See* Ginsburg, *supra* note 118, at 61-65 (discussing possible impact of contractual limits on fair use); Kreiss, *supra* note 113, at 54-56 (noting that the fair use doctrine does not excuse access that violates trade secret or contract law); Samuelson, Technological Protection, *supra* note 14, at 28-30 (pondering the demise of public domain works in online contexts).

148. Indeed, IBM's InfoMarket already operates on this basis. *See InfoMarket* (visited Oct. 7, 1997) <http://www.infomarket.ibm.com>.

149. Riddick, *supra* note 7, at 248; *see also* Ginsburg, *supra* note 118, at 65 ("[Librarians may] fear that publishers will be sorely tempted to 'overcharge' for access to and copying of their works, especially if there is no longer a fair use doctrine to hold them in check. However, we do not now know whether . . . digital media will also enable libraries to save money overall."); Okerson, *supra* note 85, at 83 (noting that "there can be no marketplace without a ready supply of customers to buy new products").

150. GOLDSTEIN, *supra* note 21, at 217.

measure several variables—many of them already intangible—that rapid technological, social, and economic changes have sent spinning.[151] At a minimum, choosing the proper quid pro quo for copyright will prove difficult.[152] It arguably defies solution entirely.[153]

This difficulty by no means implies that we should forego deliberating about how copyright law affects public policy. It does imply, however, that we should not take it on faith that traditional fair use doctrine represents the one best rule for regulating access to expressive works in the digital intermedia. Regardless of our public input and the sincerity of their deliberations, legislators simply do not and cannot know that much.[154]

Automated rights management allows experimentation with a wide variety of approaches to regulating access to expressive works in digital intermedia. To the extent that ARM merely enforces existing tenets of copyright law, on the one hand, it hardly can give rise to any special objections. On the other hand, to the extent that ARM supports particular agreements between copyright owners, information providers, and consumers, its use merits a presumption of enforceability. Absent proof of a very narrow category of circumstances, such as duress or misrepresentation, we can assume that contracts under fared use reflect the interests of those who choose to enter into them.[155] It seems highly doubtful that such contracts would generate sufficient negative externalities to justify their invalidation.[156] Whether a full-blown fared use system would

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151. *See* Palmer, *Patents and Copyrights*, *supra* note 19, at 850.

152. *See* Mackaay, *supra* note 144, at 906 (describing questions about the optimality of copyright's quid pro quo as "vacuous"); *see also* George Priest, *What Economists Can Tell Lawyers About Intellectual Property*, *in* RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS, at 19, 21 (1985) ("[E]conomists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.").

153. *See* LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION 70-75 (3d ed. 1985) (arguing that economic calculation cannot proceed absent price signals).

154. *See* FRIEDRICH A. HAYEK, INDIVIDUALISM AND THE ECONOMIC ORDER 77-78 (1948) (noting that the knowledge essential for central planning does not exist in concentrated form).

155. *See* Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318-19 (1986).

156. *See* Cange v. Stotler & Co., 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring) (noting that "contracts rarely defeat the function of a statute so utterly that they may be set aside" under common law doctrines of public policy).

Professor Lemley has observed that "the compromises inherent in the copyright statute reflect the accommodations of a number of different interests. Private parties who 'contract around' the compromises established by Congress affect the rights of third parties . . . ." Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL.

interfere with federal regulation of expressive information remains a separate question, and receives consideration below.[157] If not killed at birth by myopic legal conservatism, however, ARM will remove decisions about which rights best suit the new digital intermedia from lawmakers' hands and put them at the local level—the only place where the requisite, relevant information exists.[158]

B. *Objectionable Use Remains Fair Use*

If ARM can give information providers the power to monitor various uses and reuses of their copyrighted materials for billing purposes,[159] it can also give them the power to bar such uses as they find objectionable. Technical prowess alone does not justify such censorship, however. Public policy and copyright law pose additional hurdles, and, as this Subpart shows, quite high ones. Whether an information provider could overcome those hurdles by supplementing copyright law with contract law remains a distinct possibility, and one that Part IV considers separately.

The prospect of information providers using ARM to track and prohibit objectionable uses of copyrighted works might well alarm free speech advocates. It seems unlikely, however, that the First Amendment's influence over state action would reach such private action.[160] Thanks to the idea-expression distinction, moreover, courts have found that they do not unconstitutionally hinder free speech in using state power to enforce copyright claims against commentators. As the Supreme Court has observed, the idea-expression distinction "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of *facts* while still protecting an author's *expression*."[161]

L. REV. 1239, 1278 (1995). All contracts "affect" third parties, however. Under common law, only very few—such as contracts to kill—generate sufficient negative externalities to merit invalidation.

157. *See infra* Part IV.B.3-4.

158. *See infra* Part IV.C.

159. *See supra* Part II.A.

160. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2383 (1996) ("[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . .").

161. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (emphasis added); *see also* Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) ("[T]he idea-expression line represents an acceptable definitional balance between copyright and free speech interests."), *quoted in* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978); 2 GOLDSTEIN, *supra* note 90, § 10.3, at 10:69 ("The idea-expression distinction is a central mechanism for protecting an author's expression while subjecting his ideas to free use, including copying."

Where the First Amendment proves impotent against ARM-based censorship, however, civil disobedience might have a very real impact. Because ARM's powers would at most reach only cut-and-paste quotations, it would not limit criticism or reportage that merely paraphrases a protected work.[162] Nor, of course, could a copyright owner count on ARM to catch reuses that, innocently or not, include cut-and-paste quotes of works stolen ("liberated," some would say) from ARM protection.[163]

It bears noting that the *NII White Paper* and NIICPA would, if written into law, considerably raise the stakes of "laundering" ARM-protected documents.[164] That escalation seems unwise, not to mention at cross-purposes to existing law. As currently interpreted, the fair use doctrine excuses some amount of unauthorized cut-and-paste quoting from expressive works protected only by ARM (and the owner's outcry). The *NII White Paper* and NIICPA propose banning devices that have "the purpose or effect" of circumventing ARM technology.[165] Because this provision would outlaw methods of squeezing fair use out of ARM-protected works, it would penalize the exercise of rights guaranteed by the Copyright Act.[166]

For now, at least, fair use can trump a copyright owner's objections. The *American Geophysical* court allowed licensing to

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(footnotes omitted)).

Note, however, that courts have cited the fair use doctrine as well as the idea-expression distinction when attempting to assuage concerns about freedom of speech. *See, e.g., Harper & Row*, 471 U.S. at 560 ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use...."). It thus remains an open question whether a court that declines to allow fair use under the reasoning of *American Geophysical* and *Princeton University Press* would nonetheless refuse to find infringement on First Amendment grounds. *See* Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1378 (9th Cir. 1993) (suggesting that in an "extraordinary" case the First Amendment might supersede fair use).

162. More precisely, ARM would only *detect* cut-and-paste quotations; once a human administrator has noted copyright violations through other means, such as the creation of derivative works, ARM might come back into play.

163. *See* Stefik, *supra* note 7, at 80 (discussing limits of ARM technology); Weber, *supra* note 7, at 11-12 (same).

164. *See supra* Part II.B.2 (discussing proposal in *NII White Paper* and NIICPA to add §§ 1201-04 to the Copyright Act, effectively outlawing anti-ARM techniques regardless of the legality of their intended uses).

165. *See* S. 1284, 104th Cong. § 4 (1995); H.R. 2441, 104th Cong. § 4 (1995); NII WHITE PAPER, *supra* note 7, at 230.

166. *See* Cohen, *supra* note 7, at 990-91; Okerson, *supra* note 85, at 84; Post, *Controlling Cybercopies*, *supra* note 9, at 45; Samuelson, *The Copyright Grab*, *supra* note 14, at 191; Samuelson, Technological Protection, *supra* note 14, at 27, 33; *see also supra* Part II.B.2 (discussing proposal to add §§ 1201-04 to the Copyright Act).

limit the fair use defense only "when the means for paying for such a use is made easier."[167] The court thus conditioned its holding on the observation that "a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use."[168] In this, it followed the Supreme Court's reasoning in *Campbell v. Acuff-Rose Music, Inc.*:

> The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.[169]

Therefore, although information providers might like to stop wags who evade ARM protection and reuse "liberated" works in objectionable ways, the fair use defense would continue to shield such defendants from copyright infringement claims.

One might well question the economic wisdom of such a policy. Just because an information provider refuses to license a particular use does not mean that no market exists. Rather, it demonstrates that the information provider demands more for that use than anyone wants to pay. Even a flat refusal to deal does not demonstrate market failure. As Professor Gordon has observed, "[a] refusal to license must not automatically justify a right to fair use; markets can function only if owners have a right to say 'no' as well as 'yes.' "[170] Strictly speaking, courts should thus find market failures only when technical barriers—not mere refusals to deal—prevent licensing agreements from taking place.

