

Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property

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* Credit for coining the term “the Googlization of everything” goes to Siva Vaidhyanathan. Thanks to Mitch Berman, Bernie Black, Jens Dammann, Michelle Dickerson, Terry Fisher, Mark Gergen, Ronald Mann, Dick Markovitz, Paul Neufeld, Bill Powers, Tony Reese, Tal Zarsky.

Even the modern great library is not generally consulted. It
is nibbled by a few

Vannevar Bush, 1945¹

In December 2004 Google announced its Google Print Library Project.² The project harnesses Google's search capabilities to making the text of books digitally searchable online.³ Google announced its cooperation with five major libraries, such as the Stanford, Harvard and Oxford libraries, with the intention of ultimately adding the bulk of these libraries' collections to the project.⁴ If Google's press announcements are to be believed, this is part of an ambitious long-term plan to make the "world's information accessible and searchable" online.⁵ Just imagine: hundreds of thousands, then millions of books available for digital search and its endless possibilities, accompanied by the power of contextual

¹ Vannevar Bush, *As We May Think*, ATLANTIC MONTHLY 101 (July 1945).

² John Markoff & Edward Wyatt, *Google is Adding Major Libraries to its Database*, N.Y. TIMES (Dec. 14, 2004); Scott Carlson and Jeffery Young, *Google Will Digitize and Search Millions of Books From 5 Top Research Libraries*, THE CHRONICLE OF HIGHER EDUCATION (January 7 2005); Stephanie Olsen, *Google adds major libraries to its database*, CNET News.com, (December 14, 2004), available at:

http://news.com.com/Google+adds+major+libraries+to+its+database/2100-1025_3-5489921.html. Google's official announcement is available here: http://www.google.com/press/pressrel/print_library.html. The project had antecedents and had been taking shape for a long time prior to December 2004. See Google's short history of the project here: <http://books.google.com/googlebooks/newsviews/history.html>.

³ Google Print Library is a component of Google's Book Search. The other major component is Google's Partner Program that offers search and some access to texts of books, under license from the copyright owners. See Google's "Program Basics," available at: <http://books.google.com/intl/en/googlebooks/about.html>.

⁴ For a detailed survey of the participating libraries and the materials included in the project see Siva Vaidhyanathan, *The Goolization of Everything and the Dystopian Vision of Copyright*, UC DAVIS L. REV. 9 (forthcoming).

⁵ See Google's Corporate Information; available at www.google.com/corporte/.

linking; the sum of printed human knowledge at your fingertips, on your PC. All for free. Doesn't it sound great? Who would not like such a project? What's not to like? Plenty! If we are to believe the Authors Guild and a group of disgruntled copyright owners who filed two separate copyright infringement lawsuits against Google.⁶

Many of the books included in the project are protected by copyright. According to Google, when such copyrighted texts are involved the results available to end-users will be limited. Unless permission is obtained from the copyright owner, search results for copyrighted books will include only bibliographical information and the highlighted search terms, accompanied by a small number of short snippets of their surrounding text as it appears in the book.⁷

Despite this architecture, the project still gives rise to complex questions of potential copyright infringement. Does the presentation of the short excerpts of text by Google constitute copyright infringement? Will end-users copying this text be considered copyright infringers and will Google incur secondary-liability for their actions? Is the scanning of the full texts into Google's digital database—an action which is necessary to facilitate the project—infringing, despite the fact that no human eye will see this scanned full text? Can any or all of these activities enjoy the fair use defense? Lawyers, legal scholars and others are vigorously debating these questions.⁸ Others raise more fundamental questions of public policy

⁶ See *Authors Guild v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005); *The McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. Oct. 19 2005).

⁷ A visual demonstration of the search results for the various kinds of works on Google's Book Search is available here: <http://books.google.com/googlebooks/library.html>. For a more detailed description of the architecture of Google's Print Library Project see Emily Anne Proskine, *Note: Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project* 21 BERKELEY TECH. L.J. 213, 217-219 (2006).

⁸ See Proskine, *supra* note 7; Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. (2005); Jonathan Band, *The Google Library Project: Both Sides of the Story*, 2 PLAGIARY: CROSS DISCIPLINARY STUDIES IN PLAGIARISM, FABRICATION AND FALSIFICATION 1 (2006); Robin Jeweler, *CRS Report to Congress: The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law?*

that are entangled with this case.⁹ Is Google—a private commercial entity occupying an extraordinarily dominant position in its market—the best institutional player for carrying out a project of such important social implications? Should a private initiative of this sort be encouraged and facilitated or should the government support a different, more publicly oriented institution—the future version of the public library—to be put in charge of a similar task? Are there troubling aspects, such as privacy implications and the power to manipulate information, to the entrustment of this project in the hands of Google?

This article brackets these important legal and policy questions. It examines another aspect of the copyright controversy sparked by Google's Print Library Project: the significance of the option given by Google to copyright owners to opt-out from participation in the project.¹⁰ Although at first blush this may seem a rather narrow and technical subject, the questions involved go to the core of the role played by copyright in the digital age. The answers we give to these questions may have far-reaching implications on patterns of dissemination and accessibility of information in our society that go well beyond the Google case.

What exactly is the opt-out option? In its public reactions to the accusations against it, Google appealed, inter alia, to the fact that it allows the owners of copyrighted texts designated to be included in the project to opt-out.¹¹ In other words, Google enables copyright owners to inform it of their wishes. Whenever a copyright owner notifies Google of her objection to the inclusion of a specific text, the text will not be included in the database, or if it has already been included it will be removed.

Should this opt-out option have any bearing on the copyright analysis of the case? Google's critics were not impressed. A barrage of reactions dismissed the opt-out option as irrelevant. Indeed, as insolent.

(Dec. 28 2005), available at:
http://www.opencrs.com/rpts/RS22356_20051228.pdf.

⁹ Vaidhyanathan, *supra* note 4.

¹⁰ For a similar, although narrower analysis, see Michael R. Mattioli, *Opting Out: Procedural Fair Use* (unpublished 2006).

¹¹ Stephanie Olsen, *Publishers Balk at Google Book Copy Plan*, CNET News.com (May 24, 2005), available at:
http://news.com.com/Publishers+balk+at+Google+book+copy+plan/2100-1025_3-5719156.html. Google's opt-out instructions can be found here:
<https://print.google.com/support/publisher/bin/answer.py?answer=20771&topic=1047>.

Copyright owners and their lawyers denounced the opt-out argument as an ill-advised attempt to “stand copyright law on its head.”¹² Google got property and copyright law backwards, they explained. Since copyright owners own the right, they do not carry the burden of opting-out. It is, rather, Google, the intermeddler with these rights, who carries the onus of obtaining permission or, in other words, convincing the copyright owner to opt-in. No unilateral notice or option to opt-out given by Google could change this state of affairs.

It is with this aspect of the controversy that this article is preoccupied. The opt-out question, despite its deceptively marginal appearance, merits a close analysis because of its potential implications that go well beyond the Google Print Library controversy. The power of ubiquitous digital tools and a global high-speed network is often perceived as a threat to copyright policy’s balance between incentive to create and maximal dissemination of information. This anxiety lies at the heart of Google’s Print Library enemies’ case. Yet the power of digital technology is not merely a threat. It is also a source of unprecedented opportunities. As demonstrated by Google’s project, digital technology has the potential of empowering many of the members of society by providing them access to gigantic quantities of information in highly retrievable and manipulable forms. Books are just the beginning. Any information “out there” that can be digitized and conveniently transmitted over public networks—which increasingly comes close to meaning any information—is a potential subject matter of this process: images, sounds, video; in short, all the building-blocks of our common culture.

¹² Patricia Schroeder, the head of the Association of American Publishers and a former Congresswoman, was quoted as reacting to Google’s opt-out defense by saying that “[t]his is really turning it on its head.” Edward Wyatt, *Google Alters Plan for Searchable Library Database*, N.Y. TIMES (August 12, 2005); *Publishers: Value of Book Search Project Shows That Scanning Is Not Fair Use*, 71 BNA PATENT TRADEMARK & COPYRIGHT J. 94 (November 25, 2005). According to another version Ms. Schroeder said that “this knocks the notion of copyright on its head,” quoted in China Martens, *Google Provides Opt-Out for Publishers*, COMPUTERWORLD, (Aug 12, 2005). The Text and Academic Authors Association took a similar position in a public announcement on their website (“TAA takes the position that copyright law is being turned on its head, and that it should be the responsibility of Google to request permission, and not the copyright holders [sic] responsibility to take the initiative”); available at: www.taaonline.net/news/09_02_05.html.

Just as the potential subject-matter of publicly-accessible information depositories goes beyond books, the variety of potential digital archivists goes beyond Google-like entities. Other potential players in this game include various public or semi-public entities, small private actors, and initiatives based on new distributed models of cooperation that recently started to blossom in the Internet context.¹³ All of these potential initiatives have a crucial common feature: mass aggregation of informational items, under conditions in which the cost of ascertaining and clearing legal rights in each item is non-trivial. Under such conditions the opt-out or opt-in question is very likely to become, metaphorically speaking, a question of life and death. In many cases, the ability to rely on opt-out as a safe-haven from infringement claims would be a crucial element. In its absence, the cost or risk of undertaking such projects would be too great, and many of these projects will not be undertaken. Others will be undertaken in a radically scaled-down form. Given the cost of clearing rights in numerous items and the background rules of copyright law, the frustration of digital-libraries projects may occur even in cases where there is a massive demand not just by end-users but also by a significant number of the owners of copyright in relevant materials. Thus, the seemingly technical question of opt-out and its legal effect is likely to have a profound impact on the landscape of our information society.

