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Online copyright enforcement represents one of the greatest current threats to online privacy. As a byproduct of the asserted imperative to control flows of unauthorized information, copyright owners and their technology partners are building into digital rights management ("DRM") systems a range of capabilities that implicate the privacy interests of users. These include both the ability to collect extraordinarily fine-grained information about uses of DRM-protected content[1] and the ability to reach into users' homes and restrict what they can do with copies of works for which they have paid.[2] Copyright owners

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1. An example of a DRM surveillance system is the one designed by RealNetworks, a manufacturer of software for streaming music and video files. The software collected and reported information about the system on which it was installed, including the number and titles of music files stored on the system and the types of portable music player installed. Class actions filed in California, Illinois, and Pennsylvania by users who discovered their RealNetworks software "phoning home" have charged that this conduct violated the federal Computer Fraud and Abuse Act and violated state law privacy rights. Greg Miller, *RealNetworks Breached Privacy, 3 Suits Contend*, L.A. TIMES, Nov. 11, 1999, at C1. The suits have been consolidated into a single proceeding, pending in the Northern District of Illinois. Amid the storm of protest that followed announcement of the lawsuits, RealNetworks rushed to disable its remote data collection capabilities, but maintains that it broke no laws. *Id.*

2. Within the past year or so, members of the recording industry have test-marketed several new releases in CD-based formats designed to prevent copying. In some cases, these copy-protection formats also prevent playback using a personal computer. The new CD copy-protection schemes have been the subject of several lawsuits, but so far no court has considered whether their implementation violates any law. The first lawsuit, filed by a California resident against Music City Records, Fahrenheit Entertainment, and DRM provider Suncomm, resulted in an out-of-court settlement. The defendants agreed to provide clearer disclosures about functionality restrictions and compatibility requirements; any other terms are undisclosed. Amy Harmon, *CD-Protection Complaint is Settled*, N.Y. TIMES, Feb. 25, 2002, at C8. The other, *Dickey v. Universal Music Group*, is a class action brought on behalf of affected consumers by a noted class action firm, and may be less likely to settle at an early stage. Brenda Sandburg, *Milberg Weiss Files Suit Over CDs With No-Copy Technology*, THE RECORDER, June 17, 2002, at 1; P.J. Huffstutter & Jon Healey, *Suit Filed Against Record Firms*, L.A. TIMES, June 14, 2002, at C3.

also have exerted political and legal pressure on third-party providers of technologies and services to build similar capabilities into their own systems,[3] and on network service providers to monitor and report on the activities of their customers.[4] Efforts are underway to design DRM capabilities into the dominant operating system for personal computers and into microprocessors.[5]

For the most part, the privacy implications of DRM systems go unexamined in the mainstream legislative and policy debates about the proper scope of a copyright owner's rights. Instead, courts and some commentators (and many intellectual property lawyers) have characterized the design of DRM systems as grounded, unproblematically, in principles of copyright and contract law and justified by reference to a copyright owner's need to enforce its property rights. Yet it is far from obvious why this should be so. The shift to privacy-invasive modes of copyright protection does not concern only the enforcement of formal copyright entitlements, nor even simple enforcement of bargains made in the shadow of the copyright law. Many of the user behaviors over which control is sought traditionally have been considered beyond law's reach. May private control extend to these behaviors? If so, on what basis?

This essay does not attempt to specify the privacy rights that users might assert against the purveyors of DRM systems.[6] Instead, it undertakes a very preliminary, incomplete exploration of several questions on the "property" side of this debate. What is the relationship between rights in copyrighted works and rights in things or collections of bits embodying works? In particular, as the (popular and legal)

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3. In several recent high-profile disputes, members of the copyright industry have sought to compel unwilling third-party providers to conduct surveillance for them. In a contributory copyright infringement suit against SonicBlue, the maker of the ReplayTV video recording device, the copyright industry plaintiffs requested a discovery order directing the defendant to rewrite the ReplayTV software to generate information detailing subscribers' use of the device. The order was denied on procedural grounds. Farhad Manjoo, *SonicBlue Freed From Monitoring*, WIRED, June 3, 2002, *available at* http://www.wired.com/news/business/0,1367,52934,00.html; Jon Healey, *Liberties Group Sues Studios Over Consumers' Use of Digital Devices*, L.A. TIMES, June 7, 2002, § 3 (Business), at 2. Whether SonicBlue is liable for contributory copyright infringement, and whether monitoring of user behavior might be required as part of a remedial order, are questions that remain unresolved.

