To Waive and Waive Not: Property and Flexibility in the Digital Era

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Even in an era when creative works can sometimes be made collectively, and where copying and modifying existing works is often easy, individual ownership of discrete creative works still makes sense. Individual creative effort is still the crucial ingredient for many high quality works, and the control conferred by ownership is often the most efficient, and even more frequently the most fair, social arrangement.

Even so, a common argument against property rights in the digital era is that they come with a heavy transactional burden. The need to clear permission to use digital works is said to impede the potential of high velocity distribution models and participatory creative efforts. Too many property rights, too many clearance and licensing deals, too much friction in the great digital creativity machine—all stand in the way of progress.

There are, broadly speaking, three solutions to the problem. First, society can cut back on the number of property rights, or rework the structure of rights with an eye toward transactional efficiencies. Second, right holders or society in general can invest in rights clearance mechanisms that make it easier for users and consumers of rights-protected works to transact more efficiently. Third, legal rules can be tailored to make it easier for right holders to commit to a binding non-enforcement of their rights.

The purpose of this brief Article is to explore in some depth this third option. I begin by describing how waiver contributes to the supple texture of property rights, making it easy for individuals to exercise choices after rights have been granted. This is, in my view, a cornerstone feature of property rights, and one of their chief advantages over other entitlements and incentive regimes. Next, I show how waiver fits with other basic features of property rights. I argue that waiver can be thought of as an aspect of the structure of rights, as well as a (particularly simple) rights clearance mechanism. Finally, I describe some simple ideas that could clarify knotty issues surrounding legal requirements for waiver of intellectual property rights. The most important are: 1) binding, easily verified waiver mechanisms that are "good against the world"; and 2) scope of waiver rules that

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make it simple for right holders to selectively waive rights, for example, permitting some uses and not others. I conclude with a call for more attention to the waiver strategy as a way of retaining our traditional commitment to property while easing the transactional burden that property rights entail.

I. WAIVER AND THE BASIC FLEXIBILITY OF PROPERTY

From a strictly transactional point of view, conferring more rather than less property creates bottlenecks, and slows down the process by which creative works move about. Property from this perspective is the enemy of flexibility.

But something else is true as well: the decision not to extend a property right over a certain asset often has a strong quality of irreversibility, of rigidity. It may be possible for individuals, acting outside formal legal channels, to duplicate some of the benefits of a property regime. But most likely efforts to duplicate the effectiveness of property through private action are destined to be but a weak shadow of the real thing. Property is, after all, a grant of power from the state, and is backed by the force of the state. And it is hard for individuals to duplicate that force.

What if it were relatively easy for private actors to move from a property to a no-property regime? What if they could easily renounce their rights and create in effect a property-free zone? If that were true, it would be easier to execute a "regime change" through purely private action—to move from a property regime to (at least a limited) no-property regime. A regime under which property rights were widely awarded, and then private actors were free to retain or renounce them as they saw fit, would be more flexible than the opposite regime. This regime would permit more freedom of action, more experimentation, more "mixing and matching" of strategies and institutions. It would *eliminate* the bottleneck impeding freedom of action that would be in place under a strict no-property regime.

All that is required to realize this vision of greater flexibility is a simple way to renounce rights, some mechanism that others can rely on as a binding expression of intent to voluntarily surrender some or all of the rights connected to an asset. With this mechanism, i.e., with robust waiver, a property regime retains great flexibility. Society's decision to grant property rights can be fairly easily "reversed" by private action. Because the no-property regime cannot be so easily reversed, we would have to say that the property-with-waiver regime preserves more options down the road. In a word, it is more flexible.

A. WAIVER AND INDIVIDUAL AUTONOMY

This idea of flexibility finds support in the property theory of the philosopher

Immanuel Kant.[1] Kant's understanding of property is closely related to other aspects of his philosophical system; it is heavily reliant on the notion of the value of each individual. One way this value is expressed is in Kant's emphasis on maximizing individual freedom of action, or autonomy.

The centrality of choice or freedom in Kant's thinking about property is a well known theme. I want to touch on just one source, which deals with a crucial aspect of choice: the right to voluntarily surrender, or waive, property rights in something one owns.

In a book review he wrote in 1785, Kant considered and rejected an argument about freedom and coercion.[2] The book in question was a book on natural law, with Kantian overtones, authored by the German legal scholar Gottlieb Hufeland.[3] Hufeland's book, entitled *Essay on the Principle of Natural Right*, had argued that a person faced with a potential violation of rights has a natural right to use force to prevent the violation, and a concomitant obligation to do so.[4] Kant demurred, on the grounds that the very idea of a right includes within it the possibility of coercing others not to violate it, but does not imply a separate obligation to use this power of coercion.[5] What bothered Kant about Hufeland's argument was that it was premised on a supposed obligation to improve oneself, to increase one's own perfection.[6] This was absurd, Kant argued, because it meant that a person would always have to maximally enforce his rights in order to fulfill this duty of self-perfection.[7] The natural right to enforce, as Hufeland had framed it, implied an ironclad *duty* to enforce—always.[8] In rejecting this, Kant implied that it was important to leave open a right holder's freedom of action.[9] Kant said any definition of a right that includes the necessity of full enforcement becomes thereby

1. Material in this section is drawn from Chapter 3 of my forthcoming book. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (forthcoming May 2011).

2. Immanuel Kant, *Review of Gottlieb Hufeland's Essay on the Principle of Natural Right* (Allen Wood trans. and ed.) (1785), *in* PRACTICAL PHILOSOPHY 109 (Mary J. Gregor ed., Cambridge Univ. Press 1999).

