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REGULATION BY CONTRACT, REGULATION BY MACHINE

by

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MARGARET JANE RADIN

Two potentially widespread phenomena, mass standardized contracts and digital rights management systems, could have dramatic impact on how the law of property and contract regulates the distribution of intellectual property. This paper argues these phenomena motivate a more careful consideration of (1) their effect on the knowledge-generation incentives that underlie intellectual property, (2) which aspects of the present property and contract regimes are default, waivable rules and which are inalienable entitlements, and (3) whether legislative approval of regulation by machine is best interpreted as a revision of the law of intellectual property or as an attempt to undermine it. (JEL: K 11, K 12)

1 Introduction

Property and contract form the legal infrastructure for what is known as private ordering. Actually, “private ordering” is a misleading term, if those who use it mean ordering without state regulation. Ordering by property and contract has significant regulatory dimensions, because whether or not entitlements and transactions are valid and efficacious depends on state definition and enforcement of the rules that comprise the legal infrastructure. The state’s structuring of the contours of property rights delimits the list of recognized entitlements and the possible range of exploitation of them. The state’s structuring of what counts as contract separates legitimate from illegitimate redistributions of those entitlements.

In this essay I want to consider what is happening to property and contract in the world of networked computers and digitized content. For purposes of this essay, therefore, property is intellectual property. The law of intellectual property interacts with the processes of knowledge generation and knowledge distribution, because, at least in the dominant contemporary discourse about IP, legal entitlements exist for the purpose of creating incentives for further knowledge generation. Entitlements are justified if they promote this purpose and unjustified if they do not. The law of contract also interacts with the processes of knowledge generation and knowledge distribution, because, although IP rights start out with content-producers, the envisioned welfare enhancement requires transfer of those rights to those who utilize and value them. Contemporary debates about IP often do not reflect any understanding that where the rights end up and how they get there, which is the province of
contract, is just as important as what rights are generated in the first place. In my opinion, the latter issue is now an urgent research agenda both for legal analysts and for institutional economists.

For purposes of opening up this research agenda, this essay focuses on two phenomena of e-commerce. One is the proliferation of the purported mass contracts called shrink-wrap, click-wrap, and browse-wrap, which involve the use of widespread standardized purported contracts to attempt to structure legal regimes of entitlement, dissemination and use. The other is the development and expected widespread deployment of digital rights management systems (DRMS’s), which empower content providers to exercise technological control over downstream access, use, and further dissemination. These phenomena may have a profound practical effect on incentives for knowledge creation and pathways of knowledge distribution. And to the extent they appear to supplant the legal infrastructure of the state with regimes of entitlement and use dictated by firms, they pose issues for our understanding of how intellectual property regimes worked out and imposed by the state can or should be implemented.¹

2 Replacing the Law of the State with the “Law” of the Firm

The original form of shrink-wrap contract, usually called a shrink-wrap license², came with software marketed in boxes covered with transparent plastic shrink-wrap film. The terms were either printed on the shrink-wrap, or on the box beneath, or on a card between the box and the shrink-wrap. The terms stated that by breaking the shrink-wrap the purchaser was signifying acceptance of the terms. In this type of procedure the purchaser could have seen the terms before purchasing – though whether in fact anyone ever actually read them is unknown but doubtful. The term shrink-wrap was later extended to refer to a procedure that has come to be known as “money-now-terms-later.” In this situation what is printed on the box or on the card under the shrink-wrap states that there are additional terms inside the box. Here the terms cannot be seen before purchase. They are on a separate sheet or in a separate envelope containing the diskettes or CD in which the software is fixed, and/or they are shown on the start-up screen when the user runs the program. The terms usually state that using the software constitutes acceptance of the terms, and

¹ In this essay I am assuming that widespread contracts that supersede the official IP regimes will structure the transactional environment. I am also assuming that DRMS’s will be widely implemented. Neither of these developments has yet come to pass, so this essay is (for now) hypothetical.