As the reasoning in the *Campbell* and *American Geophysical* decisions on this point demonstrates, however, the fair use doctrine sometimes favors public access over sound economics. Information providers who would prefer to use ARM and copyright law to completely bar objectionable reuses of their work will thus probably find their efforts thwarted by anti-ARM techniques and the fair use doctrine. Here, at least, fair use strikes back at ARM.

Suppose that you defused the ARM protecting a copyrighted

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167. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

168. *Id.*; *see also* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1387 n.4 (quoting *American Geophysical*, 60 F.3d at 931), *cert. denied*, 117 S. Ct. 1336 (1997).

169. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

170. Gordon, *supra* note 114, at 1634 (citation omitted).

expression and reused the work without the owner's authorization. Often such an owner, offended, will disdain to charge you a licensing fee.[171] But some owners will, if able, take your coin (and your apology).[172] Can you count on the fair use defense to excuse not only your objectionable reuse of a copyrighted work but also your refusal to pay for that use? Probably so. Reuses that qualify for the fair use defense do not, under § 107 of the Copyright Act, constitute infringement.[173] The Act would thus not obligate you to pay.[174]

Requiring payment in such circumstances arguably makes more sense, for the same reasons that support the spread of licensing generally.[175] Furthermore, excusing non-payment might encourage over-production of reuses that aim, for purely economic reasons, to offend copyright owners.[176] True, parody and other criticism "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[177] But too much of a good thing is no good at all.

Such theoretical considerations have yet to change copyright law, however. Unless and until they do, it looks as if information providers will have to suffer objectionable uses without remuneration,[178] license them grudgingly,[179] or try to prevent them by

171. *See Campbell*, 510 U.S. at 572 (describing how plaintiff refused defendants' offer of payment for right to parody its copyrighted work).

172. *See, e.g., infra* Part III.C.1 (discussing how and why the litigants in *Campbell* finally settled their dispute).

173. *See* 17 U.S.C. § 107 (1994) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright.").

174. *See* Ginsburg, *supra* note 118, at 64 ("Today, the effect of declaring a use 'fair' is to make it free of charge.").

175. *See infra* Part III.A.

176. *See Campbell*, 510 U.S. at 599 (Kennedy, J., concurring) ("We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original.").

177. *Id.* at 579.

178. Certainly, copyright owners would sometimes refuse or refund licensing fees in order to express disdain for the uses to which their material has been put. The flat claim of the Court that "the law recognizes no derivative market for critical works," *id.* at 592, raises a question whether copyright owners can demand payment for objectionable uses formerly excused by fair use. Surely, though, the Court's language reflects an assumption about the difficulties of negotiating licenses under hostile conditions—an assumption that ARM's coolly automated functions could very well invalidate.

179. At what price could copyright owners license objectionable uses? Writing prior to *American Geophysical* and *Princeton University Press*, Professor Ginsburg suggested that courts might in general discount fees for licenses newly extended to digital media. *See* Ginsburg, *supra* note 118, at 64. Professor Ginsburg noted that:

Perhaps in a digital world, fair use would not be an all-or-nothing matter; a court

means of supplementary contracts.[180]

C. *The Advent of Fared Use*

Considered together, the ARM technology described in Subpart A likely will combine with the legal doctrines described in Subpart B to place digital intermedia under a system of reciprocal quasi-compulsory licenses. This spontaneously generated outcome would represent the default rule under fared use. For reasons that this section explains, fared use offers a welcome alternative to the dystopia portrayed by those who would have fair use function in digital intermedia exactly as it has in conventional media. Section 1 explores the scope of fared use's reciprocal quasi-compulsory license. Section 2 describes the benefits of a fared use system and defends it against possible objections.

1. The Reciprocal Quasi-Compulsory License

The technical and legal factors set forth above likely will combine in digital intermedia to supplant fair use with an analogous but distinctly different rule: fared use. In a nutshell, fared use would subject copyrighted material in digital intermedia to a reciprocal quasi-compulsory license.[181]

The impact of ARM on licensing transaction costs, together with the theory of fair use embraced by *American Geophysical*, *Princeton University Press*, and the *NII White Paper*, ensures that consumers in most instances will have to pay for using copyrighted material in digital intermedia. Consumers thus face increased licensing. At the same time, the reasoning of *Campbell* and its progeny, *American*

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might uphold the copying at issue, but require the copyist to pay for it. The price the user would pay would be less than the price the information-provider would have charged. In effect, a compulsory license regime might split the difference between user claims to free access and publisher initiatives to charge for all uses.

Id.

Consistent with the market failure view of fair use, however, the courts in *American Geophysical* and *Princeton University Press* did not demand that copyright owners discount their wares just because they used new and better licensing techniques. That a copyright owner licenses a use grudgingly should not change the result. To the contrary, a use that offends the copyright owner, thus imposing non-monetary as well as monetary costs, presents an even better case for full remuneration.

180. *See infra* Part IV.A (discussing such contractual techniques); *infra* Part IV.B (discussing enforceability of resultant contracts).

181. The use of the prefix "quasi" serves to distinguish this type of license, compulsory only in the sense of its virtual inevitability, from the conventional type of compulsory licenses, imposed by statute and committed to imposing uniform rates. *See, e.g.*, 17 U.S.C. §§ 111(c), 115, 118(c)(3) (1994).

Geophysical and *Princeton University Press*, ensures that copyright owners cannot selectively bar what they regard as objectionable uses of their material. Copyright owners must therefore endure increased licensing, too. In sum, fared use establishes, at least in its default mode, a reciprocal quasi-compulsory license.

This license has limits, however. For one thing, it does not require a copyright owner to put up with as much objectionable use as consumers choose to purchase or take. Rather, consumers have a right to only as much access as fair use would traditionally provide. Beyond this, a copyright owner presumably could shut off access by declining to license further. To borrow the example from *Campbell*, a parodist would have the right to a guitar riff, but not a whole song.[182] Fair use therefore would continue to guarantee access, albeit limited, to expressive works in digital intermedia.

Another example from *Campbell* demonstrates that copyright owners will face powerful incentives to offer licenses even for uses that qualify as fair. To settle the *Campbell* litigation, the copyright owner, Acuff-Rose Music, agreed to accept license fees from the defendant parodist, 2 Live Crew.[183] Acuff-Rose did so, moreover, despite the fact that it earlier had disdained 2 Live Crew's offer to pay licensing fees.[184] A representative for Acuff-Rose succinctly explained the motivation for this change of heart: " '[W]e will be getting paid for the song.' "[185] The settlement benefited 2 Live Crew as well, giving it a safe harbor more clearly defined than the Supreme Court's necessarily theoretical opinion could provide.

This outcome suggests that fared use will introduce licensing not only where, thanks to ARM, "the means for paying for such a use is made easier,"[186] but even where "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions"[187] might otherwise give rise to the fair use defense. Consumers would, of course, retain the right to refuse to pay for uses

182. *See Campbell*, 510 U.S. at 588-89.

183. *See Nashville: Acuff-Rose, Rappers Settle Copyright Suit*, NASHVILLE BANNER, June 5, 1996, at B2 ("Acuff-Rose said it dismissed its lawsuit against the group while 2 Live Crew agreed to license the sale of their version of the Roy Orbison classic.").

184. *See Campbell*, 510 U.S. at 572 ("2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of 'Oh, Pretty Woman,' ... and that they were willing to pay a fee for the use they wished to make of it.... Acuff-Rose's agent refused permission....").

185. *Nashville: Acuff-Rose, Rappers Settle Copyright Suit*, *supra* note 183, at B2.

186. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

187. *Campbell*, 510 U.S. at 592.

that qualify as fair.[188] But they will no doubt find the prospect of clarifying their rights appealing, and payment via ARM not at all burdensome. In similar fashion, the prospect of increased revenue and of escaping the uncertainty of fair use may very well encourage copyright owners simply to license *all* uses of their works.[189]

Given the continuing high transaction costs of determining the proper boundaries of fair use, one might argue for *requiring* that those who benefit from copyright protection in the digital intermedia license all uses. Implementing that proposal almost certainly would require new legislation, however, such as that which already requires the compulsory licensing of non-dramatic musical works and the like.[190] The prospect of Congress dictating the price and availability of every copyrighted bit surging through the digital intermedia does not, to say the least, give much comfort.[191] On this point, even the otherwise activist *NII White Paper* counsels a hands-off approach.[192] The sanest response to fair use's lingering influence, therefore, would tolerate its remaining (if reduced) transaction costs, let courts continue shaping common law solutions, and give information providers and consumers freedom to polish rough spots with contractual devices.[193]

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188. Thus, lawmakers should reject the proposal of *NII White Paper* and NIICPA to add §§ 1201-04 to the Copyright Act, effectively outlawing anti-ARM techniques regardless of the legality of their intended uses. *See supra* Part II.B.2.