3. DAVID F. LINDENFELD, THE PRACTICAL IMAGINATION: THE GERMAN SCIENCES OF STATE IN THE NINETEENTH CENTURY 85 (1997).

4. Kant, *supra* note 2, at 109.

5. *Id.*

6. *Id.*

7. Allen Wood, *The Final Form of Kant's Practical Philosophy*, *in* KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS 1, 7 (Mark Timmons ed., 2002).

8. *See* Kant, *supra* note 2, at 116 (agreeing with Hufeland that there is no need for a concept of obligation embedded within natural rights because all that matters is that one have a right to coerce compliance; but disagreeing with Hufeland's insistence on an independent, prior requirement of obligation that motivates or leads to natural rights—because that would imply that all rights are bound up with an obligation to enforce them, which Kant takes exception to); *see also* Marcus Willaschek, *Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Laws in Kant's* Metaphysics of Morals, *in* KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS, *supra* note 7, at 65, 81–82 ("Juridical laws as such, independently of ethical considerations, do not *require* anyone to do something; they only issue *warrants* to coerce those who hinder other people's rightful use of freedom." (citation omitted)).

9. Kant, *supra* note 2, at 116 ("[I]t seems to follow from [Hufeland's ideas] that one *can cede nothing* of one's right as permitting coercion . . . .").

a straightjacket, and this makes no sense at all.[10] Kantian rights are meant to extend individual freedom, to enhance autonomy. Mandatory enforcement has no place in such a scheme.

The essence of Kant's objection is this: Hufeland's idea of rights did not include the concept of waiver.[11] To waive a right is to choose to relinquish it, to elect not to enforce it. Given Kant's support for wide-ranging rights in support of human dignity and personal freedom, this is an important point. Kant obviously thought it essential to separate the grant of rights from their enforcement. In Kant's conception of property, the function of rights is to further the reach of, and provide security to, an individual who wants to work his will in the world.[12] But a right that constrains its holder to maximal enforcement works against these goals. Put differently, rights are meant to extend the range of personal freedom, not constrain it.

How do Kant's ideas regarding waiver apply to property rights? Begin with the notion that for Kant, the state is to be quite liberal in granting rights over the many objects on which a free individual might want to project his or her will.[13] But liberality of enforcement is another matter. Enforcement decisions are to be made not by the state but by individual right holders. Here, individual freedom takes on a new and important dimension: the instrument of personal dignity and autonomy, a property right, is not permitted to become a straitjacket, restricting the freedom of the right holder. Freedom of choice in the "post-grant" stage of the property right is to be preserved by placing the enforcement decision in the hands of the right holder. The state may be obligated, in Kant's view, to permit a wide range of property claims, but it is at the same time prohibited from determining the conditions of their enforcement.[14] Once again, maximizing autonomy—individual choice—is the organizing principle. And in the case of property, the instrument that makes this possible is waiver.

10. *Id.*

11. *Id.*

12. *See* MERGES, *supra* note 1, at ch. 3 (describing Kant's theory of property, which includes the ability to assert ownership over objects (of any kind) on which people have impressed their will).

13. Only recently have Kant's contributions to property theory been widely discussed among legal scholars. His stature in other areas, however, is of course virtually unparalleled. The great milestones of Kant's writing career were the three famous Critiques: *The Critique of Pure Reason* (1781), *The Critique of Practical Reason* (1788) and *The Critique of Judgment* (1790). Together with the *Groundwork of the Metaphysics of Morals* (1785), they are considered the most important works in Kant's rather extensive oeuvre. Kant covers property in *The Doctrine of Right* ("DOR"), which has also been called *The Metaphysical Elements of Justice*. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., Hackett Publ'g Co. 2d ed. 1999) (1797) [hereinafter Ladd]. The DOR was originally published under the title *Die Metaphysische Anfangsgründe der Rechtslehre*. IMMANUEL KANT, DIE METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (2d ed. 1798). This book came very near the end of Kant's writing career. It forms Part I of a larger work whose title is *The Metaphysics of Morals*, which was completed in 1797. The DOR is Part I of the *Metaphysics of Morals*; Part II is called the *Tugendlehre*. Ladd, *supra*, at xiii.

14. On Kant's views regarding the very wide scope for property rights, see MERGES, *supra* note 1, at ch. 3. On his view that legal rights are not inherently linked to a duty to enforce them—which thus permits individual enforcement decisions—see Kant, *supra* note 2.

1. Waiver and the Mixed Nature of Property

Kant's views on waiver reveal an important facet of property rights. To be effective, property must be backed by the state. The only way to protect a right "good against the world" is to invoke the power of the state.[15] Property is effective against strangers—those with whom the right holder may have no direct contact, or no preexisting relationship. But enforcement against strangers is impossible without some centralized power that has authority over all citizens of a state. Contrast this with trading relationships, or relations among members of a close-knit group. Enforcing norms in these settings can be achieved without involving a central authority, for example, through reciprocity or informal sanctions. Property differs from these relations by virtue of its generality, the fact that a property right binds all other members of a polity, regardless of whether they otherwise interact with the property owner.

Even though the state is central to property relations, however, property rights are still *individual* rights. Although the state is necessary to grant property rights, those rights belong to individuals. The power of the state that lies behind a property right is invoked strictly at the discretion of the right holder. The enforcement apparatus is made available by the state, but only the right holder decides when to invoke that power. The flipside of the decision to invoke the state is an election *not* to enforce a property right—to waive it.