The purpose of this article is threefold. First, I want to refute the claim that copyright, or any other property right, always and inevitably places the burden of obtaining permission on the intermeddler and that an opt-out option can never be enough to escape infringement of such a right. Once the universal assumption about the nature of property rights is abandoned, the question of how to structure property entitlements becomes a context-specific, normative choice. Accordingly, my second purpose is to supply a policy discussion of the opt-out mechanism—to ascertain the typical normative considerations that underlie the choice between opt-out and its alternatives and examine how these considerations apply in the case of digital-libraries. The third goal of this article is to rely on the insights of the normative discussion in order to craft a proposed, concrete legal regime for dealing with the sensitive intersection between digital-libraries and copyright.

The sections of this article correspond to these three purposes. In part I, I argue that the idea that property has a “nature” that necessitates any particular result concerning the opt-out question is a myth, albeit a

¹³ See *infra* text accompanying notes 97-109.

powerful and tempting myth, that needs to be demystified (although it has been demystified time and again during the previous century). Instead of the nature of property image, I suggest an alternative model for discussing property rights in general and copyright in particular. This model is based on the combination of three fundamental insights of American property theory: a) Wesley Hohfeld's classification of legal relations;¹⁴ b) Calabresi and Melamed's famous three-partite taxonomy of property, liability and non-alienability rules;¹⁵ and c) the more recent analysis of Bell and Pachomovky of the dynamic character of legal rules, or of "transformation rules."¹⁶

This framework for discussing copyright entitlements has two implications. First it demonstrates that a supposed "nature" of property or copyright supplies no answers to questions as the one under discussion here. The positive question of whether under existing American copyright law an opt-out option given by an alleged infringer can serve as a successful defense is debatable. The answer to the normative question of whether and under what circumstances an opt-out option *should* give rise to such a defense does not follow from any uniform nature of property rights, because such a nature does not exist. The answer to such a question can be produced only by a substantive normative discussion. Second, the concepts and taxonomies discussed in this part lay the analytical foundation for developing such a normative discussion.

Part II supplies the needed normative discussion of opt-out mechanisms and applies it to the digital-libraries context. The section discusses a few examples where the law adopted opt-out mechanisms and identifies typical policy reasons for doing so. It goes on to apply two major normative perspectives to our context. The first is economic efficiency. Given the structure of the relevant market and the background rules of copyright law, a switch from opt-in to a properly constructed opt-out rule is likely to produce a tremendous saving of transaction costs. This

¹⁴ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913); idem, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917).

¹⁵ Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁶ Abraham Bell and Gideon Pachomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002).

saving, in turn, will prevent the frustration of socially beneficial initiatives. An alternative way of understanding the efficiency gains of opt-out in the context of digital-libraries is to analyze it from the perspective of information asymmetries between typical parties in this market. A typical copyright owner usually has far better information about the legal status of his work. An opt-out regime, by introducing the “penalty” of an undesired use, serves as an incentive to unwilling copyright owners to disclose their superior information to would-be users, and clear the informational fog that plagues these projects.

The second normative perspective applied to our subject is “cultural democracy.” I use this term to refer to a loosely related group of normative visions that were developed recently by several copyright scholars. Under this vision the “good society,” toward which we should strive, would have a rich and active cultural sphere, but, just as important, it would be a cultural sphere in which all members of society have an equal chance to participate in the creation and reworking of social meaning as embedded in cultural materials. The good society, in other words, would be one that blurs the line between the producer and the consumer of social meaning. I argue that this normative vision weighs heavily in favor of an opt-out regime. Such a regime would facilitate the creation and growth of a variety of online digital-libraries, which are invaluable instruments for realizing the participatory vision of cultural democracy.

Part III examines the possibility of converting the abstract normative insights of Part II into an actual legal regime. As always, such a descent from theory into practice involves imperfections and tradeoffs. An attractive legal arrangement, however, would minimize these imperfections. It would limit the application of the opt-out mechanism to those situations where its supporting rationales strongly apply and would minimize any undesirable side-effects. Part III discusses the feasibility of such a regime. It examines the merits and demerits of three main alternatives. The first is incorporating, through judicial interpretation, an opt-out mechanism into the fair use defense. The second alternative is a legislative arrangement specifically tailored to deal with the problems of digital-libraries. Such a legislative arrangement would define precise conditions under which builders of digital-libraries, who give an appropriate opt-out option, would enjoy a safe-haven. The third option is a variation on the second. Under this alternative the legislative scheme would delegate to an administrative agency the power to determine the applicability of the safe-haven to specific cases and to tailor its conditions

on an ad hoc basis. Finally, I discuss briefly the possibility of combining the fair use alternative and either variations of the statutory safe-haven. I explain how the two could be combined and find that this is likely to be the preferable alternative.

I. Transcendental Nonsense and Beyond

The notion that the existence of an opt-out option should exempt from liability would be standing copyright law on its head or that it is precluded by copyright's "nature," would seem plainly silly to some. Nevertheless, as demonstrated by the Google Print Library debate, for others the notion still enjoys some credibility both as a positive claim about what the law is, and a normative assertion about what it should be. This obstacle, then, must be set aside before we discuss the substantive merits of opt-out. The argument that the nature of property entails an opt-in structure has an instinctive appeal. It seems to correspond to a common-sense notion of ownership. Saying that something is mine means that you cannot take it without my permission. It means that you cannot legitimately take it even if you give me an option to object and have full intention to comply if I do object. It means you cannot take it, absent my permission, even if you left a ten dollar bill in my pocket.

Or does it? On second thought, it is easy to see, even on this common-sense level, that opt-out is all around us in everyday life. We step onto peoples' front porches and knock on their doors; we tap people on their shoulder; and we enter shops on Main Street, even absent a specific invitation to do so. We do all of those things without prior permission. Yet, in the absence of prior notice of objection by the owners of these normally protected interests, hardly anyone would say that any right is breached in these cases. No one would say that, even if it turns out that an enraged porch owner claims that she never consented to the use of her property and demands a legal remedy. The lawyers among us, no doubt, would be quick to explain these situations using legal terms such as implied consent or maybe deminimis damage. But, obviously, this is no answer at all. These concepts are legal constructs. They are technical instruments we use in order to give formal effect to the basic normative conviction that in some cases otherwise protected property interests are not deemed violated, unless the owner gives specific prior notice of his objection. Can we dismiss these everyday examples as minor discrepancies or negligible exceptions that prove the rule?

The main point of this section is simple: property and copyright have no nature. Copyright has no head (or feet, for this matter) on which it could be stood. The entitlements created by copyright have no natural “direction” that one can get “backwards.” The argument proceeds as follows. Read literally, the nature-of-property argument maintains that property rights have an essential form and content. From this essential “nature” one can derive answers to questions such as whether opt-out can exempt intermeddlers from liability, without reference to any normative discussion. I explain that this claim is false both conceptually and empirically. Property rights in general and copyright in particular do not correspond to this notion of a uniform essential form. Property rights are bundles of specific entitlements whose exact composition and configuration change from one context to another. These entitlements are protected by varying enforcement rules. Finally, property rights sometimes have a dynamic element: rules that define conditions under which the configuration of a property right would change.

Given this structure, the form and content of property rights becomes a normative choice. Should a particular entitlement be included in the bundle of copyright protection in a specific context? What should be the enforcement rule protecting that entitlement? Should either of these two parameters change under certain circumstances? When normative choices of this sort are involved, one needs a convincing normative argument, rather than flat assertions about the nature of copyright. The assertions about “copyright’s nature” are, thus, what Felix Cohen called “transcendental nonsense.”¹⁷ It is answering the normative question of whether copyright *should* always ignore opt-out options with an empty statement that, by definition, it does.

A more charitable way of reading the nature of property objection is as a shorthand version of the claim that there are substantive normative reasons to ignore opt-out options. These reasons are, supposedly, universally applicable and hence no specific discussion is required to determine whether imputing legal significance to an opt-out option is desirable in the context of digital-libraries. At the end of this section I briefly examine and dismiss a common variant of this claim.

¹⁷ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

A. The Good Old Bundle: Hohfeldian Copyright

Our modern consciousness of property is bifurcated. A popular layperson's notion of property is that of an absolute control over an object.¹⁸ This is the very notion within which the nature-of-copyright assertions, discussed above, are grounded.¹⁹ In professional legal thinking, however, this Blackstonian conception of property as "sole and despotic dominion" over things²⁰ has lost favor long ago. Since the advent of legal realism in the early twentieth century, it was supplanted by an alternative, very different conception.²¹ One of the first things that an American law student hears in a first year property class is that property is a "bundle of entitlements."²²

¹⁸ BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97-100, 113-67 (1977); Thomas Grey, *The Disintegration of Property*, in XXII NOMOS: PROPERTY 69 (J. Ronald Penock & John W. Chapman eds. 1980).

¹⁹ The copyright variant is a slightly modified version of the notion of property as absolute control over an object, because the relevant "object" is a postulated intangible entity, namely, the intellectual work. Blackstone, who is often associated with the absolute dominion over things conception, was one of the first to develop this modified version. He did it exactly in order to encompass copyright within his abstract model of property as absolute control of things. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 405-6 (1765-1769).

²⁰ 2 Blackstone, *supra* note 19, at 2. See also Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 330-33 (1980).