4. A federal district judge recently ruled that the recording industry could invoke statutory subpoena provisions directed toward providers of Web hosting services to compel Internet access provider Verizon to identify a subscriber alleged to have traded infringing MP3 files over a peer-to-peer network. *See In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d (D.D.C. 2003). The recording industry also has sent letters to the presidents of U.S. colleges and universities requesting that they begin monitoring student accounts to detect peer-to-peer file trading activities, *see* American Council on Education, *Higher Education Associations and the Creative Content Community Letters on P2P Piracy*, ACEnet Eye on Washington, (Oct. 8, 2002), *available at* http://www.acenet.edu/washington/letters/2002/10october/copyright.cfm (last visited May 7, 2003).

5. *See* Neil McIntosh, *Online: Old Bill's Police Tactics*, THE GUARDIAN, July 4, 2002; Chris Gaither, *Intel Chip to Include Antipiracy Features, Some Still Fear Privacy of Users Will Be Violated*, THE BOSTON GLOBE, Sept. 10, 2002, at C3.

6. I attempt that task elsewhere. *See* Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. (forthcoming 2003).

understanding of copies of works as residing in "things" becomes largely metaphorical, how should the law construct and enforce boundedness with respect to those copies? Does the calculus of property and contract allow for consideration of other rights, based neither in works nor in things, that might be weighed in the balance? I will suggest that the property justification for using DRM systems to invade privacy is far too narrow, and ignores a number of important public policy considerations.

An attempt to parse the interaction between copyright and privacy might begin by disentangling the legal attributes of copyrighted works from those of the things in which copies of works are embodied or stored. Do individual users of copyrighted works have rights in things/copies that limit or trump copyright rights? Do copyright owners, the antecedent owners or licensors of the things/copies in question, have rights in things/copies that augment their copyright rights? If both users and owners have rights in things/copies, how do those rights interact? This process of disaggregation proves both harder and less conclusive than might be supposed, and it exposes the underlying problems as fundamentally problems of policy.

Copyright law gives copyright owners rights in works, not things. Even so, it is not quite correct to say that, therefore, copyright law gives copyright owners no rights in the things embodying their works. Copyright subsists, at least in part, in the form of rights to prevent others from taking certain actions with things embodying copies of the work, for example, reproducing and selling copies, causing copies to be displayed publicly to viewers not present at the place where the copy is located, and so on.[7] In other words, copyright law gives copyright owners (some) rights in things as proxies for rights in works.

The distinction between rights in works and rights in things also means, however, that copyright owners' rights in things embodying works are limited in two important ways. First, copyright law gives users of copyrighted works certain statutorily defined freedoms with respect to things/copies as well. Of these, the two most closely linked to user privacy are the first sale doctrine, which recognizes a right of alienation that includes the freedom to lend one's copy of a work, and the fair use doctrine, which sanctions certain acts of private copying.[8] Second, and less well appreciated, copyright law implicitly reserves to users the right to engage in conduct not encompassed by the statute.[9] The inaptly-named fair use doctrine may tend to suggest that if some uses of copyrighted works are fair, then all other uses must be unfair, but that is a long way from the truth. Fair use and other copyright limitations are not outer limits on permissible uses of copyrighted works and the things

7. *See* 17 U.S.C. § 106 (2000).

8. *See* 17 U.S.C. §§ 107, 109(a) (2000).

9. *See* 17 U.S.C. § 106 (2000) (enumerating the exclusive rights of copyright owners); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 40-43 (1994).

embodying them. They are simply outer limits on a copyright owner's statutory rights. It follows that any uses not covered by one of those rights, such as reading a book that one owns, are reserved to users whether or not the fair use doctrine applies. If there are broader limits on individual users' freedom to make use of things embodying works, they must arise from another source.

Copyright law does not end the inquiry, however, because copyright owners also claim rights in the things embodying their works as things, that is, regardless of the fact that copyrighted content is involved. This is the second prong of copyright owners' "property" argument: things embodying works are their personal property. They may choose to sell these things, or to structure transactions granting access to them in some other way. The greater power to withhold the transaction entirely includes the lesser power to impose conditions on the terms of access and use. If the result is that individual users are left with fewer freedoms than copyright law appeared to contemplate, the conventional answer is that individuals exercise their autonomy rights by choosing to enter into the license transactions.