This brings us back to autonomy. Property theorists identify autonomy as perhaps the chief value inculcated by individual ownership rights. The ability to exclude others from using an asset, to control investment and development of the asset and to rent it or sell it, confers very wide latitude on its owner. Exclusive control over assets allows people to choose how to make a living, who to live near, whether to invest in improvements, and many other aspects of their life projects. In a word: ownership bestows autonomy.

But the freedom of action provided by a property right would be pointless if there was a mandatory rule of enforcement. It would not make sense to award individual property rights, and then take away the choice of how or when to enforce them. So, our legal system permits individuals to selectively enforce their property rights. A voluntary, conscious decision to eschew enforcement—i.e., waiver—is thus the flip side of the freedom that property provides. It is another dimension of freedom.

This is the sense in which I mean that property has a mixed nature. It is a creature of the state, a right backed by the state; but it is to be enforced only by an individual right holder, and only when that right holder decides.

15. *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 307 (1988) (relating autonomy to independence).

2. Property as Option

Property rights give their holders options. A right holder can decide whether and when to enforce a property right. Some violators may be let off the hook, for strategic or other reasons, while others are met with an enforcement action. Selective enforcement, in other words, is built into the structure of the right. In a general sense then, this feature of property means that ownership gives people options—choices about what they want to do.

This feature of property can also be analyzed in a slightly more analytic way under the rubric of real option theory.[16] This area of finance provides tools that help people put a dollar value on the benefits of flexibility down the road. A decision to enforce a property right is tantamount to the finance concept of *exercising* an option. The exercise period or term of the option, again by analogy, would be the maximum time a right holder has to bring an enforcement action once he learns of a violation. The exercise period would thus be bounded by legal concepts such as estoppel and laches. The point of financial analysis tools in this area is to place a precise value on the right to exercise an option at some future date. Again in general terms, this amounts to an economic measure of the value of flexibility.

It is easy to apply these ideas to the exercise of property rights. Say for instance, you are a professional photographer, someone who makes a living taking photos of new events, outdoor scenes, maybe even weddings and portraits. You take some dramatic pictures of a newsworthy event, maybe a natural disaster or the opening of a new state park, and post them on your website on the Internet. You retain copyright in the works, by not disclaiming your rights and by placing a copyright notice on them. The steps you have taken preserve your ability to enforce your copyrights at a later date.

II. WAIVER AS STRUCTURAL FEATURE/TRANSACTIONAL MECHANISM

So far I have argued only that waiver makes property rights more flexible. The next step is to show how a robust conception of waiver fits into the overall body of property theory. In particular, I want to push the idea that waiver is both built into the basic structure of IP entitlements, and also related closely to the formation of clearance and permissions mechanisms that arise after property rights are granted. Waiver, from this dual perspective, is thus both a feature of the basic entitlement and part of the post-grant environment that arises to help move entitlements around among economic actors. This makes waiver a special case of the more general attribute of alienability. When done correctly—as suggested by the proposals in Part III below—waiver becomes a zero transaction-cost species of alienability.

16. *See* Christopher Cotropia, *Describing Patents as Real Options*, 34 J. CORP. L. 1127, 1128 (2009) (describing economic literature on "real options theory" and its application to patent law).

This is an important feature of property, and one that takes on growing importance in an era where transaction costs are a major concern in the IP world.

A. WAIVER AS STRUCTURAL FEATURE

What I mean by a structural feature is this: an essential building block of the property entitlement; a foundational component or dimension; something built into the basic fabric of the legal device or concept. To put it simply, waiver is "baked into" the foundation of property rights. Because of the growing importance of both IP rights and the transaction costs they engender, waiver should, in my opinion, be even more firmly baked in.

The idea that waiver is a structural feature of property rights is not quite new, but it is also safe to say that this particular feature of property has not drawn a great deal of interest from theorists. As a theme in discussions of property, it is there, but mostly implicitly. So for example, waiver is a built-in feature of the Coase Theorem; without waiver, it is impossible to structure a payment to someone to get them not to enforce their right, and payments of this type are integral to the workings of the theorem.[17] Waiver is also but one species of the larger genus of alienability, which has been thought of as a foundational aspect of property since its earliest history.[18] But waiver as a special case of alienability, as a feature of property whose contours are worth spelling out in detail, has largely escaped detailed scrutiny by legal scholars.

The same is not true of economists. In many ways, the economic theory of property rights incorporates a sophisticated, though largely implicit, understanding of the importance of waiver. The entry point for this understanding is the idea of enforcement costs. Fundamental to economic discussions of property is that only when a potential property right becomes worth the cost of enforcing will anyone lobby for the grant of such a right or bother to obtain it, if it is available.[19] Likewise, rights that exist in theory, but are not worth the cost of enforcing, are for purposes of economic analysis not really rights at all, or at any rate not worth talking about. Rights like these are implicitly waived. And so, it is in this sense that economists incorporate waiver into their understanding of the structure of property. What is missing in most of these analyses, however, is a detailed discussion of the specific role of waiver as a distinct transactional device. So for example, while selective waiver as a concept does arise in the economic literature on property, there is not much detailed discussion of specific waiver rules and requirements.[20]

17. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

18. WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 325 (3d. prtg. 2007) (2004) (discussing the Roman law principle of dominium or full ownership rights).

19. *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

20. *See, e.g.*, YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 65 (1989) ("People

B. WAIVER AS A TRANSACTIONAL MECHANISM

The incipient right to waive is, as we have seen, a structural feature of property entitlements. But the widespread practice of waiver, waiver as a common behavioral pattern, occupies a different part of the property landscape. It is one example of a broad array of mechanisms for transferring property rights. As such, it may be thought of as one aspect of the post-grant environment in which property rights operate—one of many transactional mechanisms designed to move rights from initial holders to those who need to use them.