²¹ The alternative concept of property as a bundle of rights was not necessarily a product of legal realism. It initially originated in the abstraction of property thinking in late nineteenth century legal thought and in the modern socio-economic conditions of modern capitalist societies. See Grey, *supra* note 18, at 74-76; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY, 1870-1960 145-51 (1992). Nevertheless, the bundle of rights concept was seized and developed by realist scholars as a critique of the conceptualist jurisprudence of their day.

²² Ackerman, *supra* note 18, at 27 (Explaining that the bundle of entitlement concept has become a "consensus view so pervasive that even the dimmest law student can be counted upon to parrot the ritual phrases on command").

Despite the predominance of the bundle of entitlements conception in professional property discourse, however, the popular idea of property as absolute control did not completely lose its hold even within such circles. As the nature-of-property claim in the Google context demonstrates, this popular idea, or at least some of the propositions that are rooted in it, have a way of creeping back to haunt professional and semi-professional legal debates. At the same time, the bundle of entitlements conception and the more general Hohfeldian framework of legal relations²³ in which it is grounded only too often deteriorate to the status of “a sack of dry beans unesteemed by those who have lost the recipe for its use.”²⁴ It may be useful, then, to briefly recount the main features of the Hofeldian conception of property.

The modern notion of property as a bundle of entitlements is usually traced back to Wesley N. Hohfeld’s analysis of fundamental legal conceptions.²⁵ Hohfeld, who set out to identify the atoms or the basic conceptual units to which all legal relations could be reduced, synthesized eight basic “jural relations” divided into two sets—the one substantive, the other procedural. On the substantive side,²⁶ Hohfeld identified four basic legal units. These four units constitute two pairs of “legal correlatives.” The first pair of correlatives is that of a right and a duty. A right is a legal claim one has to require or prevent a certain act or acts by another, backed by the state’s coercive power. The necessary logical correlative of a right is a duty, or the legal state in which a person is subject to a right claim by another. The second pair of correlatives is a privilege and a no-right. A privilege is a legal state under which one can engage or refrain from engaging in a certain act or acts, free from anyone’s ability to use state coercion in this regard. The necessary logical correlative of a privilege is a lack of right by another, or in Hohfeld’s terminology: a “no-right.” By definition, these four basic units can also be paired as two logical oppositions: a right is the opposite of a no-right, and a privilege is the

²³ See *infra* text accompanying notes 25-34.

²⁴ Duncan Kennedy & Frank Michaelman, *Are Property and Contracts Efficient?*, 8 HOFSTRA L. REV. 711, 751 (1980).

²⁵ Hohfeld, *supra* note 14. See also Grey, *supra* note 18, n. 40; Vandavelde, *supra* note 20, at 359.

²⁶ In order to simplify, I focus here on the substantive set of legal relations and neglect the procedural one. The procedural legal concepts are: power and its correlative liability; immunity and its correlative disability. As I mention below the procedural set of legal relations is closely related to the concept of transformation-rules. See *infra* note 58.

opposite of a duty. All legal relations, Hohfeld explained, can be analyzed using these few basic units. All legal relations, no matter how complex, are, in fact, aggregates of rights, privileges, duties and no-rights.

The Hohfeldian framework, cryptic though it may seem, had a resounding and lasting effect on legal thinking in general and on property thought in particular. The most important effect of Hohfeld's insight, as it was developed by his legal realist successors, was the decline of the traditional concept of property rights as absolute control over things. Analyzed in Hohfeldian terms, property rights are no longer seen as a person's control over an object, but rather as a relation between people in the context of any possible resource or interest.²⁷ Saying that I own this house, actually means that I have various rights and privileges vis-à-vis other people who have correlative duties and no-rights, all in respect to the house. Moreover, seen from this perspective, property rights are no longer understood as total or absolute control, but rather as collections of various rights and privileges and their correlative duties and no-rights.²⁸ In other words, property rights are seen as the modern bundles of entitlements.

Property rights are not just bundles of entitlements; they are eclectic bundles, whose exact content changes with context and with time. The aggregate of entitlements that constitutes a property right in a house is quite different from that of a property right in a table, and both are quite different from a property right in a trademark. The bundle of entitlements that constitute my ownership of Blackacre may change dramatically over time if I assign some of the original entitlements and create various legal arrangements, such as trust, in respect to others. Thus, great variation among property bundles is produced both by the initial framing of the property right by the law and by the dynamics of private ordering over time.

The process in which this view of property emerged is sometimes termed the "disintegration of property."²⁹ Its implication was that property could no longer be seen as having a necessary and fixed character or a unifying model that could apply to all cases. It also meant that the abstract concept of property lost much of its power to decide specific cases. Merely saying that I have property in X no longer decided the question of whether the specific bundle constituting my "property" contains any particular right or privilege.

²⁷ Vandeveld, *supra* note 20, at 360-61; Horwitz, *supra* note 21, at 156.

²⁸ Vandeveld, *supra* note 20, at 360-62.

²⁹ Grey, *supra* note 18.

This new conception of property was augmented by several other typical features of realist thought that remained deeply engrained in American legal culture. A strong Instrumentalist approach—the conviction that law is a tool for serving social purposes and policies—meant that the content of any particular bundle of entitlements could be determined and evaluated only on the basis of a normative discussion of values, policies and effects.³⁰ A commitment to legal positivism combined with the bundle of entitlements conception revealed a broad space of state choice, well beyond the binary determination of whether or not to recognize and enforce property rights.³¹ The configuration of each property right came to be seen as a long series of choices by the state about how and when to lend its coercive power to the service of certain individuals or refrain from doing so.³² Choice about the allocation of the coercive power of the state entailed, again, the need for convincing normative justifications. Finally a tendency toward particularism—the belief that the dynamic and complex character of society requires relatively narrow and context-attuned legal categories—entailed a contextualist approach to property rights.³³ This does not necessarily mean endless fragmentation of property rights into completely ad-hoc laundry lists of entitlements.³⁴ A commitment to particularism does entail, however, a willingness to accept and even a preference for great variance among specific bundles of property rights according to social context and relevant policies.

Although there is no consensus over all the components and implications described above, the bundle of entitlements framework is

³⁰ See William Fisher III, *The development of modern American legal theory and the judicial interpretation of the Bill of Rights*, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS AND LAW 1791 AND 1991 276-79 (Michael Lacey & Knud Haakonseen eds., 1991) and references there.

³¹ *Id.*, at 274.

³² Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUDIES FORUM 327, 328-334 (1991) and references there.

³³ Fisher, *supra* note 30, at 273-77 and references there.

³⁴ See Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1534-35, 1558-64 (2002) (There is “a limited number of conventional configurations of property entitlements that represent the institutional options, constituted and recognized by property law”). For a different explanation and support for a limited number of property forms see Thomas Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. REV. 1 (2000).

generally accepted within modern professional legal thought about property. Copyright law is not exceptional in this sense, but it does seem to be an example of a legal regime that is shaped in the bundle of entitlements image in a particularly strong and immediately-apparent way.

It is hard not to notice how perfectly American copyright law fits the bundle of entitlements model. This is apparent in several respects. First, the basic organizing principle of the American copyright regime is not based on any general conception of “ownership” as general control of an intellectual work. It, rather, has the formal structure of a series of specifically-defined exclusive entitlements enjoyed by the copyright owner.³⁵ The fact that this list has grown quite long and far-reaching notwithstanding, copyright is defined, on its face, not as absolute control but as a bundle of concrete entitlements. Moreover, these entitlements are limited by a long list of exceptions, defenses and exemptions that apply in specifically defined circumstances.³⁶ It is hard to miss the fact that these entitlements, defenses and exceptions constitute a mosaic of Hohfeldian rights, duties, privileges and no-rights that are distributed among the copyright owner and other entities.

Second, the dynamic, non-essentialist character of copyright’s bundle of entitlements is explicitly emphasized by the Copyright Act and its treatment of change over time. Subsection 201(d)(2) of the Copyright Act provides that “[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights... may be transferred.”³⁷ In other words, the copyright bundle can be easily unbundled and reshaped. A specific entitlement can be transferred and retransferred independently of any other. Moreover, any specific entitlement can be split into components, which then become themselves entitlements that are transferable and subject to being split.

Third, the copyright Act seems to closely follow the realist credo of particularism. Many of the various entitlements it contains apply to narrow specific circumstances and vary greatly according to context. A copyright in a sound recording, for example, does not include an exclusive right of publicly performing the sound recording. Unlike copyright in other subject matter;³⁸ it only creates a limited right for digital

³⁵ 17 U.S.C. §§106-106A.

³⁶ 17 U.S.C. §§107-120.

³⁷ 17 U.S.C. §§201(d)(2).

³⁸ 17 U.S.C. §§106(4).

transmission.³⁹ Copyright in architectural designs does not preclude pictorial representations of buildings visible from public places.⁴⁰ Libraries have the privilege of making certain copies for archival and other purposes.⁴¹ And so on and so forth. Whether due to the historical and political process that produced it⁴² or due to a normative judgment the Copyright Act is the epitome of particularism.

In short, copyright law is the perfect example of a property right whose character as a Hohfeldian bundle of rights and privileges is obvious. Copyright is explicitly structured as a complex aggregate of entitlements that may be separated and rearranged. The division of these entitlements tends to follow the realist particularist credo: it often creates narrow and context-specific rules.