This argument about the consequences of property rights in things is consistent with the thesis advanced by Michael Heller that viewing property as a bundle of fragmentary entitlements leads inexorably to the expansion of property rights.[10] This insight underscores a profound irony: the legal realist mantras that property rights are relational, and that the life of the law is also the sum of bargains made in its shadow, can as easily be used to strengthen property entitlements as to limit them.[11] Heller's thesis, however, does not seem sufficient by itself to capture fully the expansionist dynamic that plays out in the copyright marketplace. The expansion is particularly dramatic in the case of things embodying works, and not just because the bundle of rights conferred by copyright is particularly limited to start with. Conditions imposed on would-be users of things embodying copyrighted works far outstrip any conditions imposed on would-be users of other kinds of things.

The variety of conceivable and purportedly legitimate restrictions on user behavior appears limitless. In April 2002, I participated in a panel discussion on copyright law sponsored, for CLE credit, by the intellectual property law section of a prominent local bar association. One of the cases discussed was *Kelly v. Arriba Soft*,[12] in which the Ninth

10. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1191-94 (1999).

11. *Cf.* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY, NOMOS XXII 69, 76 (J. Roland Pennock & John W. Chapman eds., 1980).

> [A]ll of these developments - the new economic structures, the legal forms through which they are organized, and the theooretical [sic] analysis of property that they suggest - can be plausibly seen as entirely *internal* to the capitalist market system . . . [and] in no way fueled by the ethics, politics, or interests of socialism, collectivism, paternalism, or redistributive egalitarianism.

Id.

12. Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002).

Circuit held that a visual search engine's reproduction of "thumbnail" images from catalogued sites was fair use, but that its framing of full-sized images from those sites infringed the copyright owner's public display rights. I compared the search engine to a tour guide, and asked whether a copyright owner could invoke its public display rights to prevent a real-space tour guide from conducting visitors through a gallery show from back to front. I was informed by audience members, in no uncertain terms, that a copyright owner could invoke its "property" right in the works to do just that. I enquired whether the copyright owner could similarly invoke its "property" right in the works to require viewers to walk through the gallery in shackles. It wasn't even a close call. They triumphantly assured me that, of course, it could.

At the core of this "property" argument is a sort of control-fetishism. Precisely because copyright does not subsist in things, the things in which copies of works are embodied take on near-iconic significance. Rights in the work and rights in the thing merge to constitute a sort of *über*-copyright, a property right delineated as absolute sovereignty over the disposition and use of both "work" attributes and thing attributes. It is noteworthy that in describing this right, copyright owners and their advocates have reverted to the language of natural rights. This is also the language of pre-1976 common law copyright, of the sort that sometimes protected unpublished manuscripts against unauthorized publication. Rights in the work and rights in the thing become conflated, and strict controls are imposed upon access to and use of the thing to guard against perceived vulnerability of rights in the work.[13] This usage of "license" is oddly consistent with the term's core definition as a limited grant of permission from the sovereign to engage in particular conduct – e.g., hunting deer in the royal forest, or driving a car on the state's roads. This meaning depends fundamentally on the notion of the power to exclude as not merely greater, but absolute.[14]

At this point, we have pretty well lost sight of the fact that copyright does not grant "sovereignty", not over works, nor over things, nor over individual users themselves. The "licenses" that dictate the conditions of access and use also set the boundaries of user freedom. Well, a diehard copyright enforcer might reply, so what? Is there anything wrong with that?

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13. For a more measured academic defense of this position, see Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, *in* U.S. INTELLECTUAL PROPERTY LAW AND POLICY 345 (Hugh Hansen ed., forthcoming 2003).

14. At bottom, this understanding of property is premised on the Blackstonian ideal of "sole and despotic dominion . . .over the external things of the world." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2. The point that broadly defined property entitlements can confer equally despotic dominion over persons is not new. *See, e.g.*, C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 762 (1986); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL. L.Q. 8 (1927); Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U.L. REV. 1 (1991).