Interest in these transactional mechanisms has grown steadily in the past fifteen or so years.[21] Beginning with early work on collective IP rights organizations such as ASCAP and patent pools, the focus in this area has been on the ways private actors respond to the need for a high volume of transactions.[22] More recent work, particularly under the rubric of the anticommons, has highlighted the problem of an excessively diverse pattern of rights holdings.[23] When too many players hold too many rights, it is too expensive to bundle the rights into functional units. An excessively fragmented landscape of rights holders can under these circumstances stand in the way of efficient economic activity.

The literature on transactional features of the post-grant environment has obvious overlaps with what I referred to in the last section as "structural features of property." For example, the stringent right to exclude that is the backbone of property is a structural feature that necessitates the need for private transactional mechanisms in the first place. (A different property structure, such as a liability rule entitlement, may well be accompanied by a different environment for post-grant transacting.) Even so, structural features and transactional mechanisms tend to be separate and distinct concerns in the literature. Waiver provides a good opportunity to bring the two discussions together.

Waiver, as we have seen, is a structural feature of property. But it is also a transactional device—indeed, a particularly important and interesting one. That is because waiver typically involves very low transaction costs. The transfer of a right under waiver will often involve little or no negotiation, does not in general

acquire, maintain, and relinquish rights as a matter of choice . . . . People choose to exercise rights when they believe the gains from such actions will exceed their costs."). For a fairly typical treatment of waiver in a particular context, see, e.g., William M. Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* 4 (Univ. of Chi., Olin Law & Econ. Program Research Paper Series, Working Paper No. 123, 2001), *available at* http://papers.ssrn.com/paper.taf?abstract_id=270985 (discussing high transaction costs of obtaining waivers under Visual Artists Rights Act, but adding no discussion of the theoretical basis of waivers).

21. *See, e.g.*, Michael J. Madison, Brett M. Frischmann, & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Transactions and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996).

22. Merges, *supra* note 21, at 1293.

23. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

require a formal agreement and is by definition without any cost to the recipients. It is therefore a particularly valuable part of the transactional landscape.

To sum up then we might say this: Waiver is built into the structure of property rights. But the *exercise* of the right to waive can be thought of as one of the transactional mechanisms that often arise to smooth the transfer of property rights. And among these mechanisms, it is an especially important one.

C. WAIVER AND BALANCE

The IP system in the digital era faces a difficult dilemma. There is a longstanding social tradition, reinforced by the legal culture, in favor of awarding property rights to individual creators. Yet digital technology makes possible several innovative practices that are potentially at odds with wide-scale individual ownership and control: rapid and decentralized distribution of digital works, widespread copying of those works, the ability to modify, remix and comment on existing works and the ability for widely distributed individuals to contribute to collective works. The great challenge of contemporary IP policy is how to balance the conflict between individual ownership and the desire many have to engage fully in user-driven digital activities.

Waiver plays a significant role in achieving this balance. The initial grant of rights that precedes a voluntary waiver honors our tradition of individual IP rights. At the same time, each act of waiver frees up an IP protected work. And in the aggregate, wide scale acts of waiver have over time contributed to a large and growing volume of material that is available for distribution, copying and remixing, all without any legal strings attached, and all contributed voluntarily by creators. The balance that waiver achieves is, I would submit, superior to any of the alternative policies that have been proposed for resolving the IP rights bottleneck in the digital era. It is superior to simply denying IP rights in the digital domain, because this approach deprives creators of the rights they traditionally deserve. And it is superior to requiring a more formal transactional apparatus, because it is simpler and less costly.

III. IMPLIED WAIVER, OPT-IN AND CHANGING DEFAULTS

The essence of waiver is voluntary relinquishment of a right. Its desirability comes from the unique combination of full ownership rights and low transaction costs. But the transactional advantages of waiver create a risk: that it will be overused. The temptation is that waiver will be interpreted so liberally that it will undermine the autonomy that is at the heart of the institution of property. Both aspects of waiver—its promise and the risk of overuse—are on exhibit in some recent controversies over online digital content.

A. ONLINE SEARCH AND CACHING: THE IMPLIED LICENSE CASES

Recently, a number of cases have pitted copyright holders against Google and Yahoo!, two companies that operate online search engines.[24] The legal issue is this: to do their magic, search engines must access and copy massive amounts of material on the World Wide Web.[25] These search engines do not comb the Web anew for each individual search; instead, they create an index of words, phrases and images, and it is these indices that are actually searched when a user types in a request. But there is no doubt that the creation of an index requires the making of a copy of at least portions of a website.

It is possible for the creators of a website to prohibit search engines from "crawling" their site.[26] This prevents the making of a copy of the site for the search index, and of course also means that the website will not be included in any search results received by a user. But it takes an affirmative step for a website operator to exclude his site from searching and indexing. The user has to set a software switch in the undisplayed guts of the website (the hypertext header fields) that instructs crawlers to "pass this site by—do not crawl or copy." If the user fails to set this switch, the website will be crawled and indexed. This is a classic case of the technical software default simultaneously encoding and promoting a behavioral norm. Classic Lawrence Lessig, in other words: code as law.[27]

The implied license cases hold that failure to turn the search/index switch off amounts to an implied license.[28] Google, Yahoo!, and other search engines are thus permitted to crawl and index any site where the switch is left on. Importantly,

24. Parker v. Yahoo!, Inc., 88 U.S.P.Q.2d 1779 (D. Pa. 2008); Field v. Google, Inc., 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006); Parker v. Google, Inc., 422 F. Supp. 2d 492 (D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007) (non-precedential), *cert. denied*, 552 U.S. 1156 (2008).

25. Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1617 (2009) (describing operation of online search engines and the copying they require).

26. *See Robots Exclusion Standard*, WIKIPEDIA, http://en.wikipedia.org/wiki/Robots_exclusion_standard (last visited Nov. 17, 2010) (describing use of robots.txt file to instruct web crawlers ("robots") not to search and index files in the website).

27. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, VERSION 2.0, at 5 (2006).

28. *See, e.g.*, *Yahoo!*, 88 U.S.P.Q.2d at 1783:

> The Court is persuaded that Parker's complaint conclusively establishes the affirmative defense of implied license. At the very least, paragraph 24 of his complaint [acknowledging Yahoo!'s posted policy of removing websites from search activities at the request of website owners] suggests that Parker knew that as a result of his failure to abide by the search engines' procedures, the search engines would display a copy of his works. From Parker's silence and lack of earlier objection, the defendants could properly infer that Parker knew of and encouraged the search engines' activity, and, as did the defendants in *Field*, they could reasonably interpret Parker's conduct to be a grant of a license for that use.

Generally, a court can find an implied license "where the copyright holder engages in conduct from which [the] other [party] may properly infer that the owner consents to his use." *Field*, 412 F. Supp. 2d at 1116 (quoting De Forest Radio Tel. & Tel. Co. v. United States, 273 U.S. 236, 241 (1927) (internal quotations omitted)). On the relationship between waiver and estoppel, see *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947–48 (S.D.N.Y.1997) (illustrating that prospective application of estoppel distinguishes waiver from an implied license, as the latter is revocable if not supported by consideration; so for example, "the institution of [a] lawsuit would constitute revocation").

the default setting for this particular software switch is the "on" position.[29] This is not surprising. After all, most people create websites and post material on them precisely because they *want* others to have access. This was the original purpose behind the World Wide Web—to connect everyone in a seamless informational network. So in this case, the desire of the average user and the underlying architectural ideology of the Web are in harmony. Openness is presumed. Embedding this preference in a legal rule, as the implied license cases do, therefore makes perfect sense.

B. THE SCOPE OF THE LICENSE; REACH OF THE NORM

And yet, these cases are only the beginning. They establish one end point in the discussion, embodying as they do a relatively uncontroversial norm that is already embedded in the basic design of Web-enabling software. The difficult question—and the one with most relevance to our topic of waiver in IP law—is how broadly implied license law will be permitted to apply to material posted on the Web, or more generally to works made available in digital form. Crawling and indexing involve copying, it is true, but this is only incidental to their main purpose. A series of cases on display of thumbnail images in search results are the first salvo in what will be a more contentious battle, because here the owners of copyrights in the images argue that the thumbnails erode the market for the full sized versions of the images.[30] Even more difficult cases may lie just over the horizon. To date, for example, many entertainment companies have learned to live with and in some cases thrive on the presence of fan websites where copying, remixing and various forms of commentary—some of which may constitute technical copyright infringement—are regular occurrences.[31] But the norms of acceptable fan related activities have not yet solidified. So some Harry Potter fans were upset when the corporate extension of the Potter creator, J.K. Rowling, brought an infringement suit against publication of a book derived from material widely available on a fan website.[32] Rowling testified at the trial that she was happy to encourage the fan website, in effect tolerating numerous technical infringing acts, but that she drew the line at the publication of a book that would compete with some of her own authorized compendia of fan related information.[33] This line—between community-building fan activities, and competing commercial enterprises—may prove to be particularly controversial. Until it becomes clear, through some

29. *See Robots Exclusion Standard*, *supra* note 26 ("If [the robots.txt] file doesn't exist web robots assume that the web owner wishes to provide no specific instructions [and therefore all files will be searchable].").

30. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

31. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1461 (2008).

32. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

33. *See* Anemona Hartocollis, *Rowling Testifies Against Lexicon Author*, N.Y. TIMES, Apr. 15, 2008, at B1 (reporting that J.K. Rowling had handed out an award for a fan website, though she later sued the author of the website for selling an unauthorized Harry Potter lexicon).

interacting combination of legal rules and behavioral norms, courts must be careful not to rashly apply principles of waiver that would preempt the careful working out of principles balancing respect for author autonomy with the desire to facilitate cost-free access to digital works of creativity.[34]

The reason is fairly straightforward. While liberal waiver rules surely promote rapid movement of digital content, they also run the risk of undermining authorial rights to such an extent that respect for the individual author, together with economic incentives for creating high quality original works, may be threatened.[35] The balance here is both difficult and delicate. Some argue in effect that ease of access is everything; that the volume of digital exchange is the highest good that all policy should pursue. Others argue that the best way to encourage a high velocity of digital exchange while still compensating original creators is to separate compensation from control by instituting compulsory licensing systems that allow creators to be paid while removing creators' rights to mete out access to their works. Others, including me, argue that traditional authorial control still makes sense in the digital era, and therefore that the goal of maximizing access to digital works must be pursued in the context of traditional respect for creator autonomy and control.

C. THE COST OF OVER-DOING IT ON WAIVER

So far, as I argued, the decided cases seem to me to have gotten things right. But I do have a concern that we could go too far. That would be a big mistake.