² The proponents of these contracts prefer to characterize the transactions they govern as “licenses” rather than “sales” in order to get around the first-sale doctrine in copyright law, which grants the owner of a physical copy the right to do with that copy what he wishes, free of restraint by the copyright owner. See, e.g., REESE [forthcoming].
that if the buyer wants to reject the terms he must return the software and will receive a refund.3

The term click-wrap has nothing to do with wrapping, other than the functional resemblance – the proponent’s desire to achieve legally binding commitment – to procedures called shrink-wrap. Click-wrap just means that the user or customer is asked to signify acceptance of terms by clicking with her mouse in a box on her computer screen. Similarly, the term browse-wrap has nothing to do with wrapping either. This locution refers to terms on an interior page of a website, which the viewer, who is browsing, will not see unless he chooses to click on the small print of a link at the bottom of a homepage, usually labeled “Terms” or “Terms of Use,” or sometimes merely “Legal Notices.”4 The terms commonly say that continuing to use the site – whether or not the user ever clicks on or even sees the link that would reveal the terms – binds the user to these terms and such new terms as the site owner may post from time to time.5 Thus the terms declare themselves binding on anyone accessing the site, regardless of whether anyone ever opens the link that reveals them.

It is clear that these “-wrap” procedures are not “agreements” in accord with the traditional rhetoric of “consent” and “meeting of the minds,” but neither are most contracts in the contemporary offline world. Although the principles to be applied in these cases are not fully developed, U.S. law inclines in the direction of finding contractual obligation in many or most of them. The controversial proposed UCITA (Uniform Computer Information Transactions Act) would validate them explicitly in a broad range of cases.6 It is my impression that non-U.S. jurisdictions are much less likely than U.S. states to find binding commitment vis-a-vis a consumer in cases involving standardized purported contracts of this kind. What should ultimately be the appropriate legal position(s) on validity and enforceability of these purported contracts? That is a complex question, and an urgent one, because if e-commerce is to flourish we will need more harmonization and more certainty of contract. We will need it all the more because, as this essay argues, contract is displacing intellectual property law as the main source of rules governing distribution of rights among content owners, licensees or purchasers, and the general public.

3 A celebrated case enforcing a shrink-wrap license of the second kind is ProCD v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996. Other courts have been doubtful. See, e.g., Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991).
5 See, e.g., www.aol.com and www.disney.com
6 The proposed UCITA has been enacted in two states, but three states have enacted “bomb shelter” legislation to prevent its being applied to their residents. The National Commissioners on Uniform State Laws (NCCUSL), after several years of championing (and redrafting) UCITA, has now put it on hold. UCITA has been opposed by the American Law Institute [ALI] and about half of the states’ attorneys general. For information on UCITA, see www.ncusl.org.
Nevertheless, I am going to bracket the question of validity and enforceability for now, in order to explore the world these contracts would create. So let us assume all of these contracts are efficacious. By efficacious I mean that the regimes of rules laid down in the contracts govern the actual behavior of parties in the world. By assuming the contracts are efficacious in this sense, I am assuming that all of the state’s rules of entitlement are default rules, and that the courts will not use contract-limiting doctrines such as unconscionability to preclude enforcement. The assumption that all entitlements recognized and laid down by the state are default rules means that all legal rights granted or protected by the constitution, all legal rules enacted by legislatures, and all doctrines worked out by the courts can be waived or altered by contract. The assumption that the courts will not use contract-limiting doctrines means that the traditional limits built into contract law, such as unconscionability, will not be used to alter the terms as written.

The hypothetical state of the world in which standardized sets of terms are efficacious could come about because the contracts are consistently enforced as written, or consistently implemented by everyone without legal enforcement. In an idealized world of rational actors, consistent judging, and perfect information about legal decisions, consistent enforcement would lead to implementation without legal intervention, because once it was known that these terms would be enforced, people would stop bringing actions. Stable implementation without legal intervention could also arise in a less ideal world because of transaction costs of bringing actions, and various social factors militating against litigation, including the fact that people assume contractual terms are enforceable even if they are not. Moreover, even if the terms would be deemed unenforceable in some fraction of cases, normal contract damages would not deter firms from using those same terms against the majority of other recipients who do not bring suit.