B. The Cathedral: Copyright Enforcement Rules

A Hohfeldian right was defined as an entitlement to require or prevent an act by another, backed by the ability to summon the coercive power of the state. But what exactly does it mean “to summon the coercive power of the state” to enforce an entitlement? The classic contribution of Calabresi and Melamed, half a century after Hohfeld, was the insight that there are several conventional ways in which the state can lend its coercive power to enforcing one’s entitlement and that the choice between these ways creates fundamentally different relations between the parties involved.⁴³ It follows that identifying and justifying the specific series of rights and privileges in a particular property bundle is only the first stage. The second stage involves the second-order question of identifying and

³⁹ 17 U.S.C. §§106(6), 114(d).

⁴⁰ 17 U.S.C. §120(a).

⁴¹ 17 U.S.C. §108.

⁴² The highly fragmented character of modern copyright could be ascribed to various factors: a) the breadth of modern copyright law that covers a very broad and heterogeneous set of subject matter, practices and industries; b) the fast pace of technological change that influences the field; c) the statutory character of the field and its susceptibility to interest group politics and negotiated compromises among various “constituencies.”

⁴³ Calabresi & Melamed, *supra* note 15.

justifying the type of enforcement rule that should support each right in the bundle.⁴⁴

Calabresi and Melamed famously suggested a taxonomy of three basic enforcement rules. Since then, many nuances and sub-divisions have been suggested.⁴⁵ Nonetheless the original tripartite taxonomy is still vital as a rough but useful simplification. The first enforcement rule identified in this scheme is a property rule. A property rule enforces a right by giving the owner a veto power over its transfer or suspension.⁴⁶ If the right is breached by another, absent a voluntary transfer, the state will use its coercive power to force that other to obey her duty.⁴⁷ Under a liability rule, by contrast, a party may avoid a right and the state's enforcement power not just by a voluntary transaction with the owner, but also by paying the owner a determined value set by an organ of the state.⁴⁸ A right protected by a liability rule is thus reduced to a conditional right that exists only until a duty-bound party pays the owner a set value. A third class of enforcement rules is populated by inalienability rules. A rule of inalienability forbids or at least does not recognize the transfer or suspension of a right.⁴⁹ A right protected by an inalienability rule can be avoided neither by paying a set value nor by a market transaction.

Various rights that form property bundles may be protected by different enforcement rules of the three brands described above. The second-order question of the appropriate enforcement rule, just like the

⁴⁴ *Id.*, at 1092.

⁴⁵ See e.g. Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 *YALE L. J.* 2149 (1997). See generally Bell & Pachomovsky, *supra* note 16, at 15-25; Terry Fisher.

⁴⁶ Calabresi & Melamed, *supra* note 15, at 1092.

⁴⁷ There is, of course, a myriad of ways in which a state can force others to respect rights and obey duties. Calabresi and Melamed identified a property rule with a right enforced by an injunction and a liability rule with a right enforced only by compensatory damages. *Id.*, at 1115-17. There are, however, many possible combinations of various remedies beyond these two options. One can think of many combinations of remedies such as compensatory damages, punitive damages, disgorgement of profits, injunctions or criminal sanctions. This plurality of possible remedies produced much of the later more nuanced elaborations of Calabresi and Melamed's taxonomy.

⁴⁸ *Id.*, at 1092.

⁴⁹ *Id.*, at 1092-93.

first-order question of the suitable entitlement, is a question about the proper use of state power. Therefore each of these choices has to be justified by a policy reason. Calabresi and Melamed are best known for their analysis of the choice among enforcement rules in terms of economic efficiency.⁵⁰ Yet, as recognized by their analysis, there are other important normative considerations that may bear on the choice among enforcement rules and the divergent social outcomes they produce.⁵¹ Such normative reasons, to name just a few, may include distributive justice, paternalistic considerations, the favoring of certain social activities, or the valuing and perceived need for protection of certain human needs and relations.

Copyright law, again, provides a good example of the choice between rules of enforcement and of the fact that the normative support for a particular rule may vary with context. American copyright law contains all three brands of enforcement rules. Property rules are the most common enforcement mechanisms of copyrights. Copyright entitlements, are commonly enforced by an array of remedies, including injunctive relief.⁵² Ordinarily, absent a voluntary transaction with the copyright owner, one cannot simply pay a sum of money and avoid the right. Moreover, the remedy of injunctive relief is notoriously easy to obtain in copyright cases.⁵³ There are, however, quite a few copyright entitlements that are protected only by liability rules. The various compulsory licenses, contained in the Copyright Act, that allow users under certain circumstances to avoid liability by paying predetermined royalties are such liability rules.⁵⁴ Finally, although more rarely, some copyright entitlements are protected by rules of inalienability. Some copyright

⁵⁰ *Id.*, at 1093-98.

⁵¹ *Id.*, at 1098-1105.

⁵² 17 U.S.C. §502.

⁵³ See Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 158-64 (1998).

⁵⁴ See e.g. 17 U.S.C. §§111(d)-(e); 114(d)-(j); 115; 116; 118; 119; 122.

entitlements cannot be transferred.⁵⁵ Others can be neither transferred nor waived.⁵⁶

Thus, even after the first-order choice was made and a particular right was created, copyright law varies greatly in regard to the enforcement mechanism that supports the right. On this level too, copyright's arrangements seems to be particularistic and highly attuned to specific context.

C. The Cathedral in Motion: Copyright Transformation Rules

There is a third level of complexity to the structure of property rights. As recently argued by Abraham Bell and Gideon Pachomovsky,⁵⁷ the configuration of entitlements making up a particular bundle and the enforcement rules that support these entitlements may be dynamic, rather than static.⁵⁸ In other words, these two parameters—the entitlement and its enforcement rule—may change over time. The important point here is not simply the obvious fact that laws may change whether by legislative, judicial, or other authoritative decision. The crux of the issue is, rather, that legal norms themselves may be defined in dynamic terms. Legal norms can be crafted to define conditions or circumstances under which the existence and the form of a particular entitlement will change.

Bell and Pachomovsky focused on the potential of dynamic norms to define transitions (in either direction) between property and liability rules, and accordingly they aptly termed such norms “liability rules.”⁵⁹ The basic insight, however, can be extended. Analytically, legal norms can define conditions for transformation of the legal arrangement in respect to

⁵⁵ The moral rights protected under section 106A may not be transferred, but they may be waived under certain circumstances. 17 U.S.C. §106A(e).

⁵⁶ The rights of authors to terminate transfers and licenses of their copyrights remain valid “notwithstanding any agreement to the contrary.” 17 U.S.C. §203(a)(5).

⁵⁷ Bell & Pachomovsky, *supra* note 16.

⁵⁸ Hohfeld's analysis recognized the dynamic character of legal norms. His procedural table of legal relations anticipated much of what I refer to here as “transformation rules.” For expositional purposes, however, I chose not use Hohfeld's terminology in elaborating the notion of transformation rules.

⁵⁹ Bell & Pachomovsky, *supra* note 16, at 5.

either of the parameters discussed above: the brand of legal entitlement, and its enforcement rule. Regarding each parameter, the transition can be between any of the available options. Thus, for example, legal norm A may mandate that under set of conditions X a particular right will be turned into a mere privilege. The trademark doctrine of genericity that provides that a trademarked term loses protection once it becomes generic to a class of products⁶⁰ is such an entitlement-transforming norm.⁶¹ The same dynamic mechanism may apply on the enforcement rule level. Legal norm B may mandate that under set of conditions Y a particular right which is protected by a rule of inalienability will transform to be protected by a property rule. Eminent domain is the most common example of this sort of norm. Takings doctrine defines conditions under which property rule protection is supplanted by a liability rule.⁶² Finally, a norm may be dynamic regarding the identity of the individuals who enjoy the entitlement, or those who are subject to it. Thus, legal norm C may mandate that under set of conditions Z a property right enjoyed by Marshall will “change hands” and will come to be enjoyed by Taney. Adverse possession is an example of such a legal norm.⁶³

The net outcome is a matrix of possibilities for dynamic norms. Analytically, a legal norm may define conditions for transformation of any of these dimensions, or any combination of these dimensions. I will be terming this more capacious notion of dynamic norms: “transformation rules.” To be sure, it is not necessarily the case that there will be good policy reasons to use the various possible transformation rules with the same frequency. It is even possible that some of the analytically available variants of transformation rules are never used in practice. By now it should come as no surprise, however, that the question is always a normative one. The question is whether there are good normative reasons—based on economic efficiency, distributive justice or any other persuasive consideration—to employ a specific transformation rule in a particular context.

⁶⁰ See *Canal Co. v. Clark*, 80 U.S. 311, 323 (1871). The doctrine is partly codified in 15 U.S.C. §1064(3).

⁶¹ See Bell & Pachomovsky, *supra* note 16, at 46-49.

⁶² As Bell & Pachomovsky explain, a taking usually involves a three-stage transformation rule: A property rule, which is supplanted by a liability rule, which, in turn, is supplanted by a property rule that protects the new owner. Bell & Pachomovsky, *supra* note 16, at 60.

⁶³ *Id.*, at 55-59.