189. *See infra* Part IV.A.1-2 (discussing incentives influencing anti-criticism and anti-censorship contracts).

190. *See* 17 U.S.C. § 115 (1994); *see also id.* § 114(f) (providing the scope of exclusive rights in a sound recording); *id.* § 116 (providing for negotiated licenses for public performances by means of coin operated phonorecord players); *id.* § 118 (providing the scope of exclusive rights for use of certain works in connection with non-commercial broadcasting); *id.* § 119(c)(2)-(3) (providing that fees will be discerned by voluntary negotiation or compulsory arbitration).

191. To date, legislation relating to the Internet has evinced sadly meager wisdom. *See* ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa.) (enjoining enforcement of several sections of 47 U.S.C. § 223 on grounds of unconstitutionality), *aff'd*, 117 S. Ct. 2329 (1997).

192. The *NII White Paper* criticizes flat-rate compulsory licensing because such licensing treats "all works alike, even though their value in a competitive marketplace would likely vary dramatically. It also treats all users alike. It alters the free market relationship between buyers and sellers." NII WHITE PAPER, *supra* note 7, at 52; *see also* Robert P. Merges, *Intellectual Property and Digital Content: Notes on a Scorecard*, CYBERSPACE LAW. 15, 21 (1996) ("Congress should stay away from compulsory licensing for new [digital] media, at least at first.").

193. *But see* Netanel, *supra* note 22, at 335 n.248 (praising German-style "industry-wide bargaining under the threat of administrative determination of binding 'reasonable' license fee[s]"); *id.* at 381 (proposing that by imposing liability rules a "democratic paradigm would in effect force content owners to bargain under the shadow of a compulsory license"). Even though Professor Netanel appears to have decided on this

To gauge from *Campbell*, *American Geophysical*, and *Princeton University Press*, defeating the fair use defense requires only that an information provider guarantee that consumers can license copyrighted works at *some* price—not at any *particular* price. Future courts might apply this doctrine to find that exorbitant licensing fees, or price discrimination designed to deter objectionable uses, shows the lack of "a ready market or means to pay for the use."[194] Perhaps courts also will review licensing practices for reasonableness.[195] Courts should, at any rate, enforce valid contracts between information providers and consumers.[196] Settling the pricing issue will have to wait until fared use enters actual practice and, inevitably, litigation.

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policy for wholly theoretical reasons, he could also have drawn support from the case law discussed *supra* in Part II.B.1. Those cases support common law and contractual responses, too, though, and Netanel's preferred, statutory strategy entails a high risk of public choice effects and regulatory capture.

194. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995); *see also* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1387 n.4 (6th Cir. 1996) (quoting *American Geophysical*, 60 F.3d at 931), *cert. denied*, 117 S. Ct. 1336 (1997). Wise courts will distinguish between the two cases.

195. *Cf.* United States v. American Soc'y of Composers, Authors, & Publishers (*In re* Turner), 782 F. Supp. 778, 778-81 (S.D.N.Y. 1991) (involving cable television challenge to Ascap licensing practices based on antitrust decree regulating Ascap), *aff'd*, 956 F.2d 21 (2d Cir. 1994); Conference on Fair Use, *CONFU Draft on Fair Use Guidelines, Proposal for Educational Fair Use Guidelines for Digital Images* § 2.1, *reprinted in* 53 Pat. Trademark & Copyright J. (BNA) 125, 126-27 (Dec. 19, 1996) ("Images that are readily available in usable digital form for purchase or license at a fair price should not be digitized for addition to an institutional image collection without permission."); Stefik, *supra* note 7, at 81.

More specifically, perhaps courts would review fared use licensing practices under antitrust law's rule of reason standard. *See* HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 457 (1996) ("Contractual restrictions on redissemination are covenants not to compete, and they should be scrutinized under the same standards used for traditional covenants not to compete."). Analogously, courts might scrutinize fared use licenses for "copyright misuse." *See, e.g.*, Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977-79 (4th Cir. 1990) (holding that a license's anti-competitive provisions gave rise to copyright misuse defense to infringement). However, the copyright misuse doctrine remains highly controversial. *See* David M. Maiorana, Comment, *Privileged Use: Has Judge Boudin Suggested a Viable Means of Copyright Protection for the Non-Literal Aspects of Computer Software in* Lotus Development Corp. v. Borland International?, 46 AM. U. L. REV. 149, 157-82 (1996) (reviewing cases and commentary relating to computer software copyrights). At any rate, regardless of how well such analyses apply to licenses between information providers, it seems unlikely that licenses between information providers and consumers would raise the same questions.

196. *See infra* Part IV.A-B (discussing likely form and enforceability of such contracts).

2. The Net Benefits of Fared Use

Compared to fair use, the fared use system described here would offer a number of advantages. The discussion above explained the power of fared use to lower transaction costs radically, and the manifold advantages of such savings.[197] Another consequence of streamlining licensing procedures merits note: it encourages public discourse by providing a safe harbor for the reuse of copyrighted material. Critics, satirists, and parodists can thus rely on fared use to immunize them from the infringement claims of irate copyright owners seeking injunctive relief.[198]

Such irate copyright owners hardly would have grounds to complain, however, that fared use treats them roughly. In other times and in other media, the fair use doctrine would have put them at risk of suffering objectionable uses of their copyrighted material *and* of losing licensing fees. Fared use blunts at least one side of that double-edged sword. It does so, moreover, without undue cost to the public. The licensing arrangements allowed by ARM would, after all, merely ask that those who engage in objectionable uses pay for enjoying a supply of victims.

Methodologically speaking, fared use offers the considerable advantage of relying solely on existing legal doctrines. It thus requires only technical innovation—not legislative or judicial innovation—to give it effect. Of course, in practice it may turn out that fared use has some unforeseen and unpleasant consequences. Legal tinkering might cure these. More likely, however, private parties will contract around any untoward effects caused by fared use and once more render judicial and legislative invention unnecessary. The next Part addresses how such contracts might affect the default rules of a fared use regime.

IV. CONTRACTUAL MODIFICATIONS OF FARED USE

Copyright owners and consumers probably will want to contract around the spontaneously generated default version of fared use described above. On the one hand, copyright owners will want to bar

197. *See supra* Part III.A.

198. For an example of how a plaintiff can use copyright law to bar an offending parody, see *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978) (affirming injunction of "a rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture"). *See also* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188-89 (5th Cir. 1979) (affirming injunction on poster of bare-chested former Dallas Cowboys cheerleaders).

objectionable reuses of the works that they place in digital intermedia. Many consumers would, for the right price, agree to such anti-criticism contracts. On the other hand, some consumers will want, and probably get, blanket licenses to engage in any reuses of protected works, however offensive. This Part considers the likelihood and desirability of such contractual modifications to fared use.

Subpart A considers the utility of two broad classes of contracts modifying fared use: anti-criticism contracts and anti-censorship contracts. It predicts that only a few especially thin-skinned copyright owners will forego licensing fees in favor of anti-criticism contracts. In contrast, the popularity of anti-censorship contracts remains in doubt. Because anti-censorship contracts raise few red flags, Subpart B focuses its enforceability analysis on anti-criticism contracts. Notwithstanding the risk of preemption that this analysis of anti-criticism contracts uncovers, Subpart C argues that we should invite experimentation with this and other ways of structuring rights to information. Subpart C thus suggests, as a compromise, an exit strategy: enforce otherwise preempted contracts on condition that either party permanently forsake appeal to copyright law with regard to the subject matter of the contract.

A. The Utility of Fared Use Contracts

Information providers and consumers undoubtedly will want to modify fared use's default rule through a variety of contractual devices. Although the details of such contracts necessarily remain beyond our ken at present, two broad types seem likely: anti-criticism contracts and anti-censorship contracts. This Subpart considers the utility of each in turn. Section 1 argues that most copyright owners, on careful analysis, will find trying to prevent objectionable uses too expensive and futile to justify the effort. They will thus hew fairly closely to the default version of fared use described above.[199] Section 2 finds anti-censorship contracts an attractive option, but one most likely limited to narrow markets.