In the hypothetical world of contractual efficaciousness and default rules, a standardized mass market contract creates its own regime of liberties and obligations, in which the constitutional, legislative or judicial rules engendered by the state are superseded by the contractual regime. Of course, a traditional, customized contract creates particular liberties and obligations between two parties, which could be considered a two-party world, the world in which A transfers his horse to B and B transfers his money to A. But when I refer here to a “regime” I mean an ordering that is socially widespread, ubiquitous or nearly so.

If the AOL TOS (“Terms of Service”) were to provide that the recipient shall not bring a class action, then a regime without class actions prevails in this social world, even if the legislature has seen fit to provide the polity with class action remedies. If

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7 For some thoughts on whether these procedures create binding commitment, see RADIN [2000].
8 The terminology of default rules for this species of alienability comes from AYRES AND GERTNER [1991].
9 I am leaving out of account here the possibility of efficient breach and the accompanying legal intervention, though it is an important feature of the institution of contract, and I will mention it below in section 6.
3 Toward the Irrelevance of the Property Regime

Now I want to examine what happens to property in this hypothetical world of EPSER’s. The exact contouring of property entitlement – what specific package of rights constitutes a property interest recognized by the state – is evolutionary and is a balancing enterprise undertaken by the polity. By delimiting property rights the entities of the state also limit propertization, and limit the extent of control propertization confers on owners. Propertization has a democratic component, because the entities of the state are, at least ideally, responsive to democratic input.

Consider this perspective on copyright law. Suppose that after extensive and expensive political debate and maneuvering, extensive consideration of the arguments of all parties, the U.S. Congress arrives at a regime of intellectual property entitlements representing various incentives, trade-offs, balances, deals, respect for property ideology and culture, express or inherent constitutional commitments, and so forth. Suppose the regime as thus constructed looks like the U.S. Copyright Act of 1976, as interpreted by the federal courts. In that regime, property in information is limited to expression of ideas; ideas are non-property. Expression can also be non-property in special situations where others need to use it for their business. Property in expression expires after a fixed term, albeit a long one. Thus, older information is non-property, and property does not include the right to extend monopoly control past the enacted term. Property in information is limited to expression that is original (exhibits some modicum of creativity); unoriginal information, such as facts, is non-property. Infringement against property can be excused on a case-by-case basis in certain circumstances labeled fair use. Whatever activity in derogation of the copyright holder that is adjudicated fair use becomes non-property, just as whatever activity of a landowner is adjudicated nuisance becomes non-property. Copyright law also contains an exhaustion provision (known as the first-sale doctrine), such that when the owner passes a tangible object in which a work is fixed to a new owner, the new owner is free to pass on the object subsequently. Property in in-

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formation does not include the right to restrain alienation of information-containing objects, nor thereby to preclude subsequent transferees from accessing or using the information. Property in information does not include the right to leverage the monopoly against would-be competitors in ways that courts interpret as copyright misuse.

Next consider a widespread promulgated contractual regime of the sort I described earlier and assumed to be efficacious, an EPSER. Let’s assume that a term of the contract says that no copying of information – software or other content – will be permitted. This provision supersedes copyright law by extending control of the property owner to information that the copyright law delimits as non-property: information consisting of facts, or consisting of ideas, or older than the duration of propertization, etc. Let’s assume that another term says that the recipient is precluded from exercising fair use rights, for example by performing intermediate copying for the purpose of reverse engineering. This provision supersedes copyright law by extending control of the property owner to foreclose a legislatively enacted safety valve, which the legislature deliberately left open to those who were willing to infringe and turn the matter over to a court to adjudicate as non-actionable. Let’s assume that still another term says that the recipient is precluded from passing to anyone else the tangible object in which the information is embodied. This provision supersedes copyright law by extending control of the property owner to include a restraint on alienation that the legislature denied.11