Copyright law includes an abundance of transformation rules of different kinds. The most important and conspicuous example of a transformation rule within copyright law is the limited duration of the right⁶⁴ In effect, the Copyright Act treats the lapse of a predetermined number of years as a triggering event that precipitates a transformation of the relevant legal entitlements. In this case the change is sweeping. When the statutory period lapses all the rights conferred on the owner by copyright, whether they are protected by a liability or a property rule, transform into mere privileges.⁶⁵ Copyright law contains numerous other transformation rules.⁶⁶

The notion of transformation rules is particularly important in our context because a legal norm that recognizes an opt-out option as a basis for exemption from copyright liability is simply a brand of such a rule. An opt-out legal rule defines two different allocations of entitlements and a triggering event that precipitates the shift from one to the other. In state 1

⁶⁴ Copyright in works created after January 1, 1978 lasts for the life of the author plus seventy years, or for the shortest of 95 years from publication or 120 years from creation in the case of an anonymous work, a pseudonymous work, or a work made for hire. 17 U.S.C. §302.

⁶⁵ Bell & Pachomovsky call this rule a “zero order liability rule,” because it involves a property rule supplanted by a liability rule that requires compensation at the sum of zero. Bell & Pachomovsky, *supra* note 16, at 39-49. As I explain below, it is much more natural and accurate to understand such a rule as a transformation from a right protected by a property rule to a mere nor-right/privilege. See *infra*, text accompanying notes 80-82.

⁶⁶ Two examples of copyright transformation rules are: the cover license in section 115(a) and the safe-haven to hosts of Internet materials in section 512(c). The 115(a) cover license converts a property rule protection to the reproduction and distribution entitlements in musical works into a liability rule. This transformation is stipulated upon several conditions, such as previous lawful fixation of the musical work. 17 U.S.C. §115(a). The 512(c) safe-haven converts a privilege into a property rule. The section exempts, under certain conditions, hosts of Internet materials from monetary copyright liability. The exemption does not apply, however, when a notice of infringing material by the copyright owner is accepted and the host does not act expeditiously to remove or disable the material. Thus, the notice is the triggering event that transforms the mere privileges of the owner to rights protected by a property rule. 17 U.S.C. §512(c).

a user has a privilege to engage in a particular use of a copyrighted work, accompanied by a no-right of the owner. In state 2 the owner has a right to exclude the use accompanied by a duty of the user. The event that triggers the shift from state 1 to state 2 is the notice of objection provided by the copyright owner. The opt-out question in our context is thus simply whether copyright law should include yet another transformation rule, as it does in many other cases.

D. A Pragmatic Objection?

The gist of the argument up to now was that property rights and copyright are not based on an inherent “nature” or abstract controlling logic from which answers to concrete questions, like the opt-out question, can be inferred. Such rights are, rather, complex and contextual series of normative choices. At this point, it becomes necessary to briefly dispose of an important objection to the relevance of this line of argument. The objection is that my elaboration of copyright as a contextual bundle of entitlements misunderstands the claims in the Google case and attacks a straw man. The appeal to the “nature of copyright” can be charitably read as a shorthand form for a claim that there are universal normative reasons to reject opt-out; reasons that apply in all contexts and situations. This claim does not fall in the conceptualist fallacy trap. It simply argues that, given certain substantive reasons, opt-out can be rejected across the board with no need for a specific examination in context.

What could these substantive reasons that justify universal rejection of opt-out in regard to property rights in general and copyright in particular be? There could be various arguments of this kind, but within modern American legal thought one is particularly dominant. This is a specific brand of a utilitarian argument that can be termed the allocative-efficiency-through-property-rights argument.⁶⁷ The argument is based on

⁶⁷ See e.g. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 49 (3rd ed. 1986); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV. PAPERS & PROC.* 347 (1967). For application of the argument to intellectual property see e.g. Frank Easterbrook, *Who Decide the Extent of Rights in Intellectual Property?*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* (Rochelle Dreyfus et al eds. 2001); Eli Noam, *Three Cheers for the Commodification of Information*, in *THE COMMODIFICATION OF INFORMATION* (Niva Elkin-Koren and Neil Weinstock Netanel eds. 2002); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 *U. CHI.*

several assumptions. Its, usually latent, starting point is that the sole important purpose that should be taken into account when crafting property rights is economic efficiency, and more specifically, efficient allocation, defined as the allocation of resources to those who are willing and able to pay the most for them. Given this criterion, the next claim is that property rights are the best mechanism for maximizing the value of each resource. The reason is that property rights that concentrate control in the hands of the owner make this owner internalize both the positive value and the cost of any use of the resource. The next assumption is that, markets are the best mechanism for achieving efficient allocation. Following the Coase theorem,⁶⁸ it is assumed that, irrespective of initial allocation, bargaining in the market will result in efficient allocation for the simple reason that those who put a greater value on resources will purchase them from those who attach lesser value to them. Furthermore, it is also claimed, as a somewhat rigid application of the Coase theorem, that even if real world bargaining is not costless and hence markets are not perfect allocators, markets are still preferable to all other alternative mechanisms for allocating resources. Finally, it is often argued that the above assumptions are particularly valid when the relevant resources involve high levels of complexity and uncertainty, as is the case with informational goods, which are the kind of resources regulated by copyright.⁶⁹

From these assumptions follow several recommendations. The first recommendation is to extend strong property rights protection to specific individuals in regard to all or almost all imaginable resources. Such property rights, moreover, should cover every conceivable aspect and use of the resource. Second, the rules governing property rights should be as clear-cut and simple as possible and all components of a property right should be concentrated in the hands of one owner. This would avoid complexities and uncertainties which create transaction costs and hinder bargaining. Third, all property rights should be easily assignable and the relevant rules should facilitate voluntary transactions and market

LEGAL. F. 217; F. Scott Keiff, *Property Rights and Property Rules for Commercializing Invention*, 85 MINN. L. REV. 697 (2001). For a general survey of these arguments see Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590 (1988); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283, 306-324 (1996).

⁶⁸ Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁶⁹ Easterbrook, *supra* note 67.

bargaining mechanisms. To translate these recommendations to the terms I used above: resources should be protected by broad, uniform and consolidated property bundles that are composed of rights as opposed to privileges; these rights should be protected by property as opposed to liability or inalienability rules; complex arrangements such as contextualized transformation rules should be avoided.

To the extent that one is prepared to dogmatically accept the assumptions and conclusions of this position as always or almost always valid, it is easy to read the “nature of property” claim as a normative argument. Seen in this light, the argument is simply a rejection of any arrangement that deviates from what is seen as the universally most effective way of maximizing the monolithic substantive value that animates copyright law—efficient allocation.

The above argument is far from being self-evident or immune to criticism. It involves highly controversial empirical and normative propositions.⁷⁰ First, it is far from self-evident that the prescribed configuration of property rights will always and in all contexts bring about the claimed result. Second, it is debatable whether efficient allocation is the only or even the most important value that always preempts all other values and considerations when crafting property rights. Third, if one rejects the assumption that efficient allocation holds this superior position, she is faced with a host of difficult tradeoffs among competing purposes. Even if a particular configuration of a property right is likely to have a positive effect on allocative efficiency, and even if this is deemed a worthy purpose, one still has to balance this gain against other values and purposes that may be better served by other configurations. Thus the efficient allocation through strong property rights argument does not possess the universal and self-evident character that is sometimes imputed to it.

Fortunately, there is no need to discuss here in depth the relative merits of the above argument and its criticisms. Such a discussion can be avoided because, whatever the merit of the argument, it is clear that currently it is not the animating principle of American copyright law. A quick look at the discussion in the previous sections⁷¹ would show that

⁷⁰ See e.g. Kennedy & Michealman, *supra* note 24; Julie Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462 (1998); Carol M. Rose, *Canons of Property Talk, or Blackstone’s Anxiety* 108 YALE L. J. 601, 618-623 (1998).

⁷¹ See *supra*, sections I.A-I.C.

American copyright law is not based on any universalizing assumption of this kind. Copyright law is highly granular, diverse and context-specific in its choice of entitlements, enforcement rules and transformation rules. This is exactly the opposite structure from the one we would expect in an area of law that imputes a preemptive status to the claim of allocative efficiency through strong property rights and its universal recommendations. In short, this version of the “nature of property” objection, while being a normative argument, is not based on any principle that is already accepted in copyright law. At best, it is a recommendation for a radical reform of copyright law. A full discussion of whether such a reform is desirable is beyond the scope of this article. It is clear, however, that the concrete opt-out question cannot be answered on the basis of any “nature” of copyright—even in the weak sense of “nature” as a uniform and universally applicable principle—for the simple reason that no such principle currently animates the copyright regime.

E. Taking Stock

To sum up, property rights in general and copyright doctrines in particular vary greatly along all three dimensions discussed above: a) they contain different mixes of rights and privileges; b) they assign various enforcement rules to protect the rights they recognize; c) they occasionally contain transformation rules of various kinds that define conditions under which particular entitlements would change their character in respect to either dimension (a) or (b). All of this is particularly applicable to modern copyright law that is characterized by a high level of granularity and attention to context. The specific configuration of a particular set of entitlements in this framework is a question of the legitimate and desirable use of state power to create and enforce entitlements and hence it must be supported by normative reasons. Finally, such normative reasons can be found neither in a supposed inherent and uniform “nature” of copyright nor in any universal substantive principle that animates copyright law and dictates uniform solutions in all cases.

It is against this backdrop that the question of whether an opt-out option should have any legal implication under copyright law, at least in some contexts, must be examined. Understood in this light, the question is twofold. First we must inquire whether there are compelling normative reasons, grounded in the values and purposes that animate copyright law, to recognize a transformation rule. This rule would stipulate, in some contexts, some or all of the copyright’s owner entitlements upon a notice of objection to the relevant party. Assuming that compelling reasons for

such a rule exist, we have to determine the exact configuration of the legal rule that would optimally serve the relevant normative purposes. In what follows, I tackle these two questions.