1. Anti-Criticism Contracts

In most cases, a contract that modifies fared use's default rules to allow a copyright owner to bar offensive uses simply will not be cost-effective. The problem, in brief: an anti-criticism contract fails to provide the licensor with any greater monetary benefit than

199. *See supra* Part III.C.1.

unconstrained licensing would provide, and may provide considerably less. Therefore, only a copyright owner with an overriding non-monetary objective, such as a powerful aversion to public criticism, will find anti-criticism contracts worthwhile.

Recall, for example, the Church of Technolism scenario introduced earlier in this Article.[200] By its close, the licensee (you) had violated a contract that gave the licensor (the Church) the right to bar offensive uses of its copyrighted material—even uses that would otherwise fall within the scope of the fair use defense. The Church cannot hope to make money by suing you for breach of contract. Tolerating your offensive use, pocketing the license fee, and avoiding the costs of litigation would prove much more cost-effective.[201] Rather, the Church will bother suing you only if it favors non-monetary goals, such as getting an injunction to end your sacrilegious quotations.[202]

Churches often have very powerful non-monetary goals, of course. But that marks them as unique. Most other copyright owners put finance before honor.[203] If that sounds crass, keep in mind that anti-criticism contracts will not come cheaply. Licensors who want injunctive relief against offensive uses will not only have to forego licensing fees for such uses and (almost certainly) bear litigation costs; they will also have to offer consumers something extra to make such censorious contracts attractive in the first instance. That something extra probably will take the form of lower

200. *See supra* Part II.C.

201. Perhaps things would work out differently if courts would enforce liquidated damages clauses that do more than cover mere losses, but as a rule, courts do not. *See, e.g.*, U.S. v. Bethlehem Steel Co., 205 U.S. 105, 118-19 (1907); DJ Manufacturing Corp. v. U.S., 86 F.3d 1130, 1133-35 (Fed. Cir. 1996); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

202. The Church may also have to show that mere money will not suffice. Generally speaking, in contract suits, "before granting a decree for specific performance, the court must make a finding that the plaintiff cannot obtain full and complete justice by a judgment for money damages." 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1136 (1964 & Supp. 1996); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party."). It bears noting, however, that advanced ARM could give the Church a self-help remedy by allowing it to automatically withdraw quotes lifted from protected documents.

203. Consider that the court in *Princeton University Press* reported only one instance of a publisher refusing to license copies: where "[t]he excerpt was so large that the publisher would have preferred that students buy the book itself." Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1388 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997); *see also supra* Part III.C.1 (discussing how and why the litigants in *Campbell* finally settled their dispute).

licensing fees for acceptable uses of copyrighted material. In sum, copyright owners so thin-skinned as to demand and enforce anti-criticism contracts had better have fairly thick wallets.

2. Anti-Censorship Contracts

In contrast to anti-criticism contracts, anti-censorship contracts would modify fared use's default rule, the reciprocal quasi-compulsory license, to commit copyright owners to allowing criticism, satire, and other potentially offensive uses. Such access contracts would obviously appeal to reporters, reviewers, academics, and others who regularly engage in biting commentary. With fared use or without, commentators would have to pay licensing fees for what they borrow in excess of fair use's limits. Anti-censorship contracts would guarantee, however, that everyone who pays such fees under fared use would enjoy free access to and reuse of the works that they quote and critique.

The size of the market for censorship-free access remains uncertain. Some copyright owners might demand a steep premium for giving up the right to license their works as they see fit. On the other hand, some copyright owners might charge *less* for such contracts. What Landes and Posner observe of book reviews may well hold true in general: "Ex ante, publishers are better off if reviewers are free to quote without permission; it makes reviews a credible form of book advertising."[204] Publishers might even come to advertise their anti-censorship agreements as proof of confidence and, thus, credibility. Still other publishers—both amateurs and start-ups employing something like Netscape's marketing strategy—would probably offer censorship-free access at no charge. Some might even pay consumers for their attention.[205]

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204. Landes & Posner, *supra* note 58, at 359.

205. This suggests that consumers provide valuable inputs that, when combined with others' copyrighted expressions, create independently valuable outputs. Audience attention, in other words, constitutes not mere consumption but rather an additional, vital step in an ongoing production process. *See generally* Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, 140-41 (offering new viewpoint for compensating intellectual effort in the Internet-based economy). We should thus perhaps reconsider whether copyright should expand as far as transaction costs will allow. *See, e.g.*, GOLDSTEIN, *supra* note 21, at 178-79, 229, 236 (posing this question); Landes & Posner, *supra* note 58, at 354 (same).

Giving copyright owners the state-backed right to appropriate from consumers the use-value of their mental assets raises grave distributional concerns. *See generally* Palmer, *Patents and Copyrights*, *supra* note 19, at 855-65 (arguing that copyright enforcement violates the property right that each has in his or her person); Palmer, *Intellectual Property*, *supra* note 19, at 278-87 (making an economic argument toward a

Here, as elsewhere, the acts of freely contracting parties defy prediction. Regardless of the price and popularity of anti-censorship contracts, however, they at least avoid the questions of enforceability that dog anti-criticism contracts. The next Subpart takes up that question.

B. The Enforceability of Fared Use Contracts

Unless Congress or courts forbid them, contracts will undoubtedly change the shape of fared use.[206] At least some copyright owners will want to limit the use of their works in contexts that they regard as critical, blasphemous, satirical, violative of their secrecy, or otherwise offensive.[207] Mere licensing fees will not satisfy such thin-skinned copyright owners, who would happily forego monetary gain for the right to bar offensive uses of their proprietary information.[208] ARM can technically empower them to police contracts reserving their anti-criticism rights. But can copyright

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similar conclusion). Even apart from such equitable concerns, however, economic efficiency demands that we assign property rights so as to reduce transaction costs. Only this path, the argument goes, will carry us closer to that Coasian ideal: a transaction-cost-free world. Assignations of property rights do not fare equally in this task. Copyrights, being intangible, fare particularly badly when compared to the *tangible* property rights in persons, copies, and distribution channels.

The sharp boundaries of tangible property make transacting in it relatively cheap. ARM technology will allow us to leverage each of our tangible property rights into technically and legally enforceable contracts that govern the exchange of information. Finally, consumers will have the power to internalize the externalities generated by their perception and remembrance of others' expressive works. Authors, on the other hand, will find that they can recoup their marginal costs without recourse to a statutory monopoly. This system of fared use, based in tangible property and express contract, could offer considerably lower transaction costs than the existing system of copyright law. Economic efficiency may thus someday demand that we abandon copyright as a temporary kludge, once useful but now outmoded.

206. Professor Goldstein recognizes the likelihood of such contracts and mentions an interesting alternative to forbidding them: "If copyright owners try to circumvent... copyright exemptions by contract—and there is every reason to expect that they will—Congress will have to reconsider the distributional aspects of its copyright agenda and decide whether to outlaw such contracts or to grant direct cash subsidies." GOLDSTEIN, *supra* note 21, at 224-55.

207. Copyright owners have issued such demands in the past, in other media. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994) (involving infringement suit arising out of use of copyrighted music in parody); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1172 (5th Cir. 1980) (involving infringement suit arising out of the use of a competitor's magazine cover in a comparative advertisement); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 958 (D.N.H. 1978) (involving infringement suit arising out of a politician's use of an opponent's copyrighted material).

208. For an economic analysis of copyright owners' motives to prevent criticism of their works, see Gordon, *supra* note 114, at 1632-35.

owners count on courts to enforce such contracts?[209] The following sections consider objections to such agreements based in shrinkwrap licenses, adhesion contracts, § 301 preemption, and Supremacy Clause preemption. Only the last of these appears to have much bite.[210] The following Subpart, C, will suggest a way for mutually consenting parties to save their otherwise preempted agreements by exiting from copyright into contract law.

1. Fared Use Contracts as Shrinkwrap Licenses

Any contract that attempts to alter the default rules for using copyrighted works in an automated rights management system will probably resemble the types of agreements that already mediate access to digital intermedia.[211] A contract shaping ARM rights will, in other words, require a consumer to consent to its terms before it grants access to the protected works. Indeed, existing ARM systems already employ contracts conforming to this model.[212]

Commentators have suggested that this type of agreement may qualify as a shrinkwrap license.[213] Insofar as that equation would render ARM invalid per se, however, it errs. Consumers can apprehend the terms of an ARM contract at the point of sale, prior to committing to purchase the information in question.[214] The lack of

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209. The *NII White Paper* would have courts do so: "The Working Group believes that, regardless of the type of transaction, where parties wish to contract electronically, they should be able to form a valid contract on-line." NII WHITE PAPER, *supra* note 7, at 58.

210. Note that this analysis largely ignores the enforceability of anti-censorship contracts, which modify fared use to provide consumers with a blanket license to engage in any paid use. Whatever the plausibility (uncertain) and appeal (considerable) of such agreements, they simply do not run the same risks of unenforceability that dog the anti-criticism agreements at issue here.