If we continue assuming, as I have been doing, that the mass-market contractual regime is efficacious, then it is obvious that for a large subset of the social order, copyright, the law of the state, has been superseded by the promulgated contractual regime, the “law” of the firm. In the limiting case, in which the entire society has become subject to the extended propertization regime, the official constitutional/legislative/judicial regime is completely irrelevant. In situations short of the limiting case, but in which large numbers of people are subject to these superseding regimes, the official constitutional/legislative/judicial regime is severely eroded or marginalized.12

Moreover, it is also obvious that these promulgated regimes extend propertization far beyond the level engendered by the law of the state. The propertization extension

11 In the case of the actual U.S. copyright act as it now stands, Congress has permitted restraint on alienation in some industries: the first-sale doctrine has been abrogated for phonorecords and software but not for videos and print media. See REESE [2003].
12 To the extent that those who held entitlements allocated by the regime of the state can be understood to have bargained them away for something of value to them, the regime of the state is not irrelevant in that it provided the entitlement-holders something with which to bargain. Even if we understand there to have been such a bargain, if the bargain is a one-time relinquishment then the state’s regime looks irrelevant going forward, even if it played a role in bringing about the current situation of regulation by EPSER’s. The state’s regime is less irrelevant, even under a regime of EPSER’s, if we assume that entitlement holders are continually trading off, in an ongoing manner, their state-engendered entitlements to the firms that promulgate EPSER’s.
regime is promulgated for a firm, for the firm’s own benefit. In the limiting case, the regime, for the firm’s private benefit, has superseded the state regime of property, which exists for the benefit of the public as a whole. The propertization extension regime is not subject to democratic input and debate. The propertization extension regime was not arrived at by balancing conflicting interests against each other, nor (by hypothesis) will it be subject to continuing rebalancing and checking by the courts. Sovereignty has been abrogated in favor of whatever firm has promulgated the regime.

4 Effect on Knowledge-Generation Incentives

What is the effect on knowledge generation of replacing the regime of the state with a propertization extension in an EPSER? In the standard economic story about intellectual property, propertization is justified because (and to the extent that) it creates incentives for knowledge production. In a world of too little propertization, there are not enough incentives to innovate, resulting in low, inefficient production of creative works and inventions. On the other hand, in a world of too much propertization, the costs of the property system outweigh its benefits. The costs of the property system include the administrative costs of enforcing the system, the substantive costs ex post of the monopolization utilized for ex ante incentivization, and the transaction costs of reaching licensing deals where necessary for future innovation. As a system increases its propertization, it reaches some limit where the deadweight loss of implementing monopoly rights outweighs the gains resulting from the incentives created by promising them. Increasing propertization also reaches some limit where propertization hinders downstream innovators (who must assemble and license needed rights to build on) more than it helps upstream innovators. All of these limits must be taken into account in order to determine the optimal level of propertization.

How much propertization is too much? That is an empirical question to which no one knows the answer. Most policy debates start with the assumption that it is up to the legislature, assisted by the courts, to arrive at the right balance of propertization and non-propertization. These debates tend to assume that the balance struck by the prevailing legal regime of intellectual property is the right one. That is a big assumption. There are a lot of arguments that it is false, and that the prevailing legislative regime reflects excessive propertization. To the extent, however, that we do start with the assumption that the legislative regime is optimal, the propertization

13 See, e.g., Eldred v. Ashcroft, 537 U.S. 186 (2003) (Breyer dissenting). The legislative regime has been evolving, and always in the direction of increasing propertization. So, many arguments against recent legislative changes take the form of assuming that the prior regime was optimal and only the new portion needs to be rolled back. In fact, no particular regime has ever been shown to be optimal. The incentive-based justification remains theoretical. It could be just a cover for rent-seeking on the part of the content owners. See section 7, below.
extensions accomplished by EPSER’s must at least provisionally be assumed to be a disincentive to knowledge production, effecting a diminution of the level of innovation that would have been achieved by implementing the legislative regime.\textsuperscript{14}