II. Should Opt-Out Matter?

This section zeros-in on the specific context of the Google case and more broadly on that of digital-libraries. It inquires whether there are good normative reasons for using in these cases an opt-out rule. An opt-out rule is a particular brand of transformation rule that stipulates a transition from a mere privilege to a right on a specific notice by the owner of the right to the party subject to it. After briefly introducing two examples of opt-out rules, I turn to examine the applicability of this model to the digital-libraries context. I begin by briefly describing several important characteristics and variants of digital-libraries. Next I discuss two relevant sets of normative considerations. The first is economic efficiency. I demonstrate that the overlapping considerations of minimizing transaction costs and remedying information gaps make a good, though somewhat inconclusive, case for an opt-out regime in this area. The second is a broader normative vision, based on democratic and egalitarian values that I refer to as “cultural democracy.” This normative commitment, I argue, entails an even firmer support for an opt-out rule.

A. Cattle and Websites

It is useful to start the discussion of opt-out by introducing two contexts in which this mechanism was or is employed by the law: grazing cattle and access to websites. As removed as those cases may seem from the context of digital-libraries and from each other, they are, nonetheless, quite useful in understanding the framework of the opt-out mechanism and the normative considerations that typically apply to it.

Open-range legal regimes that were made famous by the work of Robert Elickson⁷² were historically common mainly in western regions. They are still in force in some places today.⁷³ An open-range regime

⁷² Robert C. Elickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); idem, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

⁷³ See Patricia L. Bellia, *Defending Cyberproperty*, 79 NYU L. REV. 2164, 2222 (2004).

rejects the common law traditional rule under which the owner of cattle trespassing on another's land is strictly liable for any property damage caused. The common law rule is supplanted by a "fencing-out" rule under which the owner of trespassing cattle is not liable for such damage, unless the land owner had fenced his land with a "lawful fence."⁷⁴ Fencing-out rules are based on opt-out mechanisms. They set a default of no liability by the owner of trespassing cattle. They also allow a land owner to opt-out of this default and subject the cattle owner to liability by erecting a qualifying fence. Thus, for the land owner the erection of a fence is not merely a way of physically preventing trespass. It is also a way of changing the allocation of legal entitlements by creating a rule of legal liability where it previously did not exist.

Owners of computers publicly accessible through the Internet are sometimes interested in excluding others from accessing and using websites or other resources available on such computers. The extent to which such owners can call upon the law to aid them in their exclusion efforts or in order to receive ex-post remedies is a hotly debated question.⁷⁵ It involves a host of different doctrines, some of which have been applied and interpreted in substantially different ways by various courts.⁷⁶ Despite the differences, the overwhelming majority of courts and commentators agree that a default rule of exclusion would be ruinous. A world in which each electronic access to a computer connected to the Internet required pre-authorization at the peril of legal liability would stun

⁷⁴ The rule does not apply in cases when the cattle owner intentionally caused the trespass. Deliberate trespass entails liability even when the victim's land is unfenced. Various jurisdictions interpreted differently the standard of deliberate trespass. In some jurisdictions deliberate trespass can be established merely by showing that the cattle was placed in such areas, as to make it fairly certain that it would wander off onto the victims land. See Elickson, *supra* note 72, at 664-65.

⁷⁵ See e.g. Bellia, *supra* note 73; Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457 (2005); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U.L.REV. 1047 (2005); Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000); Dan L. Hunter, *Cyberspace as a Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Greg Lastowka, *Decoding Cyber Property* (forthcoming 2006).

⁷⁶ For a thorough survey see Bellia, *supra* note 73.

much of the power and promise of this medium. Courts have avoided this problem by creating an implied consent legal construct.⁷⁷ Under this construct, an owner who makes computer resources publicly available on the Internet creates a presumption that he intended to allow access. However, this implied consent can be revoked by giving an appropriate notice to users in general or to a specific user. In case of such a notice, any legal liability that applies to unauthorized access comes back to life.

Courts and scholars fiercely disagree over the questions of whether computer owners should have the legal power to exclude unauthorized access in the first place, and what the contours of this power should be. There are also different views about what form of notice should suffice in order to revoke the implied consent.⁷⁸ Almost everybody agrees, however, that at a minimum the implied consent construct should apply to unauthorized access to publicly available Internet resources. Again, it should be plain that this framework creates an opt-out mechanism. Assuming that a computer owner has any potential right to exclude others, such a right is suspended by the implied consent presumption. The owner, however, can always opt-out of this default by providing a notice to the relevant party.

Why is all of this relevant? The two incidents described are important examples, among many others, where opt-out mechanisms are employed by the law. I will return to them in order to demonstrate some of the normative considerations that are relevant to the possibility of using this mechanism in our context. At the moment it suffices to note three observations about these examples. First, opt-out mechanisms of the kind used by fencing-out rules and the Internet access implied consent construct

⁷⁷ See, e.g., *Compuserve Inc. v. Cybe Promotions*, 962 F. Supp. 1015, 1024 (D. Ohio 1997); *America Online v. IMS*, 24 F. Supp. 2d 548, 550 (D. Va. 1998); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1374 (Cal. 2003) (dissent).

⁷⁸ The spectrum of possible notices is broad. One could signal his revocation of consent through technological means ranging from mere machine-readable “notices” (such as a robots.txt file that “asks” web-crawler applications “not to crawl” a particular site or page) to actual exclusion means (such as username/password protection). Similarly there is a range of human-readable notice means stretching between obscure “use policies” posted on dark corners of a website and an explicit written notice sent to a specific user. See *Bellia*, *supra* note 73, at 2218-2224.

are what I described earlier as transformation rules.⁷⁹ The legal norms in these cases define a triggering event that transforms one initial set of entitlements into another.

Second, the two transformation rules described define different kinds of actions or changed circumstances as the triggering event. In the case of fencing-out rules the triggering event involves a change of the actual physical circumstances that are relevant to the case. A “lawful fence” erected by the land owner transforms a relevant part of physical reality. The fence may have some informational function. It signals to a cattle owner who is aware of it the objection of the land owner to trespassing cattle. The informational effect alone, however, is not deemed sufficient to transform the default legal entitlements. This is the reason why pure notices, such as “no trespass” signs or even, the likely more effective, specific notice of objection sent to the relevant party are not enough to revoke the rule of no liability in this case. It is only the fence, which achieves a change of actual physical circumstances by making it much harder for trespass to occur, that triggers the transformation. By contrast, in the Internet access case it is the notice alone and the informational function it serves that are sufficient to change the legal entitlements. The mere fact that an unauthorized user was supplied with the information of the owner’s objection to access or use revokes her former privilege to access with impunity.

Third, the two examples involve the same brand of transformation rules. In both cases the initial allocation of entitlements is a privilege to one party (the cattle owner or the unauthorized user) accompanied by a no-right to the other (the land or the computer owner). In both cases the triggering event creates a right protected by a property rule (to the land or computer owner) accompanied by a correlative duty. Bell and Pachomovsky call this brand of transformation rules “Zero Order Loperty Rules.”⁸⁰ They use this term because they describe the transformation as one from a right protected by a liability rule to a right protected by a property rule. Hence the term “Loperty.”⁸¹ According to this explanation, in a fencing-out regime the land owner initially has an entitlement against owners of trespassing cattle, which is protected by a liability rule. It is a

⁷⁹ See *supra*, text accompanying notes 57-63.

⁸⁰ Bell & Pachomovsky, *supra* note 16, at 53.

⁸¹ A Loperty rule is a transformation rule whose triggering event causes a right protected by a liability rule to be supplanted by a right protected by a property rule.

“zero order” liability rule, because the cattle owner has to pay zero in order to ignore the entitlement with impunity. Although the difference is semantic, I think that this usage is confusing and artificial. It is much more straightforward to say that the cattle owner initially has no right at all. Therefore I will call this configuration of transformation rules: “Noperty Rules.”⁸²

Notice that in neither of the examples there is a necessity to use a Noperty rule. Of the many analytically-available transformation rules the most plausible competitor in these cases seems to be a Loperty rule. Under a Loperty rule, prior to notice an authorized user of a publicly available website would be subject to a duty protected by a liability rule. She would be required to pay a certain sum for each unauthorized access, but the website owner would not be able to mobilize the power of the law to prevent her from accessing. In reality in both of our examples a Noperty rule that creates an initial privilege to the user was preferred to a Loperty rule, presumably for good reasons. In the discussion of digital-libraries below I will be focusing on a Noperty rule and neglecting the possibility of Loperty.⁸³

B. Digital-Libraries and Opt-Out

1. Digital-Libraries

The Google case and the broader universe of cases it represents involve neither cattle nor access to websites. The main context there is, rather, digital-libraries. Digital-libraries are organized collections of informational items in digital format, accessible through computers.⁸⁴

⁸² A Noperty rule is a transformation rule whose triggering event causes a no-right to be supplanted by a right protected by a property rule.

⁸³ In a nutshell, a Loperty rule does not seem an attractive option in our context because it is likely to reproduce many of the problems it was meant to solve. I argue below that an opt-in regime is likely to impose very high transaction cost on digital-library users who are ignorant of the status of the works they are using, their owners’ identity and their preferences. A Loperty rule is likely to implicate similar information problems and generate similar high levels of transaction costs.