211. *See, e.g., General Terms and Conditions for Use of the Lexis-Nexis Service*, Apr. 1, 1996, LEXIS, TERMS Library, GENRL File.

212. *See, e.g., Registered User Agreement for IBM InfoMarket Service, supra* note 97.

213. Shrinkwrap licenses "purport to condition the purchaser's right to use the program on acceptance of the license and explicitly indicate that opening the software package or loading the program into a computer constitutes acceptance." RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY, ¶ 7.24[1][b], at 7-87 (2d ed. 1992 & 2d Supp. 1995); *see also* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1920 (1990) (questioning protective worth of "shrinkwrap license" equivalent for CD-ROM absent a validating state statute); Paul T. Sheils & Robert Penchina, *What's All the Fuss About* Feist? *The Sky Is Not Falling on the Intellectual Property Rights of Online Database Proprietors*, 17 DAYTON L. REV. 563, 573 (1992) (" '[B]ound-by-use' license agreements are (albeit with some very important differences) the online database equivalent of 'shrinkwrap licenses' that accompany mass-marketed computer software programs.").

214. *See supra* Part II.A.

this degree of notice has proved fatal to shrinkwrap licenses in some cases.[215] In other cases, giving consumers prior notice has saved "shrinkwrap" licenses—better called "access contracts"[216]—from invalidation.[217]

Still other factors widen the margin of safety for ARM access contracts that, rightly or wrongly, get equated to "shrinkwrap" licenses. The Seventh Circuit recently enforced a shrinkwrap license despite its reliance on terms disclosed *after* purchase,[218] and the forthcoming Article 2B of the Uniform Commercial Code almost certainly will guarantee the enforceability of a wide class of "shrinkwrap" licenses.[219] Point-of-sale contracts offered to consumers via automated rights management thus appear likely to escape the risk of invalidation that, according to some authorities, shrinkwrap licenses should face.[220]

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215. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 108 (3d Cir. 1991); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 766 (D. Ariz. 1993). *But see* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996) (upholding enforceability of terms imposed after sale on grounds that "[n]otice on the outside [of the box of software], terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike").

216. *See* U.C.C. § 2B-102(a)(1) (Discussion Draft Apr. 14, 1997) (" 'Access contract' means a contract for electronic access to a resource containing information, resource for processing information, data system, or other similar facility of a licensor, licensee, or third party.").

217. *See* Microstar v. Formgen, Inc., 942 F. Supp. 1312, 1317-18 (S.D. Cal. 1996) (holding that where the opening screen refers to a separate LICENSE.DOC that conditions use of plaintiff's software, and defendant reads the license, defendant cannot claim the license is invalid on grounds of waiver or abandonment); *Arizona Retail Sys.*, 831 F. Supp. at 763 (holding that where plaintiff ordered an evaluation diskette, but received and opened a live diskette, "the contract was not formed when TSL shipped the goods, but rather only after ARS opened the shrinkwrap on the live version of PC-MOS which ARS had notice would result in a contract being formed").

218. *See ProCD, Inc.*, 86 F.3d at 1455.

219. *See, e.g.*, U.C.C. § 2B-112(d) (Discussion Draft Apr. 14, 1997) ("Manifestation of assent may be proved in any manner, including by a showing that a procedure existed by which a party must of necessity have engaged in conduct that manifests assent to the contract or the term in order to proceed further in the use it made of the information."); *see also id.* § 2B-202(a) ("A contract may be made in any manner sufficient to show agreement, including by the conduct of both parties . . . .").

220. *But cf.* Karjala, *supra* note 86 *passim* (regarding shrinkwrap licenses as suspect on preemption grounds). Professor Karjala notes:

> Shrinkwrap licenses purport to bind a purchaser to terms to which he or she did not specifically assent, but such assent can easily be made a condition of access in the Internet environment. We must be cautious in accepting these kinds of distinctions, however, because the end result is the same as in the case of the enforceable shrinkwrap license, namely, the transformation of copyright into a pure owners' rights statute.

2. Fared Use Contracts as Adhesion Contracts

Despite its rhetorical sting, the "adhesion contract" label carries surprisingly little legal weight. As one commentator has noted, "[t]he law currently governing contracts of adhesion is a jumble of different lines of analysis, contradictory outcomes, and convoluted expressions."[221] For the most part, courts remain unmoved by adhesion contract claims. Absent extraordinary circumstances,[222] courts traditionally enforce all duly signed contracts unless the drafting party affirmatively misleads the signing party.[223] It thus does not seem likely that the contracts giving rise to fared use routinely will suffer invalidation on grounds of adhesion.[224]

That fared use survives this test should please even those who would have courts take more aggressive steps against adhesion contracts. Fared use does not exist in a vacuum. One can evaluate its merits only by considering the alternative: copyright law's fair use doctrine. Insofar as that doctrine represents a "bargain" between copyright owners and the public—a popular fiction[225]—it epitomizes the type of take-it-or-leave-it offer that foes of adhesion contracts so dislike.[226] Neither authors nor their audiences have much real say in

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Id. at 532.

221. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1197 (1983).

222. *See* U.C.C. § 2-302(1) (1987) (allowing courts to refuse to enforce unconscionable contracts in whole or in part); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (same); *see also, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (refusing to enforce installment contract that entitles the seller to repossess goods no matter how small the unpaid balance). As Posner notes, however, the contract at issue in *Williams v. Walker-Thomas Furniture Co.* merited invalidation, at any rate, on grounds that it penalized the buyer by withholding all shares of the proceeds. *See* POSNER, *supra* note 107, at 103 n.3.

223. *See* Rakoff, *supra* note 221, at 1184-85. Judge Posner supports such a narrow view of adhesion contracts. "Economic analysis reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract." POSNER, *supra* note 107, at 104.

224. *See* NII WHITE PAPER, *supra* note 7, at 58-59 ("Moreover, state validating statutes—similar to those used to validate shrink wrap licenses—can be used for on-line licenses to help overcome concerns regarding adhesion . . . .").

225. *See supra* Part III.A.3.

226. Indeed, one seminal analysis of adhesion contracts criticized them on grounds that they *too greatly* resembled legislation. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943) (describing adhesion contracts as "private legislation"). The "private legislation" metaphor tends to mislead, however, because it over-emphasizes citizens' power to shape statist legislation, underestimates the power of consumers to choose between and thus shape contracts, and ignores the fact that so-called "private legislation" does not fundamentally rely on coercive state power. *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) (arguing that

how Congress distributes rights to expressive works.[227] It hardly answers this objection to observe that parties can bargain away from fair use to agree to alternative allocations of rights—not, at least, so long as lawmakers stand ready to preempt certain of those agreements. Nor does it do much to observe that special interests can—and indeed do—successfully lobby Congress for favorable treatment under the Copyright Act.[228] For "although the political process itself involves bargaining, government typically offers benefits to individual beneficiaries on a take-it-or-leave-it basis."[229]

Fared use ameliorates the adhesive aspects of this political bargain by empowering mutually consenting parties to experiment with alternative ways of allocating their rights to information. Given the likelihood that fared use will force information providers to compete for consumers by offering them attractive terms of access, and that decreasing communication costs will encourage consumer coordination and self-help, we should not assume that fared use will decrease consumers' bargaining power.[230] Ultimately, however, bargaining power has little to do with the question at hand. As Judge Posner has observed of adhesion contracts, "[t]he problem is monopoly, not bargaining power."[231] Insofar as fared use weakens the State's monopoly on specifying the terms by which consumers access expressive works, therefore, it addresses the very concerns at the heart of the adhesion contract doctrine.

3. Preemption by § 301

Both § 301 of the Copyright Act[232] and the Constitution's

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contrary to "private legislation" arguments, "freedom of contract and private property... define domains in which individuals may establish both the means and the ends for themselves, to pursue as they see fit (so long as they do not infringe upon the rights of third parties)," and that "[p]rivate property is an institution that fosters individualized, if not eccentric, preferences; it does not stamp them out").

227. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is *Congress* that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." (emphasis added)).

228. *See* Cohen, *supra* note 7, at 1001 ("[NIICPA] would vest copyright owners with absolute authority to define the scope of the digital rights management regime.... It is difficult to imagine a more blatant example of single-interest group legislation.").

229. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1452 (1989).

230. *See supra* Part III.A.3.

231. POSNER, *supra* note 107, at 102.

232. 17 U.S.C. § 301 (1994).

Supremacy Clause[233] threaten to preempt the types of agreements that would regulate access to information under fared use. Because § 301 typically fails to interfere with contractual obligations, however, it poses little risk of preempting fared use contracts.