My argument here draws inspiration from the contract law scholarship of Professor Lisa Bernstein.[36] She studied situations in which courts modified the terms of formal contracts after looking to patterns of commercial behavior.[37] Evidence of this "course of performance" had come to dominate actual contract language, a trend that was celebrated by a number of noted contracts theorists.[38] But despite the appeal of this approach, which elevates operational norms over contractual terms, Bernstein's research makes a telling point. Contracting parties

34. On the role of social norms in these issues, see Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009).

35. *See, e.g.*, Orit Fischman Ofori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275 (2009); Raghu Seshadri, *Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap*, 11 UCLA J.L. & TECH. 3 (2007). For a sophisticated explanation of this complex issue, see Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

36. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

37. *Id.* at 1796–98 (discussing differences between "relationship-preserving norms" and "end-game norms" used by merchants in the grain and feed industry); *id.* at 1809 (discussing the potentially deleterious effects of the Uniform Commercial Code's treatment of "course of performance").

38. *See* John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 266, 268–69 (2000) (describing how the great contracts scholar Karl Llewellyn incorporated evidence of context into various Uniform Commercial Code provisions, including those concerning "course of performance").

often rely on the formal terms of their contracts as a weapon to be used in extreme circumstances. So while they often quite consciously choose to excuse minor lapses when the overall contractual relationship is going smoothly, they count on the ability to enforce their contracts if the relationship breaks down. Contracting parties lose the ability to fall back on the formal terms of their contracts when courts override these terms by converting what might be called "fair weather waivers" into ironclad contractual rules meant to apply in foul weather as well. Even when widespread waivers are common in practice, it may not be wise or fair to assume that a pattern of waiver should override the written terms of a contract. To do so is to deprive a contracting party of the very fallback option that he may have explicitly bargained for in the first place.

The lesson of Bernstein's analysis can be stated this way: it is not a good idea to overzealously read operational industry norms into the formal structure of legal rules.[39] It is better to leave each to their own separate domain, at least where it appears that industry participants rely on each to perform distinct but interrelated functions.

This has obvious application to the question of waiver in IP law. In terms of operational behavior, we see the same pattern as in the contract case. Waiver is widespread. It makes good sense commercially in many circumstances. Indeed, in some settings, waiver might well be seen as something akin to an industry norm. The full enforcement option may be used rarely enough that it appears to be all but abandoned. If a court were to infer from all this a broad de facto implied license, however, this fallback option would be lost entirely. And as the contracts research shows, that would be a mistake. The overzealous application of implied waiver, in other words, might wind up cutting back on the very flexibility that waiver is intended to foster.

IV. MAKING WAIVER WORK

In this section, I suggest some slight adjustments in the structure of IP law that would make the waiver of rights more effective, while at the same time not undermining the logic of IP as a property right.

39. Below is an insightful application of Bernstein's point to the law of property:

> In other words, parties may be reluctant to tolerate the ordinary deviations from contract language that are the stuff of ongoing relationships—accepting late payments, for example—if doing so will cause a court to later interpret the contract to permit such deviations. Thus, enabling parties to deal with each other flexibly while leaving intact strict contract language to which they may resort in the event things reach an end-game state may be value maximizing. By the same token, neighbors might wish to have a set of legally enforceable rules to which they could resort if necessary, but might prefer to operate most of the time according to informal neighborly norms that do not involve strict adherence to those rules. Yet this approach is difficult in the private development setting, at least to the extent that courts will construe a failure to enforce a rule in a given instance as a waiver or abandonment of that rule that will preclude its enforcement in a later instance.

Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 886 (2004).

We can start with a straightforward proposal. All IP right holders should have access to a simple and binding mechanism for complete renunciation of their rights. Ideally, an election to permanently waive rights would be recorded in the same database that holds registration and ownership information—the Library of Congress copyright database, for example, or the official U.S. Patent Office website/search facility.[40] A password protected interface permitting an IP owner to make a binding waiver of all rights would permit the database to be updated, so that all subsequent search results for the IP right in question would show that the rights had been renounced. This simple mechanism would go a long way toward making waiver more practical.[41] This could be accompanied by a public notice provision permitting a right holder to announce that all rights in the given creative work had been waived or renounced (e.g., "All rights waived under U.S. Code section __.").

A second legal change that would facilitate waiver would be a set of rules permitting partial waivers: permissions for a work to be employed in specific *uses* or by specific types of *users*. These rules would be designed to ameliorate the relative bluntness of current waiver rules. The basic idea is to allow a right holder to create safe harbor categories, permitting qualified users to avail themselves of the categories without an affirmative duty to obtain permission or a license from the IP owner. Some features of these legal rules, and the business infrastructure needed to implement them, are described just below.

The final reform is more of a guiding principle: when in doubt, remember that waiver is supposed to be a voluntary act. When circumstances, conditions or norms are asserted to amount to voluntary surrender, courts must be sensitive to the fact that entry into the digital milieu may be intentional, but a surrender of rights may not. At a minimum, there should be a requirement of clear notice that the creator of a work is, by the act of putting it into circulation, performing an act with legal consequences. If we are going to move to an opt-in system of property rights in the digital setting, we should be sure that everyone is clear about which actions amount to a voluntary waiver. It should be as clear as possible regarding when "opting" occurs and what one is opting in or out of. Only when this condition is satisfied can we be said to remain true to the value of autonomous choice that is the hallmark of property rights.

A. SELECTIVE WAIVER: SOME DETAILS

IP owners ought to be able to say to users, "If you fall into a certain category, if you only want to use my protected work(s) for certain uses, then go ahead—I will

40. *See Search Copyright Records*, U.S. COPYRIGHT OFF., http://www.copyright.gov/records (last updated Nov. 15, 2010); U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov (last updated Nov. 19, 2010).

41. I made the point in an earlier article that this public recordation has some advantages over the alternative of distributing works with a liberal use license, in the manner of Creative Commons licensing. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004).

not enforce my rights against you." And this election by the owner should be binding and irrevocable—a partial public assignment, rather than a mere license. This is what I mean by "selective waiver."