⁸⁴ The term “digital libraries” encompasses a wide range of technologies and models and there is no one agreed upon definition. The definition supplied in the text is purposefully loose in order to encompass many of the relevant variations. See Nancy A. Van House et al, *Introduction:*

They are the digital age equivalents of the traditional library.⁸⁵ As such, digital-libraries have a technological aspect— a system for storage and retrieval of information. Digital libraries also have a social-institutional aspect— an organizational structure that maintains and supports the system as well as a community of users.⁸⁶ The early digital-libraries were predominantly text-based. However, just as traditional libraries are not limited to books, digital libraries are not limited to texts.⁸⁷ They may include any kind of information available in digital format, including sound, images and video. Although far from being “pure information,” relative to their older “brick and paper” siblings, digital libraries are less constrained by the limitations of physical space.⁸⁸ In the past many digital libraries were embodied in portable material copies, such as CDs, containing the entire database and computer software for its use. Commercial encyclopedia software was a common example. Increasingly,

Digital Libraries as Sociotechnical Systems, in, DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION 1 (Ann Peterson Bishop et al eds. 2003); CHRISITNE L. BORGMAN, FROM GUTENBERG TO THE GLOBAL INFORMATION INFRASTRUCTURE: ACCESS TO INFORMATION IN THE NETWORKED WORLD 35-49 (2003).

⁸⁵ See MICHAEL LESK, UNDERSTANDING DIGITAL LIBRARIES (2nd ed. 2004); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, Pepperdine L. Rev. (forthcoming 2006).

⁸⁶ Christine L. Borgman, *Designing Digital Libraries for Usability*, in, DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION 86-8 (Ann Peterson Bishop et al eds., 2003).

⁸⁷ It seems that a large relative-share of digital libraries is still text-based. The main reason is probably the lower cost of storage and of an effective search and retrieval system in the case of text, compared to other media. There are, however, many non-text-based digital libraries. As the cost of storage decreases and as the use of metadata as well as the development of non-textual search tools gain momentum, non-text-based digital libraries are likely to become more ubiquitous.

⁸⁸ Digital libraries are not “pure information” despite the rhetorical hyperboles to the contrary often found in foundational cyber-culture texts such as: NICHOLAS NEGROPONTE, BEING DIGITAL 11-20 (1995); John Perry Barlow, *The Next Economy of Ideas* WIRED (Oct. 1994), <http://www.wired.com/wired/archive/8.10/download.html> (“Is the genie out of the bottle? A better question would be, ‘Is there a bottle?’ No, there isn’t.”).

however, digital libraries are network-based.⁸⁹ The information in network-based libraries is stored in computers connected to a network—most significantly, but not necessarily, the Internet— from which it is retrievable by other computers connected to the same network. Thus the history of the Internet and of digital libraries is intertwined. The appearance and development of the Internet boosted the proliferation of network-based digital libraries that made use of the new possibilities created by this medium.⁹⁰

Digital libraries are, of course, not identical to traditional libraries. The technological differences between the two entail staggeringly different consequences and possibilities. In the context of copyright, one usually hears about the dangers to important social policies that are associated with the technology of digital-libraries.⁹¹ The Google Print-Library project is no exception to this rule.⁹² The story is the, by now, familiar one about digital technology in general and the Internet in particular. To the extent that digital-libraries make available to users copyrighted items in unsecured formats, they may facilitate copyright

⁸⁹ Lesk, *supra* note 85, at 156-168. Borgman, *supra* note 84, at 44, 49; Clifford Lynch, *The Evolving Internet: Applications and Network Service Infrastructure*, 49 J. OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE 961, 966 (1998).

⁹⁰ The development of digital library technologies was fueled in the 1990s by extensive publicly funded research programs. The most important of those programs were the Digital Library Initiative (DLI) and the Digital Library Initiative Phase II (DLI2). Under these two programs the National Science Foundation, in collaboration with many other institutions such as NASA, the Library of Congress and the NEH funded research programs for the construction and analysis of digital libraries prototypes. See Clifford Lynch, *Where Do We Go From Here? The Next Decade for Digital Libraries*, 11 D-LIB MAGAZINE (July/August, 2005).

⁹¹ See e.g. Peter Lyman, *What is a digital library? Technology, intellectual property and the public interest*, 125 DAEDALUS 1 (1996).

⁹² The project is accused of facilitating massive copyright infringement, despite the fact that, absent the copyright owner's consent, Google's Print Library does not provide access to more than miniscule fragments of copyrighted text. One claim leveled against it is that a security breach may cause the full digital text, stored on Google's computers to "leak out." Once the Genie of the full digital text is out of the bottle and on the Internet, the argument goes, the damage will be hard to contain See Vaidhyanathan, *supra* note 4, at 11.

infringement. Given the quality of near-perfect digital copies and the instant distribution power of a vast global computer network, the scale of infringement and the damage caused to copyright owners and to the social policies behind copyright law may be very substantial.

One has to look at digital-libraries through a very distorted prism in order to see only, or even mainly, dangers. Digital libraries open up tremendous new possibilities for effectively realizing the traditional mission of libraries and for extending them in new directions.⁹³ The potential of digital libraries dwarfs not just the ancient Library of Alexandria, but also the largest and most extensive among our own modern libraries. Digital libraries allow to aggregate, store and make available a vast amount of information for a fraction of the cost and space requirements of traditional libraries. The use of digital search tools allows instantaneous access and previously unimaginable retrieval possibilities. An Internet-based digital library can overcome geographic limitations and offer access to millions of users worldwide.⁹⁴ At stake here is not just an unprecedented dissemination power, but also a powerful equalizing potential.⁹⁵ Digital libraries can be the key for universal access to cultural materials, for empowering many to engage with those materials and for a democratization of many of the related social fields and practices.

I will return later in more detail to some aspects of the risk and promise of digital libraries. At this stage, it is enough to keep this duality in mind and to realize that the dangers of digital libraries of which we are

⁹³ See *infra* text accompanying notes 174-183.

⁹⁴ Lesk, *supra* note 85, at 2.

⁹⁵ To be sure, an equalizing potential is not necessarily the actualization of the potential. Certain threshold requirements will have to be met before digital libraries can increase and equalize meaningful access to cultural materials by broad segments of society. Some of those preconditions are: the bridging of the digital-divide as to achieve ubiquitous computer and Internet access; technological and commercial models that maximize access and participation; widespread information-literacy skills; and design features that empower traditionally marginalized populations. See Ann Peterson et al, *Participatory Action Research and Digital Libraries: Reframing Evaluation*, in, *DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION* 161 (Ann Peterson Bishop et al eds., 2003); Nancy Kranich, *Libraries: The Information Commons of Civil Society* in *SHAPING THE NETWORK SOCIETY* 287-292 (Douglas Schuler and Peter Day eds., 2004).

reminded daily, though not completely imaginary, should be considered and weighed in relation to their vast positive potential.

Not all digital libraries are born equal, or at least, identical. Various digital libraries differ from each other along several dimensions.

First, digital libraries may be owned and controlled privately or by a public entity.

Second, a digital library may be commercial or non-commercial. These two first dimensions are not identical. While a commercial public digital-library is implausible (but not logically impossible), not all private digital-libraries are commercial. In fact, many digital-libraries are non-commercial private initiatives.

Third, the architecture of the library can be centralized or decentralized. Under a centralized architecture one central entity carries out two functions: a) controlling the library, that is to say, the storage of information and related search and retrieval utilities; b) collecting, preparing and posting materials. Under a decentralized model these two functions are separated and carried out by different entities: a) a central entity controls the library; b) many other entities collect, prepare and post materials. A decentralized digital-library is roughly the equivalent of a real-world library where all items are collected and deposited by a multitude of individual contributors. It is worth mentioning that there is also a third possibility: a peer to peer (p2p) library. Under a p2p architecture there is no central entity that controls either the library or the collection, preparation and posting of materials. Users collect and store items on their individual computers and exchange the files through a network. Certain entities may provide technology or services that facilitate the p2p search and exchange of materials, but no central entity controls the entire library. File-sharing applications are paradigmatic examples of p2p digital-libraries. Indeed, the world-wide-web as a whole, and possibly other subsets of the Internet, may be plausibly described as p2p digital-libraries.⁹⁶ Because I believe that such a p2p architecture involves unique issues I will be bracketing it in this article. Subsequent discussion is thus limited to centralized and decentralized digital-libraries.

⁹⁶ For an argument to the contrary see: Jose-Marie Griffith, *Why the Web is Not a Library*, in *THE MIRAGE OF CONTINUITY: RECONFIGURING ACADEMIC INFORMATION RESOURCES FOR THE 21ST CENTURY* 229 (Brian L. Hawkins and Patricia Battin eds., 1998).

Fourth, libraries differ from each other in regard to the degree of exclusion or regulation of access exercised by the entity that controls the library. Some digital-libraries are exclusionary. They allow access only to a limited group of people (e.g. paying costumers, members of an academic institution) and employ various means to regulate the use of the library accordingly. Other libraries are much more open. The more open a library is, the more general access it allows and the fewer restrictions it imposes. Again, it should be noted that there is no complete overlap between the degree of exclusion and the commercial character or the public nature of the library. Public, non-commercial digital-libraries can be quite exclusionary. Private, commercial libraries can be very open, extracting their revenue through models that do not rely on charge per-use.