Whether or not one accepts that the regime of the state is optimal for incentivizing knowledge-creation, the hypothetical scenario of EPSER’s counsels that academics and policy-makers should spend more time arguing about the official regime of contract. In evaluating a regime and the state of the world it produces, it is important to know not just where the rights start out, but where they end up, and how they end up there. In particular, the EPSER scenario counsels that academics and policy-makers should now think seriously about which parts of the official property regime are default rules (waivable) and which, if any, are inalienable entitlements (non-waivable).

5 Intellectual Property as a Set of Default Rules: The Issue of Waivability

All of the following purported waivers regularly appear in shrink-wrap, click-wrap, and browse-wrap contracts: Class action remedy, litigation remedy (vs. mandatory arbitration), damages in tort for negligence, publication of criticism or review, fair use, commercial use of facts, commercial use of content whose copyright has expired, free access to facts and ideas, right of alienation of the medium in which information is fixed. To what extent should the regimes of property and contract be structured and interpreted to allow these kinds of waivers? To put the question the other way, should society consider imposing (or interpreting the legal infrastructure as containing) certain mandatory or immutable rules to modify the universe of default rules?

The universe of default rules can be limited by concerns about co-modification,\textsuperscript{15} or about wealth distribution, or by economic concerns about market power, heuristic biases, information impactedness, and so on. There is a big set of issues here. At least it is clear that debates about what uses of information can be officially fair use, for example, are pretty useless without parallel debates about whether the fair use entitlement can be routinely waived. We must consider to what extent treating the property regime as consisting of default rules is itself only a default rule, and one that society should alter under certain circumstances.

To launch consideration of the set of issues involving whether waivability should be limited under some circumstances, a couple of efficiency arguments can be taken into account. First, blanket non-waivability for certain well-defined exceptional categories of entitlements could be less costly and uncertain to implement than

\textsuperscript{14} Even if we accept (see note 12, \textit{supra}) that recipients of an EPSER should be understood to have received a quid pro quo acceptable to them in exchange for their rights, nothing says that the acceptability of that quid pro quo from an exchange point of view has any bearing on the state of the social incentive structure for knowledge production.

\textsuperscript{15} RADIN [2002].
case-by-case judicial imposition of contractual limiting doctrines such as unconscionability. As an example, it could be inefficient for society as a whole to permit firms to use adhesion contracts to impose mandatory arbitration on everyone they deal with. Arbitrators vary in expertise and their decisions are not published or reviewed, so their decisions cannot create a clear body of law. Exclusion of class actions means that certain widespread small complaints must go unremedied. If the legislature was correct in providing a remedy, then it may be inefficient to abrogate the remedy by taking advantage of transaction costs to injured parties.

Second, in a hypothetical lawmakers proceeding, firms themselves might rationally prefer legislatively imposed non-waivability under some circumstances, but may be prevented by coordination problems from achieving this regime. That is, it could be that in its first-best world, each firm would prefer to keep all content it generates foreclosed from use by others, but at the same time would prefer to have access to some content produced by others, because creation of new IP assets requires access to the already existing knowledge base. Because this solution is impossible, firms would have some incentive to coordinate to achieve the second-best world, in which all would allow each other some uses of each other’s content. But that coordination scheme would be weak because firms would always have the incentive to defect, using others’ content but keeping their own unavailable. This is a version of the classic Hobbesian coordination problem, and the classic answer to it is pre-commitment through legislation. Firms would have an incentive to pre-commit to legislation that forces them, and all others, to allow access to certain content. In fact, the copyright regime can be interpreted as a species of this kind of solution to the coordination problem, because it legislatively delineates areas of knowledge production that are to remain open to use by others. From this perspective, then, if the solution envisioned by copyright is now being undermined because all of its rules are treated as default rules, there is an argument that some of those rules should instead be treated as mandatory.