Through § 301, the Copyright Act preempts common law doctrines or state statutes that might otherwise conflict with its provisions. Section 301 specifies that the Copyright Act alone will govern "all legal or equitable rights that are equivalent to any of the exclusive rights" set forth in § 106 of the Act.[234] This terse delineation of the Copyright Act's exclusive domain leaves a good deal uncertain,[235] a problem that reference to the legislative history of § 301 fails to alleviate.[236]

Under the consensus view, however, contractual rights do not qualify as "equivalent to any of the exclusive rights within the general scope of copyright"[237] because enforcing contractual rights calls for proof of an additional legal element: the existence of a contractual obligation.[238] As the Seventh Circuit recently explained,

> [c]opyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission .... A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not

233. U.S. CONST. art. VI, cl. 2.

234. 17 U.S.C. § 301(a). The Act also specifies that only "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103" will suffer preemption, *id.*, but the works protected by fared use will *ex hypothesis* satisfy those criteria.

235. *See* Hardy, *supra* note 31, ¶ 34 (reviewing case law and concluding "preemption and contract doctrine are far from being comfortably settled").

236. *See* Carole P. Sadler, Comment, *Federal Copyright Protection and State Trade Secret Protection: The Case for Partial Preemption*, 33 AM. U. L. REV. 667, 674 (1984) ("Rather than clarifying what state causes of action survive copyright preemption, the legislative history of section 301 compounds the confusion.").

237. 17 U.S.C. § 301(a).

238. *See* 3 GOLDSTEIN, *supra* note 90, § 15.2.1.2, at 15:11 ("Contract law is a good example of a state law that will be immune from preemption under the extra element test."); 1 NIMMER & NIMMER, *supra* note 112, § 1.01[B][1][a], at 1-19 (concluding that "contract-based rights themselves are typically not subject to preemption" (footnotes omitted)); Ginsburg, *supra* note 118, at 62 ("[S]ubstantial authority supports the proposition that rights under contract are not equivalent to rights under copyright."). *But see* David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543, 614 (1992) ("The far-reaching public policy Section 301 implements clearly requires preemption of contract-based protection of expression *as* expression where the effect is to secure rights in that expression which are greater than, equal to, or supplemental of those which Section 106 secures.").

create "exclusive rights."[239]

It thus seems highly unlikely that § 301 would preempt a contract that authorizes information providers to forbid those who obtain information under the contract from putting it to offensive uses.[240]

4. Preemption by the Supremacy Clause

The Supremacy Clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."[241] It of course provides the legal foundation for § 301, which Congress enacted merely to clarify and reaffirm preemption principles originally developed under the Supremacy Clause.[242] Perhaps the broader wording and intent of the Supremacy Clause allows it to preempt fared use contracts that the more specific provisions of § 301 would leave untouched.[243] A paucity of relevant case law[244] and the subtleties inherent to

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239. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996); *see also* National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 433 (8th Cir. 1993) ("The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively different from one for copyright."); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 719 (2d Cir. 1992) (holding that a trade secret action was not preempted because "where the use of copyrighted expression is simultaneously the violation of a duty of confidentiality established by state law, that extra element renders the state right qualitatively distinct from the federal right, thereby foreclosing preemption under section 301"); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990) ("This action for breach of contract involves an element in addition to mere reproduction, distribution or display: the contract promise made by Taquino, therefore, ... is not preempted."); Acorn Structures, Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988) ("Plaintiff's claim for breach of contract entails a distinct cause of action which is clearly not within the subject matter of copyright....").

240. *But see* Karjala, *supra* note 86, at 531 ("Mass-market adhesion 'licenses' clearly fail the test insofar as they purport to extend or expand federal copyright rights....").

241. U.S. CONST. art. VI, § 2.

242. *See* H.R. REP. NO. 94-1476, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5747 (stating intent "to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*, that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute" (citations omitted)).

243. *See* Hardy, *supra* note 31, ¶ 35 ("Because it is as of yet unsettled whether or not this more general doctrine of preemption exists independently of the Copyright Act's section 301, the possibility that it may be used to invalidate certain contractual provisions remains strong.").

244. Courts have had little need to refer to the Supremacy Clause since § 301 became law in 1976, because now they can "simply turn to the explicit statutory language." 1 NIMMER & NIMMER, *supra* note 112, § 1.01[B], at 1-9; *see also* 3 GOLDSTEIN, *supra* note 90, § 15.3.3, at 15:35 to 15:36 ("Arguably, section 301 has entirely displaced constitutional preemption doctrine under the supremacy clause in cases involving state protection of copyright subject matter."). Cases applying the Supremacy Clause to questions of the Copyright Act's preemptive power have almost solely concerned state statutes

Supremacy Clause preemption[245] leave the supposition unresolved, however.[246]

The Supreme Court has interpreted the Supremacy Clause to open several avenues to preemption. First, Congress can preempt state law "by so stating in express terms."[247] Congress has said nothing to bar the sorts of fared use contracts at issue here, though.[248] Second, preemption may take place when "federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."[249] This description hardly fits copyright, however, which continues to enjoy protection—albeit solely for unfixed works—at common law. What about state protection for *fixed* works? That Congress has not seen fit to attack the ample authority upholding contracts under § 301[250] indicates that here, too, Congress has "left room" for fared use contracts.[251]

Third, federal law may preempt a state law that "actually conflicts" with federal law because the state law "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[252] This test arguably frames

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particularly directed toward regulating intellectual property. *See, e.g.*, Association of Am. Med. Colleges v. Cuomo, 928 F.2d 519, 532 (2d Cir. 1991); Associated Film Distrib. Corp. v. Thornburgh, 800 F.2d 369, 375 (3d Cir. 1986); American Soc'y of Composers, Authors, & Publishers v. Pataki, 930 F. Supp. 873, 878 (S.D.N.Y. 1996). These fail to shed much light on the issue of the Supremacy Clause's impact on fared use contracts. *But see* F.E.L. Publications, Ltd. v. National Conference of Catholic Bishops, 466 F. Supp. 1034, 1046 (N.D. Ill. 1978) (applying the Supremacy Clause to find that "[t]he copyright laws do not protect a licensing program instituted by a copyright owner" and that therefore, "defendants' preemption argument is inappropriate").

245. For a notoriously winding line of cases applying Supremacy Clause preemption doctrine to patent law, see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 159-60 (1989), *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234, 237 (1964), and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).

246. "Nonetheless, it remains true that the vast bulk of copyright contractual issues must be resolved under state law, given the silence of the Copyright Act in addressing such issues . . . ." 1 NIMMER & NIMMER, *supra* note 112, § 1.01[B][3][a], at 1-44.7.

247. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

248. Congress came closest to such an express statement in § 301, which leaves ample room for contracts to modify copyright's default rules. *See supra* Part IV.B.3.

249. *California Fed. Sav. & Loan*, 479 U.S. at 280-81 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

250. *See supra* Part IV.B.3.

251. *See* Goldstein v. California, 412 U.S. 546, 553 (1973) ("The clause of the Constitution granting to Congress the power to issue copyrights does not provide that such power shall vest exclusively in the Federal Government. Nor does the Constitution expressly provide that such power shall not be exercised by the States.").

252. *California Fed. Sav. & Loan*, 479 U.S. at 281 (quoting Hines v. Davidowitz, 312

preemption in terms sufficiently broad to pose a threat to anti-criticism contracts enforced by ARM as part of a widespread system of fared use. Suppose that in practice and in the aggregate, such contracts would render the fair use defense largely inapplicable. Would this result thwart the "purposes and objectives" that led Congress to enact § 107 in particular, and the Copyright Act in general?

Here we enter the realm of conjecture. As one court has noted, "[i]t is possible to hypothesize situations where application of particular state rules of [contract] construction would so alter rights granted by the copyright statutes as to invade the scope of copyright law or violate its policies."[253] This hypothetical has, however, remained exactly that: a mere hypothetical. On the other hand, the Supreme Court has made clear that preemption arguments have a high hurdle to cross before they begin to threaten contracts between private parties: "Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property . . . ."[254]

The Supreme Court has regarded state laws specifically regulating intellectual property with far less solicitude than it has contracts that, backed by state law, affect rights to intellectual property.[255] Some commentators thus have argued that the Supreme

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U.S. 52, 67 (1941)). "Actual conflict" can also arise if "compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). The same sort of analysis applied under § 301 would presumably prevent this formulation of the test from preempting fared-use contracts, however. *See supra* Part IV.B.3.

253. Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 483 (5th Cir. 1981). The court's reference to "copyright law or . . . its policies" indicates that it has both § 301 and the Supremacy Clause in mind. *See id.* ("[A]pplication of Georgia rules to determine parties' contractual intent is not preempted by [the] copyright act nor does their application violate federal copyright policy.").

254. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979).

255. *Compare* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 155 (1989) (holding that a state law protecting boat hulls from copying was preempted by federal law), *and* Compco Corp. v. Day-Brite Lighting, 376 U.S. 234, 237 (1964) (holding that a state unfair competition law was preempted by patent law), *and* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964) (same), *with Aronson*, 440 U.S. at 266 (holding that a contract affecting rights to a patent was not preempted). Professor Merges notes that preemption,

> which has been applied almost exclusively to overturn state legislation, has in theory been available as a limit on the terms that parties can include in a private contract; but no court—so far as I can determine—actually has ever used this principle to render unenforceable a particular licensing agreement.

Robert P. Merges, *Expanding Boundaries of the Law: Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1610 (1995) (footnote omitted) (reviewing PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF

Court should preempt form contracts that so pervade the market as to amount to "private legislation."[256] The Supreme Court appears highly unlikely to accept this invitation, however. The Court has shown great unwillingness to expand the definition of "state action"—particularly with regard to the private resolution of commercial disputes.[257] It explained that "even if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it."[258] Because ARM's power to thwart unauthorized use will often make recourse to litigation unnecessary, moreover, it looks even less likely to qualify as state action.[259]

The question of Supremacy Clause preemption of fared use contracts thus remains unresolved and probably involves too many variables to *ever* allow an easy answer, much less at this far remove.[260] The burden of proof of course will fall on those who would use preemption to force open access to others' copyright works.[261]

INTELLECTUAL PROPERTY (1994)).

256. *See* Merges, *supra* note 255, at 1613 ("Standard form software licensing contracts, by virtue of their very uniformity and the immutability—in other words, non-negotiability—of their provisions, have the same generality of scope as the state legislation that is often the target of federal preemption. Furthermore, these contracts have the same effect as offending state legislation: wholesale subversion of an important federal policy.... [W]hen a licensing provision in contravention of the federal statute has become totally pervasive... the statute [might] preempt it."); *see also* Cohen, *supra* note 7, at 1022 (criticizing the NIICPA on grounds it "superimposes upon the existing framework of copyright and contract law an additional layer of private legislation regarding the terms and conditions of access to copyrighted works"). *But see supra* note 226 (criticizing the "private legislation" metaphor).

257. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978).

258. *Id.*

259. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible...." (citations omitted)).

260. *See* 1 NIMMER & NIMMER, *supra* note 112, § 1.01[B][3][c], at 1-44.13 (commenting that its "many twists and turns" demonstrate "how murky copyright pre-emption issues can be"). *But see* Karjala, *supra* note 86, at 540-41 (arguing that because enforcement of a "purported 'contract' on widely distributed products" would "frustrate[] basic federal copyright policy honed by the courts over decades and to a significant degree codified in the 1976 Act," the Supremacy Clause preempts enforcement of such a contract).

261. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.")) ("[P]re-emption is not to be lightly presumed."); ProCD, Inc. v. Zeidenberg, 86

Nonetheless, for reasons discussed above, there remains a non-negligible chance that courts will interpret the fair use doctrine to require that copyright owners put up with objectionable uses.[262] The next Subpart thus proposes an exit strategy that both protects the integrity of copyright law and liberates mutually consenting adults to give and receive information as they see fit.

C. *Exit from Copyright*

The *NII White Paper*[263] and the legislation it begat[264] have drawn criticism for rushing to impose uniform solutions to problems that remain poorly understood.[265] Even commentators who disagree about the proper role and scope of copyright agree that federal authorities should give private parties time to craft their own solutions.[266] Professor Samuelson has suggested that we "[l]et copyright owners use technology to build 'fences' around their works and explore new markets. If the fences they use are inadequate to protect against market failure, there will be time enough to adopt appropriate legislation."[267] The U.S. Register of Copyrights likewise

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F.3d 1447, 1454 (7th Cir. 1996) ("Although Congress possesses power to preempt even the enforcement of contracts about intellectual property... courts usually read preemption clauses to leave private contracts unaffected."); *see also* Hardy, *supra* note 31, ¶ 37 ("[As originally conceived, copyright law was] to be exercised like any other property right, in any way the owner saw fit, with a correspondingly wide scope for contractual variation in license terms, fees or sales price.").

262. *See supra* Part III.B.

263. NII WHITE PAPER, *supra* note 7.

264. *See* S. 1284, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995).

265. This over-eager response appears most clearly in the *NII White Paper*'s call to redefine "distribution" and "publication" in the Copyright Act to include "transmission." *See* NII WHITE PAPER, *supra* note 7, at 213-17; *see also* S. 1284 § 2 (involving proposed amendments to §§ 101, 106(3) of the Copyright Act); H.R. 2441 § 2 (same). It likewise appears in the *NII White Paper*'s zealous protection of copyright management information. *See* NII WHITE PAPER, *supra* note 7, at 230-33, App. at 4-6; *see also* S. 1284 § 4 (providing civil and criminal penalties for circumventing copyright protection systems and for giving false copyright management information); H.R. 2441 § 4 (same). Having thus raised the ceiling on copyright protection, the *NII White Paper* readily defers to private efforts: "Copyright owners should be free to determine what level or type of protection (if any) is appropriate for their works." NII WHITE PAPER, *supra* note 7, at 233.

266. *See, e.g.*, Okerson, *supra* note 85, at 84 ("Progress in the creation and distribution of electronic information is being made nicely, though not rapidly.... Many believe the technology is not mature enough for agreement about fair use guidelines."); Post, *Controlling Cybercopies*, *supra* note 9, at 45. *But cf.* Cohen, *supra* note 7, at 998-1000, 1031-38 (forecasting effects on consumers' privacy of private ordering, and recommending remedial legislation).

267. Samuelson, Technological Protection, *supra* note 14, at 33; *see also* Samuelson, *The Copyright Grab*, *supra* note 14, at 191 ("It would be more sensible to wait to see what kinds of markets emerge and then figure out what, if any, legal fences are needed....").

has argued against premature legislative attempts to update fair use for digital intermedia.[268]

Attempts to abort the development of fared use would merit similar criticism. Private parties must have free rein to explore technological and contractual answers to the problems of protecting information in the new digital intermedia.[269] At this early stage, we can predict neither the solutions that entrepreneurs will discover nor the systemic effects of their various, individual experiments. Few people will object to anti-censorship contracts. Even anti-criticism contracts deserve a presumption of enforceability, however.

Though third-party commentators and lawmakers might frown on some types of fared use contracts, they should refrain from banning them. They should instead require merely that those who would rely on such contracts choose between copyright law and contract law. Suppose, in other words, that the worst-case scenario described above comes to pass,[270] and that contracts under fared use develop so as to leave copyright's traditional concern for the public interest wholly unrepresented in digital intermedia.[271] The proper response would not invalidate such agreements, and thereby punish private parties for quite naturally pursuing their *private* interests. The proper response would instead withdraw copyright's *public* benefits. Information providers who prefer contract to copyright would have to rely on ARM to protect their wares, which otherwise would fall into the public domain.[272] Those who prefer copyright

268. *See* Mary Beth Peters, U.S. Register of Copyrights, *Letter to the Chairman of Subcommittee on Courts and Intellectual Property in Response to Questions Concerning the National Information Infrastructure Copyright Protection Act*, Answer to Question 4 (Feb. 15, 1996) <ftp://ftp.loc.gov/pub/copyright/cpypub/niistat.html> ("The questions posed for fair use in the digital environment are therefore not a problem of statutory language, but relate instead to judicial interpretation of the doctrine in the differing environment of digital communications, and to the ability to take advantage of the fair use privilege in an encrypted digital world.").

269. "The marketplace should be allowed to develop whatever legal licensing systems may be appropriate for the NII." NII WHITE PAPER, *supra* note 7, at 53.

270. *See supra* Part II.C.

271. Such an extreme result appears highly unlikely. "Commercial copyright owners seem a long way from suing libraries or elementary schools." Okerson, *supra* note 85, at 84. Social sanctions alone limit over-zealous copyright enforcement. Consider how public outcry forced "Ascap, gasping, ... to issue a press release saying it never intended to charge for campfire sing-alongs, and that it 'has never brought nor threatened to bring suit against the Girl Scouts.' " Elisabeth Bumiller, *Battle Hymns Around Campfires: Ascap Asks Royalties from Girl Scouts, and Regrets It*, N.Y. TIMES, Dec. 17, 1996, at B1 (quoting Ascap's press release).