First of all, the argument from license, or more conscientiously from informed consent, ignores that individuals have property rights in things as well, including both the personal computers that are used to access copyrighted works and the homes and apartments from which access is gained. The "licenses" that set the boundaries of consumer freedom to use works also set the boundaries of consumer freedom to use both property and concomitant seclusion that is theirs beyond dispute.

The argument that individuals who wish to use DRM-protected information goods must accept the accompanying invasions of their own property is premised on a massive double standard. Information users have to accept incursions into their own environment, but information proprietors do not. Where information providers are concerned, user activities much less invasive than the incursions worked by DRM technologies are legally actionable. Thus, for example, the use of spiders or bots to crawl the Web and gather comparative pricing information may be enjoined as a trespass to chattels upon the mere speculation that the information-gathering might under certain circumstances strain the technical capacities of the system.[15] According to two courts, the process of comparison shopping via automated software agents also violates the federal Computer Fraud and Abuse Act ("CFAA"), which prohibits unauthorized access to a computer involved in interstate commerce or communication, i.e., any computer linked to the Internet.[16] At the same time, we are told that the use of advanced Web marketing techniques to deposit "cookies" on users' computers constitutes neither trespass (because it is purportedly consensual) nor unauthorized access prohibited by the CFAA.[17] On the legislative front, copyright owners urge Congress to create an exemption from the CFAA allowing them to send users of peer-to-peer networks logic bombs disguised as copies of their copyrighted works.[18]

From the perspective of a property formalist, these results are decidedly peculiar. The answer cannot be that copies of works are bounded property but individuals' home computers are not. A server connected to the Internet, and files residing on that server, are much less bounded than a home computer system that cannot directly serve up content. In the case of the CFAA, the rule allowing some acts of unauthorized access but forbidding others has partly to do with the

15. *See, e.g.*, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1070-72 (N.D. Cal. 2000); Register.com v. Verio, Inc., 126 F. Supp. 2d 238, 249-50 (S.D.N.Y. 2000). For critical analysis of this reasoning, see Dan L. Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000); Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561 (2001).

16. 18 U.S.C. § 1030(a)(2)(C), (e)(2)(B) (2000); *see* EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 582-85 (1st Cir. 2001); Register.com, 126 F. Supp. 2d at 251-52.

17. *In re* Pharmatrak, Inc. Privacy Litigation, 220 F. Supp. 2d 4, 14-15 (D. Mass. 2002); Chance v. Avenue A, Inc., 165 F. Supp. 2d 1153, 1158-60 (W.D. Wash. 2001); *In re* DoubleClick, Inc. Privacy Litigation, 154 F. Supp. 2d 497, 520-26 (S.D.N.Y. 2001).

18. *See* H.R. 5211, 107th Cong. (2d Sess. 2002).

statutory minimum damages requirement. A plaintiff must show damages exceeding $5,000;[19] according to the courts, Web crawling causes this much damage, but cookies do not. Even this conclusion, though, is not as straightforward as it seems. In one of the Web crawling cases, the plaintiff met the statutory damages requirement not by showing that the defendant's information-gathering itself had caused harm - it had not - but by showing that it had spent more than the statutory minimum on technical consultants hired to assess whether damage had occurred.[20] In the other, the court granted relief based on speculation about the harm that might occur if the plaintiff's server became overloaded and crashed.[21] The plaintiffs in the cookie cases, meanwhile, were denied the benefit of similar speculation about the harms they claimed to have suffered.[22]

The debate about what constitutes proper versus improper access to another's computer system turns not on the formality of boundedness, but rather on policy choices that determine where boundaries will be drawn and enforced. The switch from metaspace to cyberspace masks the slipperiness of these choices. We believe that (some kinds of) rights reside in things and inhere within boundaries, yet in digital space the notion of "thing-ness" is at least partially fictitious. We are, after all, attempting to define and delimit rights that inhere in transient agglomerations of bits and to reconcile conceptions of boundedness based on the physical world with the fact of open networking communications protocols.[23] In fact, the legal regime being created in digital space is not "simply" a regime based on property rights designed to mimic the behavior of property rights in real space. Instead, we are constructing a legal regime in which notions of boundedness are applied unevenly and unequally. In a legal culture that believes in taking property seriously, resolving the tension between owners' and users' rights in things requires consideration of users' countervailing rights in some less expedient manner than simply defining them away.