This is the beginning of a general argument that there could be some exceptions to the default regime. It is not yet to say what those exceptions might be. As a preliminary pass at the problem, I suggest three categories for our attention: (1) rights related to legal enforcement; (2) human rights; (3) rights that are politically weak. The result of analyzing these categories (or others that may emerge) could be only to caution legal decision makers to scrutinize purported contractual waivers strictly if they fall into one of these categories. We could also go further and consider whether any category or subcategory warrants instead a legislative mandate of inalienability (non-waivability).

In the category of terms pertaining to legal enforcement, we could start by observing that if an adhesion contract provided that the recipient would have no right of legal action or remedy under any circumstances, that would take the transaction completely outside the legal system, and there would probably be no reason to call it a contract. There are many gray areas, in which the promulgated clauses do impinge on the ability of the legal system to enforce its ordering and to stand behind the rights that users of that system are granted. Making recipients promise
not to litigate and use only binding arbitration is questionable on this score, as I mentioned earlier, especially if the arbitration is expensive. Other clauses that can be considered questionable on this ground are exclusion of class actions, undertakings to pay the firm’s attorney fees, and severe curtailment of remedies. For example, if firms are permitted to enforce clauses limiting the remedy for a victorious plaintiff to whatever the recipient paid for a service, even if the firm is perfectly aware that it is engendering large risks of consequential damages and even if the firm could have implemented cost-effective prevention measures), that might severely undercut the envisioned scheme of legal enforcement.

In the category of human rights, one can start with data privacy rights, and rights to freedom of speech. The category of human rights might include other uses of information that are important to personal and group identity, such as information related to cultural preservation.

As a matter of social commitment to support a certain social context, society might not agree that waiver of these rights should be entirely determined by individuals. Even if we can judge that waiver is fully informed, which is problematic enough, when enough individuals waive their rights the character of society is arguably seriously altered for those who do not waive their rights. Moreover, even considering the matter strictly from an individualistic point of view, these categories are especially sensitive to heuristic biases. People may not know their true valuation of these kinds of rights, or may not know the extent to which they might later regret waiving these rights.

Rights that are politically weak are those that are most likely to be undermined by interest groups. This is most likely where two conditions are true: first, that strong interest groups have reason to try to undercut the right; and second, that the right is not being supported by a strong interest group of its own with money to spend to defend it. In this regard, for example, we could consider fair use rights in commercial videos and recordings.

### 6 Replacing Contracts with Machines

Contrary to my hypothetical world of EPSER’s, the case-by-case limitations of contract law no doubt will be invoked to invalidate a “-wrap” license on occasion, though probably in a haphazard way. Moreover, as I have just suggested, legal systems could legislatively impose well-defined pockets of non-waivability to bolster their IP regimes. But these avenues of regulation through structuring of contractual implementation may now be blocked. The advent of Digital Rights Management Systems (DRMS’s) has the potential to read out the regulatory contouring of contract just as the advent of ubiquitous superseding entitlement regimes has the potential to read out the regulatory contouring of property.

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16 See, e.g., *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).
A DRMS is a program that limits distribution and use of a particular item of digital content (text, video, music, software). It is elaborate technological copy-protection, with limitless possible permutations. A DRMS could prevent content from being copied, or allowed it to be copied once and sent to one recipient, but deleted from the original recipient’s hard drive. It could delete the content automatically after a set time period. It could link a copy to a particular computer, so that it would not be playable anywhere else. There are many other possibilities.

It is evident that DRMS’s – if wide deployment of them does come to pass – will attempt to accomplish by machine what was previously attempted by contract. A EULA that comes with the software and says that I may not copy it for any purpose can be replaced by a DRMS that simply makes all copying impossible. A EULA that says my right to use the software will be revoked if I attempt to copy it can be replaced by a DRMS that simply disables the software when copying is attempted. The DRMS can be configured to render a video unplayable after a certain window of time, or on somebody else’s machine. And so on.