272. Professor Merges argues that contract offers scant competition to copyright as a means of protecting proprietary information in digital media. "[T]he argument for the

would have to forego overly restrictive contracts.[273]

In broad terms, this option to exit[274] copyright law would apply only to fared use contracts otherwise barred by preemption. The exact details of implementing this program obviously deserve thoughtful input from many points of view.[275] The drafters of the proposed UCC-2B[276] could certainly stir discussion by considering a new § 104(c):[277] "Any party to a contract governed by this title but preempted by copyright law may enforce the contract if that party permanently abandons any rights and remedies arising under copyright law to the subject matter of the contract."[278]

Amending UCC-2B ultimately would prove futile, however, because—even if adopted by each state—the UCC exercises little more than an advisory influence on federal lawmakers. A more complete and effective reform would therefore amend § 301 of the federal Copyright Act[279] by adding something like the following subsection: "(g) Nothing in this title annuls or limits any rights or remedies that a party enjoys under contract law if said party permanently abandons any rights and remedies arising under

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dominance of contract has one serious flaw: it fails to address the problem of rights against those who are not in contractual privity." Merges, *supra* note 255, at 19. He does not, however, address the impact of advanced ARM on this problem. *Cf.* Ginsburg, *supra* note 118, at 63 ("If access to works could be obtained only through the information provider (directly or through an authorized online distributor) no 'third parties' to the contract would exist.").

Professor Lemley observes of the contract option in the analogous case of shrinkwrap license, "I suspect that copyright owners would find this an unattractive alternative, however, and that in fact they would prefer to 'pick and choose' only the copyright rules that benefit them." Lemley, *supra* note 156, at 1274.

273. *Cf.* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 485-90 (1974) (discussing the wisdom of letting state trade secret law provide an alternative to federal patent law as a means of encouraging innovation).

274. For seminal discussions of the importance of the right and power to exit regulatory schemes, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970), and Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

275. Excessive opportunism, for example, would need to be avoided. One possible solution would be that information providers should have to abide by one choice for each *class* of contracts, rather than for each individual agreement or contractual term. Of course, the outcome of deliberations to solve such problems matters little if, as the analysis above suggests, preemption poses scant threat to fared use contracts. *See supra* Part IV.B.3-4.

276. *See* U.C.C. § 2B-104(c) (Discussion Draft Apr. 14, 1997).

277. Sections 104(a)-(b) currently concern "Transactions Subject to Other Law." *Id.*

278. It remains uncertain whether the sorts of ARM-enabled agreements discussed in this Article would fit best under the UCC-2B's definition of access contracts, § 102(a)(1), or of mass-market licenses, § 102(a)(25). Depending on the particular transaction and technology used, either might apply.

279. 17 U.S.C. § 301 (1994).

copyright law to the subject matter of that contract."[280]

Congress already has made explicit its willingness, in the context of the first sale doctrine, to force copyright owners to decide between contract law and copyright law.[281] The amendment to § 301 proposed here would merely make that Hobson's choice generally available. A measure such as this proposed amendment could open up alternatives to an outright ban on any fared use contract that skirts preemption. Policy makers therefore can—and should—let fared use develop unhindered, interfere with private arrangements only on proof of imminent peril to the public interest, and provide the freedom to exit from a statutory regulatory scheme to contractual ones.

To the extent that information providers and consumers opt to manage expressive works solely by contract, they will deregulate (more aptly, "re-regulate") access to expressive works.[282] Their various private agreements will supplant the allocation of rights that copyright's fair use doctrine formerly required. This prediction raises an interesting choice: should we favor private agreements, or a state law, when it comes to controlling the creation, dissemination, and use of expressive speech? Commentators and courts largely agree on how to answer this question in the First Amendment context. No such consensus exists in the context of copyright, however.[283] Indeed,

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280. Query, however, whether even this would forestall preemption under the Supremacy Clause.

281. *See* H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 (commenting that the first sale doctrine set forth in § 109 "does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright"); *see also* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908) (expressing willingness to uphold valid contract claim despite applicability of the first sale doctrine); American Int'l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) (holding that the "first sale" does not make first or subsequent buyer an infringer, but copyright owner retains right to sue for breach of contract accompanying sale); United States v. Wise, 550 F.2d 1180, 1187 n.10 (9th Cir. 1977) (holding that after first sale, vendee violating agreement with vendor "may be liable for the breach but he is not guilty of infringement").

282. We might say that consumers and providers will "contractualize" copyright. We would not say that they "privatize" it because copyrights already rest in private hands.

283. Although Professor Netanel recognizes the value of voluntary associations in sustaining civil society, *see* Netanel, *supra* note 22, at 341-47, he clearly wants the State to regulate what consenting adults do with copyrighted works. Netanel sometimes speaks quite broadly, saying for example that under his "democratic paradigm . . . the limits to copyright's duration and scope represent the outer bounds not only of copyright protection, but also of other forms of private control over publicly disseminated expression." *Id.* at 363; *see also id.* at 385 (arguing that the public policy of the Copyright

scarcely anyone even asks the question in those terms.[284]

V. CONCLUSION

Academics view with horror the prospect that automated rights management may limit copyright's fair use defense. But academics have a peculiar affection for fair use. It gives them the valuable right to use others' copyrighted works generously and free of charge. Furthermore, academics themselves suffer scant harm from fair use because they have few licensing fees at risk. In fact, academics typically prefer that others copy, read, and cite their works freely.[285] Such special incentives do not encourage academics to regard fared use with disinterested eyes. Only a comprehensive and objective view can accurately assess ARM's impact on the fair use defense, copyright law, and the public interest.

This Article has argued that a confluence of new ARM technologies and existing legal doctrines stand ready to radically reduce the scope of the fair use defense—and that, on reflection, this should horrify no one. In the place of fair use, a reciprocal quasi-compulsory license will likely come to define rights to expressive works in the digital intermedia. A balanced accounting reveals that, whether in its default mode or specially modified by contract, this

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Act should not be subordinated to market demands and private contract). Strictly speaking, however, it remains unclear how he would regard civil associations that forsake copyright altogether and allocate rights to expressive works solely by contract, since he does not consider the exit option set forth here.

Similarly, although Professor Karjala argues emphatically "that copyright cannot be simply a 'default position' against the background of which copyright owners and users should be fully free to make variations by contract," Karjala, *supra* note 86, at 521, he bases this argument on the assumption that to hold otherwise would give copyright owners the double benefit of copyright and contract. "The free use of unprotected elements of such works . . . [is] the quid pro quo that benefit[s] the public in exchange for the public's recognition of the exclusive rights of copyright." *Id.* It thus remains unclear how he would regard contracts enforced only after abandonment of overlapping copyright claims.

284. This Article can do little more than stir curiosity about the question—and mention that the author has begun trying to answer it.

285. The court in *Princeton University Press* took due note of "the assertions of numerous academic authors that they do not write primarily for money and that they want their published writings to be freely copyable." Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997). It disregarded such assertions, however. "It is the publishers who hold the copyrights, of course—and the publishers obviously need economic incentives to publish scholarly works, even if the scholars do not need direct economic incentives to write such works." *Id.*; *see also* American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992) (noting that "authors have a far greater interest in the wide dissemination of their work than in royalties"), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

system of fared use would generate considerable net benefits and distribute them equitably.

In comparing fair use to fared use we might well ask, "which allows 'freer use'?" Fair use *seems* freer to academics and others who regularly use copyrighted works because, quite simply, nobody demands payment. But such use comes "for free" only in a very superficial sense. More careful scrutiny demonstrates that fair use imposes costs on consumers via risk of suit, on copyright owners via uncompensated uses, and on society as a whole via transaction costs. The alternative presented by fared use, because it can liberate us from a copyright system rotten with uncertainty, in fact offers freer access to expressive works.

As copyright owners and consumers contract around the default rules for fared use, they will experiment with a wide variety of methods for managing information in the digital intermedia. A full assessment of this exploratory and entrepreneurial process must await our observations of actual results. We can assume, however, that copyright owners and consumers will modify fared use's reciprocal quasi-compulsory license only when they find it mutually beneficial to do so. Their agreements thus deserve a presumption of enforceability. If federal preemption threatens to negate that presumption, lawmakers should protect continued experimentation by opening an exit route from copyright law to contract law.

Neither lawmakers nor academics can expect to dictate the single best means of regulating online access to expressive works. The necessary information—information that would give policymakers a shortcut to the future—hardly "wants to be free." To the contrary, such information cannot yet be had at any price. It must come from those who actually participate in the market for information, and it will appear in the mosaic of their diverse experiments and agreements. Only by patiently studying their evolved preferences, in the fine and in the aggregate, will we discern which types of rights best suit the new digital intermedia.