All of this property talk also dances around the question of whether consumers have (or should have) other affirmative rights to prevent such conduct. In a narrow doctrinal sense, the distinction between property and privacy is the historical one between contract and tort – between a libertarian conception of obligation voluntarily assumed and broader notions of public policy. In a more abstract sense, the distinction is

19. *See* 18 U.S.C. § 1030(4) (2000).

20. *See EF Cultural Travel*, 274 F.3d at 585. Congress subsequently amended the CFAA to sanction the treatment of damage assessment costs as damages. 18 U.S.C. § 1030(e)(11) (2002).

21. *See Register.com*, 126 F. Supp. 2d at 251-52.

22. *See* cases cited *supra* note 17.

23. *See generally* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. (forthcoming 2003) (critiquing transplantation of "place" metaphors to cyberspace to support the definition and enforcement of property rights "there"); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. (forthcoming 2003) (same).

between forms of marketplace conduct viewed as substantively acceptable if procedurally fair and other forms of conduct viewed as invidious because they violate societal aspirations to protect values not readily comprehended by markets.

Even in the privacy arena, though, the myth of property as sovereignty is omnipresent. Advocates of market ordering criticize privacy as conceptually flaccid, lacking in definitional clarity (and, in particular, lacking the crispness that "property" connotes). Yet no one insists that "property" be susceptible of a comparably unitary definition, and, indeed, the prevailing view of property as a fragmentary bundle of entitlements suggests quite forcefully that one could not so insist.[24] If notions of "property" are evolving and contested in digital spaces, the insistence on a fixed, coherent definition of "privacy" is even more perplexing; under the circumstances, it is equally hard to see why definitions of "privacy" should remain static. Yet, the double standard persists even under conditions of change. No one asks what "reasonable expectations of property" might be or tries to suggest that property entitlements should diminish in scope and force as invading them becomes easier; indeed, quite the opposite is true. In contrast, the prevailing approach to defining privacy entitlements takes reasonable expectation as its lodestar and assumes erosion to be the natural state of affairs.[25]

Rather than engage the question why we value property so highly and privacy so little, the conventional wisdom about consumer privacy seeks refuge, once again, in the notion of license and its corollaries, informed consent and waiver. We are told that informed consumers can waive their privacy rights, just as they can waive their copyright privileges, and that the option not to transact at all preserves choice. The harshness of this rule may be mitigated to a degree by sweeping information access issues under the aegis of consumer protection law, as some commentators have suggested.[26] But prevailing conceptions of consumer protection laws are largely proceduralist and proceed on the assumption that an informed consumer is an adequately protected one.

The suggestion that the law can rely upon a single act of waiver to slice through the Gordian knot of copyrights, other personal property and place rights, and privacy rights has a certain seductiveness. Like

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24. *See* Grey, *supra* note 11.

25. It is worth noting that when courts are confronted, instead, with the oxymoronic assertion of corporate privacy in trade secrets, the standard of protection instantly becomes less evanescent; trade secrets are protected if their owner has made reasonable efforts to ensure their security. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. g (1985); UNIF. TRADE SECRETS ACT § 1(4)(ii) (1985); *see also* Andrew Riggs Dunlap, *Fixing the Fourth Amendment with Trade Secret Law: A Response to* Kyllo v. United States, 90 GEO. L.J. 2175, 2195 (2002) (recommending adoption of the "reasonable efforts" standard in Fourth Amendment privacy cases).

26. *See, e.g.*, Pamela Samuelson, *Digital Rights Management {and, or, vs.} the Law*, 46 COMM. ACM (forthcoming 2003).

beads on a string, rights in works, rights in things, and non-property rights click neatly into their allotted places, and we need not confront the difficult problem of how to weigh competing claims directly against one another. Intellectual property practitioners, in particular, need not confront the difficult ethical questions attending an expansive view of copyright as sovereignty.

But it is deeply disingenuous to pretend that the conflict between copyright and user privacy is amenable to resolution by zero-sum doctrinal calculus. The problem that courts and policymakers must resolve is fundamentally a problem of power and its limits – power to impose the terms of "licenses," power to define the boundaries of things, and power to specify the extent of the privacy that users should reasonably be entitled to expect. To a substantial degree, the answers that we devise will shape the degree of privacy that information users – which is to say everyone, will enjoy in the era of digitally transmitted information.