DRMS’s give rise to the same policy problems that I have mentioned above with respect to the promulgated superseding contractual regimes they replace. Content owners can use technological protection to foreclose activities that the background public legal regime has made the right of the user. Common among these foreclosed activities will be prevention of copying of material that is not covered by copyright; and prevention of uses that are covered by copyright but could have been adjudicated fair use.

DRMS’s bypass contract. They bypass the state’s structuring of the legal infrastructure of exchange. The DRMS is like an infallible “injunction” controlled completely by one party. The recipient has no option to breach and pay damages; efficient breach is therefore “repealed.” The recipient has no option to infringe and then argue fair use to a court; the safety-valve for fair use is “repealed.” The recipient has no option to plead unconscionability or some other grounds for unenforceability in order to stop the “injunction” from “issuing.” No entity of the state will balance the hardships and look for irreparable harm before issuing an injunction. Indeed, irreparable harm to the recipient will be ignored in the case of mission-critical systems. The recipient cannot ask the court to reinterpret what the terms mean, in order to balance the rights of the parties. The recipient cannot ask the court to consider reliance, reasonable expectation, economic duress, and so forth. In other words, DRMS’s will make even non-waivable rights irrelevant, unless legal limitations on the operation of machine “injunctions” come into existence.19

17 The recipient could try tit-for-tat and implement her own technological self-help to dismantle the DRMS; but see section 7 (discussing the DMCA).
18 An example of a mission-critical system is licensed software that runs a heart-lung machine in a hospital.
19 It is also argued that DRMS’s, because they are vehicles for gathering detailed information about purchasers, will be utilized to implement perfect price discrimination. See, e.g., PUTNAM [forthcoming].
Some commentators have considered the “terms” of a DRMS to be a contract, rather than, as I am saying, a replacement for contract. I think this locution should not be hastily or casually adopted, because it reads out the regulatory contouring of property and contract. To me it seems instead that DRMS’s are technological self-help. Using DRMS’s is more like landowners building high fences and less like using trespass law. Indeed, using DRMS’s is more like landowners building fences beyond their official property lines, and deploying automatic spring guns to defend the captured territory.

Against my labeling DRMS’s as non-contractual, it could be argued that the consumer chooses whether or not to purchase the content-plus-DRMS package, and that this decision is consensual, and thus an agreement, a contractual transaction. In order to think that the consumer chose to be bound by the terms in the package, we are remanded to familiar empirical questions about the market: whether the consumer is aware of the operations of the DRMS and whether the same content is available in the market without the DRMS attached to it, so that the consumer could have obtained it elsewhere on other terms. Assimilating the browse-wrap procedure to consent does seem at least to move the word consent far from what it used to mean, and far from what it has meant in the political, legal and social understanding of the institution of contract. A fortiori, reinterpreting consent to cover what happens when a recipient is forced to comply with the configuration of a DRMS is even more of a stretch (see Radin [2000]). Nor would consent necessarily exhaust the need for justification.

7 The Irony of Non-Ideal Democracy

In discussing the regime of the state, I have implicitly accepted the standard premise that the legislature (and judiciary) should be assumed to have balanced all factors and come up with a regime that somehow represents the general welfare or the public interest. In the case of IP, that state regime would be the optimal intellectual property regime for incentivizing knowledge production and use. In a more skeptical view, however, that is just an idealized story. The darker, non-ideal view of democratic politics views legislation as purchased by firms and interest groups – through lobbying, campaign contributions and sometimes bribes. Legislation represents regulation desired by one firm for its own benefit, and purchased by that firm, or else instantiates deals struck by interest groups among themselves for their own benefit, whose enactment is purchased by the group.