Like full renunciation of rights, a widely used and well respected form of selective waiver would be a useful supplement to contract based solutions currently in use, such as certain varieties of Creative Commons license. The two key advantages of binding waiver over contracts are 1) that waiver would be good against the world, whereas contracts typically require that contracting parties deal directly with each other in some fashion;[42] and 2) waiver operates as a (partial) assignment of rights, a full transfer of a property interest rather than a mere license, which means it cannot be revoked and would not, ideally at least, be subject to complex termination of transfer issues under copyright law.[43] To be effective, selective waiver would include business practices, software and legal rules, all designed in a mutually supportive way. The interaction between these three features of an overall waiver system, if done well, would produce much more flexibility in the world of IP transactions. At the same time, with proper safeguards, creator autonomy would be respected and even advanced.

Selective waiver as I have described it would rely primarily on the honesty of users. The IP owner's publicly posted notice would require end users to certify that they are of the types specified, or that their uses fall into the categories specified. For example, a professional photographer might post photos on her website, with a notice to the effect that, "I will not assert (and hereby waive) my copyright in these photos for noncommercial, not for profit uses." Users would then be free to incorporate the photos into their personal websites, or use them to illustrate school projects, or send them to a limited number of friends. An artist, essayist, poet or musician could make a similar declaration.

42. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 119–20 (1997) (discussing problem of contractual privity, and breaks in the chain of privity, in the online environment).

43. On this issue, see Timothy K. Armstrong, *Shrinking The Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 363 (2010) (proposing binding dedication to the commons or public domain that would avoid copyright's termination of transfer provisions). Note that, ironically, copyright's termination of transfer rules have often been defended on the basis of author autonomy; a grant of rights early in the career of an artist is thought to bind him or her too tightly in later years, especially if the early grant was made before the grantor achieved recognition success. For background on this and related provisions, see Lionel A. Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475 (2010) (concluding that the history and practice suggest at best inconsistent achievement of reversionary rights' aim to offset the author's weaker bargaining position by assuring her a future opportunity to make a better deal). *See generally* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994). Netanel notes that reversion rights have their basis, at least to some extent, in the Kantian roots of Continental copyright theory. Personally, I think the Kantian legacy is more nuanced. Though Kant's thinking clearly supports a place for moral rights, and therefore necessarily leans toward inalienability in certain circumstances, there is also support in Kant for certain varieties of alienability—in particular, voluntary waiver of rights. *See supra*, Section I-A; *see also* MERGES, *supra* note 1, at ch. 3.

An obvious question is whether such a system could work. Should IP owners rely on the accuracy of self-reporting by users? Perhaps surprisingly, there is a strong argument that they should. Though it is often overlooked, our economy in fact includes a fairly robust sector that relies on self-reporting. In a 2004 study, for example, the consulting firm KPMG estimated the value of the self-reporting component of the U.S. economy at $300 billion.[44] A fair portion of this involves IP licensing agreements, under which, typically, licensees must self-report sales volumes and other activities. Even though parties to these sorts of agreements typically have negotiated them at some length, and therefore have come to know each other, some scholars argue that under certain conditions greater reliance on self-reporting systems makes sense.[45] In particular, when accompanied by investments in verification systems to enhance the reliability of self-reporting by licensee/users, and that facilitate auditing by licensor/owners, self-reporting might be a viable strategy.[46] Similar investments have often paid off in the past, as for example when the pioneers of collective rights organizations such as ASCAP and various patent pools invested in the infrastructure necessary to coordinate their activities and license their IP-protected works.[47]

To see how this strategy would work, consider again the photographer I mentioned earlier. She posts some photos along with a partial waiver of rights, making it legal for others to use the photos for noncommercial purposes. If a particular work becomes well known, and rights in that work have been partially waived in this fashion, users may be tempted to violate the terms of the waiver by incorporating the work in a calendar sold at retail or in another commercial work. How would the photographer ever find out? And wouldn't this scenario then lead other IP owners to avoid the partial waiver strategy in the future?

Not necessarily. The photographer could employ various enforcement technologies and services to search out illicit uses of the photo and commence legal enforcement actions where necessary. The same is true for artists, essayists, musicians and others. Digital watermarking tools are widely available that permit an IP owner to search out instances of a work on the Web and in various broadcast

44. KPMG LLP, THE SELF-REPORTING ECONOMY: A MATTER OF TRANSPARENCY AND TRUST (2004). This study included not only self-reporting of IP related transactions (such as volumes sold under licensing agreements), but also warranty reimbursement claims and preferred pricing discounts based on sales volume. For a summary, see *KPMG Report: Poor Controls Over "Self-Reporting,"* KPMG (Mar. 3, 2010), http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Press-Releases/Pages/KPMG-Report-Poor-Controls-Over-Self-reporting.aspx. *See also* THE ECONOMIST CORPORATE NETWORK, CHINA: INTELLECTUAL PROPERTY RIGHTS: PROTECTING ASSETS IN THE INFORMATION, COMMUNICATIONS AND ENTERTAINMENT MARKET 18 (2005), *available at* http://www.kpmg.sk/dbfetch/52616e646f6d4956f6e6dd80e11914449d96a56fc2025abb/economist_ipr_report.pdf (citing the KPMG report).

45. Romana L. Autrey & Richard Sansing, *Licensing Intellectual Property with Self-Reporting Outcomes* 2 (Harv. Bus. Sch. Acct. & Mgmt. Unit, Working Paper No. 07-100, Sept. 21, 2010), *available at* http://ssrn.com/abstract=971998 ("We find that variable royalty arrangements that depend on either audited self-reports or third-party attestation become more attractive as information system costs decrease and as the benefits from outsourcing the use of intellectual property increase.").