The Digital Millennium Copyright Act (DMCA) lends itself to this non-ideal view of democratic politics. The DMCA criminalizes the creation of and “trafficking in” technology that could be used to disable DRMS’s. It is widely seen as a victory of content owners over hardware manufacturers, among others (see Samuelson [1999]): Although one provision of the DMCA purports not to alter

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20 On the coalescence of contract and product, see Radin (forthcoming).
any pre-existing rights under copyright law, the DMCA clearly cuts back on the public’s ability to use materials in the public domain (ideas, or merged expression and ideas; facts; materials whose copyright has expired). It also impairs the right of fair use by making the decision to infringe and test the use in court impossible for all but those who can write their own programs. There is no legislation on the other side of the DRMS issue. That is, there is no legislation limiting the unfettered use of DRMS’s when they are used to “enjoin” violation of the “law” of the content owner in contexts that are mission-critical, or otherwise seemingly inappropriate to leave to a corporation’s pre-programmed inexorable machine. The fact that the DMCA is one-sided in its protection of DRMS’s may perhaps indicate that it results from industry capture and not from democratic dialogue in the public interest.

In light of the observations of this essay, what should we make of the DMCA? The sequence of events we have observed, in logical if not chronological order, is: Firms use contract to read out the regulatory contouring of property, by treating all property rules as default rules and contracting around them in a manner that increases the scope of the owners’ control. Then firms use technology to read out the regulatory contouring of contract rules that might have limited and re-shaped those contracts to respect the state’s limitations on property. Then firms obtain legislation to quash design-arounds that would enable users and the public to exercise rights that are part of the property law of the state and still officially on the books. Should the DMCA be interpreted as a considered reassessment of copyright and a reallocation of rights away from recipients and the general public and in favor of those who maintain DRMS’s? Or should it indeed be viewed as industry capture – a final nail in the coffin for the public dimensions of property and contract?

Many view the DMCA as resulting from industry capture, as indeed some have viewed the Copyright Act itself as resulting from industry capture (see Litman [2001]). It is true that over time the copyright term has steadily lengthened, the scope of propertization has steadily burgeoned, and the scope of liability has been ever-broadening. A particular style of critique has evolved, in which the commentator first observes that the scope of propertization has increased over whatever it was in the immediate past; then the commentator assumes that wherever the law stood in the immediate past was efficient and justified, an exemplar of the results of democratic dialogue and public interest decision making for the general welfare; then the commentator goes on to argue that the latest increase therefore cannot be justified, and is an instance of interest-group rent-seeking. This style of argument is unsatisfactory for various reasons, notably the lack of empirical support for claiming that any particular regime is efficient. But it is particularly unsatisfactory if the efficiency or justified status of the immediate previous state of the law is always mythological, because these laws have resulted from nothing but interest-group capture all along.

If the propertization regimes of the state reflect nothing but capture – that is, private profit-maximization by another avenue that happens to be advantageous under the
circumstances – then there may be nothing to choose between the official regimes of the state and the promulgated regimes of EPSER’s or DRMS’s. If this is the right theory of democracy, then my observation that the state-engendered contouring and limitation of property and contract is being undermined rings hollow. So particularly does my counsel to pay more heed to the state-imposed structures in our debates over information policy.

I do not think, however, that a simple rent-seeking theory of democracy can be correct. (Actually, I think no simple theory is going to be correct.) In economic views of politics the primary purpose of the state is to impose efficient, non-rent-seeking regulation to further the general welfare in the face of collective action problems. If all legislation is assumed or defined to be rent-seeking, then this economic justification for there even being a state collapses. I certainly do not hold the opposite view, however, that all legislation is in the public interest merely because a democratic representative body enacted it. My view instead has long been that the difficult problem in political theory is how to differentiate government actions that can be considered rent-seeking (capture) from those that can be considered general welfare-maximizing (in the public interest) (see RADIN [1995]). Unfortunately, there is no canonical method for doing that.

The place where I end up, therefore, is only partially skeptical. The regulatory contours of property and contract engendered by the state are not meaningless, though they are by no means ideal. It makes sense for us to seek policies that shore up checks on the superseding regimes promulgated by firms, where those checks are justified economically or otherwise, even if some legislative enactments look as if their purpose is to undermine such checks.

References


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