46. *See id.*

47. *See* Merges, *supra* note 21.

media as well.[48] In addition, creative people can outsource the policing function to private services.[49] A higher value work obviously justifies greater investment in these sorts of policing technologies and activities. But for works of any value, the point is that policing and compliance systems can help to assure the viability of self-reporting as a strategy for IP owners.

The interconnections between waiver of rights and private verification were much discussed in the run up to the Digital Millenium Copyright Act (DMCA) of 1998.[50] This was part of a larger debate, over the appropriateness of giving legal sanction to various schemes for protecting digital content.[51] The oft-expressed concern of that era was that the DMCA would lead to a world of hyper control by IP owners, but subsequent events have shown that this has not really been the case. Much more content is given away for free—many more IP rights are in effect waived—than was envisioned when the DMCA debate was at its peak. In addition, the cost of policing content and associated IP rights has turned out to be higher than many seemed to anticipate at the time. It therefore seems likely that in the current, less histrionic policy environment, some modest ideas for integrating legal rules with private enforcement systems may be in order. This is especially so, or ought to be, where the proposals center on facilitating more effective waiver of rights. The fears that accompanied the launching of the DMCA, in other words, surrounded the prospect of over-enforcement, whereas what I am talking about here is facilitating voluntary *non-enforcement*. Which ought to mean, I would hope, less resistance to the ideas I propose.

A rule permitting binding, partial waivers would be more effective if it contemplated potential disputes over the appropriateness of user activities.

48. *See, e.g.*, Martin Steinebach, Enrico Hauer & Patrick Wolf, *Efficient Watermarking Strategies*, 2007 THIRD INT'L CONF. ON AUTOMATED PRODUCTION CROSS MEDIA CONTENT FOR MULTI-CHANNEL DISTRIBUTION 65–71. For an early contribution, see Mitchell D. Swanson, Bin Zhu & Ahmed H. Tewfik, *Transparent Robust Image Watermarking*, 3 PROC. IEEE INT'L CONF. ON IMAGE PROCESSING 211–14 (1996). For video watermarking and detection, see K. Raghavendra & K.R. Chetan, *A Blind and Robust Watermarking Scheme with Scrambled Watermark for Video Authentication*, 2009 IEEE INT'L CONF. ON INTERNET MULTIMEDIA SERVICES ARCHITECTURE & APPLICATIONS 106–11 (proposing scheme to break watermark into several segments and disperse among different scenes in a video stream).

49. *See* COPYSCAPE, http://www.copyscape.com (last visited Nov. 12, 2010); DIGIMARC, http://www.digimarc.com (last visited Nov. 12, 2010); PICSCOUT, http://www.picscout.com (last visited Nov. 12, 2010); *see also Image Processing Wizard 1.1—Free Software Downloads and Software Reviews*, CNET DOWNLOAD.COM, http://download.cnet.com/Image-Processing-Wizard/3000-12511_4-10428423.html?tag=lst-0-2 (last visited Nov. 12, 2010) (free utility that includes watermarking). *See generally Protecting Intellectual Property on the Internet*, U.N.C. SCH. LAW, http://www.unc.edu/courses/2007spring/law/357c/001/policing/methods_policing_infringement_inexpensive.html (last visited Nov. 12, 2010) (providing materials from IP Online Enforcement course).

50. *See, e.g.*, Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997).

51. For a sense of the debate, and a call for common ground, see Dan L. Burk, *Legal and Technical Standards in Digital Rights Technology*, 74 FORDHAM L. REV. 537 (2005); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13 (2006).

Consider this a minor step in that direction: Any user who had a bona fide, good faith belief that he qualified for the waiver would have a prima facie right to use the work in question. If that belief turned out to be wrong, the IP owner would have the right to clarify that the waiver did not apply, but the monetary penalty for the user would be moderate. The overall design would be to encourage flexible partial or selective waivers whose boundaries would be largely self-policing, but also permit resolution of close cases without too much intimidation of users or too great a threat to owners' IP rights.

V. CONCLUSION

My basic point is simple. Waiver doctrine holds great promise. It can go a long way toward transforming IP—and especially copyright—into a supple institution capable of coexisting with the basic facts of creative works in the digital era.

But if the hallmark of property is flexibility, then widespread waiver creates an ironic risk. When many forms of conduct are construed as waiver, entitlement-related default rules are in effect modified. This may, perversely, cut down on the very flexibility to which moderate and voluntary forms of waiver are meant to contribute. Which leads us to this most interesting paradox: the fact that waiver is de facto ubiquitous does *not* mean that the legal system should eagerly read waiver into the fabric of property rights in every situation. The power of waiver is that it is a voluntary act. When too much waiver is implied from prevailing norms, some of this power is lost. Waiver is meant to be a concept yoked to autonomy: we retain the power to relinquish our rights when we choose. But if courts should become too willing to read waiver into the structure of rights, waiver will lose its ability to enhance autonomy.

In the interest of a flexible, workable waiver doctrine, I have proposed some simple rules: 1) a binding, easily verified notice mechanism that is "good against the world"; and 2) scope of waiver rules that make it simple for right holders to selectively waive rights, for example, permitting some uses and not others. Together with enhanced monitoring systems, these rules would go a long way toward making waiver common and effective.

In the end, the proper balance here may be difficult, given the transactional imperatives of contemporary digital communication and distribution. But because waiver represents such a reasonable balance between creator autonomy and transactional efficiency, it is a topic well worth pursuing.