Combining these various dimensions, it is possible to compose a taxonomy of different types of digital libraries.⁹⁷ The following classification is not meant to be exhaustive. It describes several important types of digital libraries, the distinctions between which may be particularly relevant to the normative discussion below.

Private, centralized, commercial, exclusionary. Lexis-Nexis or Westlaw as well as many other commercial database services, provide a good example of this type. The commercial goal of the private entity is based primarily on an exclusionary model that involves both centralized control and exclusion of all but paying customers.

Private, centralized, commercial, open. Google's Print Library project falls under this category. The project, despite its noble official mission-statement and possible salutary social effect, is part of Google's overall commercial enterprise. The model for extracting revenue, however, is not based on exclusion and use fee. The key for revenue is, rather, open uncharged access and maximization of the quantity of users. The number of users or of "eyeballs" is leveraged into revenue streams through various mechanisms such as advertisement or extraction and exploitation of user information.

Private, centralized, non-commercial, open. Centralized and open models are sometimes used by private entities whose primary goal is non-commercial. The Internet Archive is a good example. The Internet Archive

⁹⁷ For a similar, more elaborate taxonomy see Clifford Lynch, *Colliding with the Real World: Heresies and Unexplored Questions about Audience, Economics and Control of Digital Libraries*, in DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION (Ann Peterson Bishop et al eds., 2003).

is a non-profit organization. Its mission is described as: “building a digital library of Internet sites and other cultural artifacts” and providing “free access to researchers, historians, scholars, and the general public.”⁹⁸ The original and still predominant focus of the Internet Archive was archiving websites. Although some of the new collections of the Archive seem to be moving in a decentralized direction,⁹⁹ much of its offering is still based on a relatively centralized model, involving substantial central control of procurement, selection and organization of materials

Private, decentralized, non-commercial, open. Many private, non-commercial, open libraries rely on a decentralized model. As the reference to the Internet Archive implied, centralization/decentralization, even more than the other dimensions, is not a binary distinction. It is, rather, a matter of degree. Some digital-libraries such as BurningWell¹⁰⁰ are decentralized in the sense that they rely predominantly on submissions of materials by a broad community of contributors/users. In other libraries decentralized user involvement cuts deeper into the core library functions. Project Gutenberg¹⁰¹—one of the largest and oldest libraries of digital books—uses the services of numerous volunteers for proofreading and preparation of texts for online publication. The Project relies on a technological architecture that aggregates the contribution of many disconnected contributors working on one project. Wikipedia¹⁰²—the internet encyclopedia—is even more decentralized. The entries in Wikipedia are not merely contributed by users. As the name implies Wikipedia is based on a wiki model,¹⁰³ which allows users to update and revise the content of webpages.¹⁰⁴ Wikipedia’s entries are thus in constant flux. They are always subject to revision and contributions by its numerous users. It is a never-ending decentralized and collaborative process of composition, collection, editing and publishing.

⁹⁸ Mission statement; available at www.archive.org.

⁹⁹ The relatively recent moving-images, live music, audio and text archives are based on users submission of their own materials.

¹⁰⁰ BurningWell is a repository for public domain images; available at www.burningwell.org.

¹⁰¹ See www.gutenberg.org.

¹⁰² See www.wikipedia.org.

¹⁰³ For the definition of “wiki” see <http://en.wikipedia.org/wiki/Wiki>.

¹⁰⁴ See Yochai Benkler, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 70-74 (2006).

Public, centralized, non-commercial, open. Unsurprisingly with the advent of digital-libraries and particularly network-based libraries, many saw the expansion of traditional public libraries into this realm as natural and necessary. Some still forcefully argue today that such an expansion, rather than exclusive reliance on private commercial and non-commercial initiatives, is the most desirable way of harnessing the promise of digital libraries in the service of society.¹⁰⁵ Despite some early enthusiasm, such an extension of public libraries into the digital realm has been, to date, relatively meager.¹⁰⁶ It is not completely nonexistent, however. In line with their traditional mission, public digital-libraries tend to be open and non-commercial. Although there is neither logical nor practical necessity involved, public digital libraries tend to appear in a centralized form that minimizes the role of users to that of consumers of the library's content. A typical example is the Library of Congress's American Memory Project.¹⁰⁷ Although much less ambitious than the original aspirations,¹⁰⁸ this digital library offers "free and open access through the Internet to written and spoken words, sound recordings, still and moving images, prints, maps, and sheet music that document the American experience."¹⁰⁹

¹⁰⁵ James H. Billington, *Libraries, the Library of Congress, and the Information Age*, 125 DAEDALUS 35 (1996); SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* 115-129 (2004); Vaidhyathan, *supra* note 4; Kranich, *supra* note 95.

¹⁰⁶ For a discussion of public digital libraries see Travis *supra* note 85, at 10-13.

¹⁰⁷ See <http://memory.loc.gov>. The project is part of a greater initiative by the Library of Congress. The National Digital Program is meant to be "a digital library of reproductions of primary source materials to support the study and the history and culture of the United States" encompassing "books, pamphlets, motion pictures, manuscripts and sound recordings." See <http://memory.loc.gov/ammem/dli2/html/lcndlpl.html>.

¹⁰⁸ Originally the library declared an ambitious plan "to convert into digital form the most important materials in its collection and in the collections of all public and research libraries in the country." Peter H. Lewis, *Library of Congress Offers to Feed Data Highway*, N.Y. TIMES (September 12, 1994). To date, the library boasts that its American Memory project offers "over five million items available online." <http://memory.loc.gov/ammem/about/index.html>. Despite the large number, this offering falls very short of the original ambitious goal.

¹⁰⁹ See "Mission and History;" available at:

The collection, which is comprised of materials from the collections of the Library of Congress as well as other institutions, is composed, prepared and maintained under the library's central control.

The distinctions between the above ideal types of digital libraries may entail in specific contexts important normative differences. As we move into the normative discussion the significance of the differences between the various possible models will become apparent.

How will the various variants of digital-libraries develop? Will they realize the unprecedented potential they seem to hold for broad information accessibility, individual empowerment and social democratization? A full answer depends, of course, on a host of technological, social and economic factors. One important factor, however, is the legal background-rules that govern and shape the design, creation and operation of digital-libraries. As many scholars in the field point out, intellectual property law has had a substantial effect on the trajectory of digital-libraries to date, and is likely to have as much effect in the future.¹¹⁰ I turn now to discuss some of the relevant normative goals, and the way the choice between the legal mechanisms of opt-in and opt-out is likely to affect these goals.

2. Transaction Cost and Information Disclosure

A good starting point for the normative discussion is a rather thin conception of the “promotion of progress”¹¹¹ goal of copyright law as the maximization of economic efficiency. Copyright law, from this perspective, is a means for solving a public-goods problem. It confers a limited legal exclusion power on creators who otherwise, given the

<http://memory.loc.gov/ammem/about/index.html>.

¹¹⁰ Lynch, *supra* note 97, at 197, 200 (intellectual property rules and licensing schemes are the most important factor in shaping digital libraries), Borgman, *supra* note 84, at 67 (intellectual property rights form one of the major constraints on digitization of materials and building digital libraries); Lesk *supra* note 85, at 3 (copyright licensing cost is probably the largest cost impeding the development of digital-libraries).

¹¹¹ U.S. Const. Art. I, §8, cl. 8. About economic efficiency as a “thin” conception of “promoting the progress” in intellectual property law see: James Boyle, *Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us*, in PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 97 (F. Scott Kieff ed., 2003).

unexcludable nature of intellectual works, would not be able to internalize the value of their creation and would thus have a suboptimal incentive to create.¹¹² The incentive-creating benefit of copyright entitlements always comes at a social cost, most notably deadweight loss produced by monopoly pricing,¹¹³ including the burden on future creation that has to draw on existing intellectual works.¹¹⁴ Copyright law, then, does not follow a principle of the more protection the better, but rather attempts to draw the line between exclusionary entitlements and free access as to achieve an optimal ratio between the social benefits and costs of this mechanism.¹¹⁵ When, and only when, the benefit of a particular exclusionary entitlement outweighs its cost it should be protected by copyright. Market exchange is then relied on in order to assure the efficient allocation of relevant entitlements to those who place the higher value on them.

The reader would remember that for the purposes of this article I chose to bracket the question of whether the various activities of Google or other digital-libraries are or should be copyright infringement. This is far from being a trivial or easy question. Indeed much of the public-legal debate is exactly over this point. The hypothetical working assumption of this article, however, is that reproduction, display, and distribution (even in the very limited form practiced by Google Print Library) constitute copyright infringement. The assumption is that the social benefits of including this particular set of entitlements as part of the owner's exclusion power outweighs the social cost involved. In Hohfeldian terms, it is assumed that the copyright owner should have the right to exclude these activities, accompanied by correlative duties by users.

Yet even when the first-order question of whether a particular entitlement should be included as part of copyright protection is resolved, or in our case hypothetically resolved, efficiency considerations still raise important second-order questions about the optimal structure of the

¹¹² WILLIAM M. LANDES & RICHARD E. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 12-16, 37-41 (2003).

¹¹³ *Id.*, at 22.

¹¹⁴ *Id.*, at 66-70; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law* 75 *TEX. L. REV.* 989 (1997).

¹¹⁵ William W. Fisher III, *Reconstructing The Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1703 (1988); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN LEGAL AND POLITICAL THEORY OF PROPERTY* 169 (Stephen R. Munzer ed., 2001).

entitlement. A major second-order consideration is that of transaction costs.¹¹⁶ Transaction costs form a very significant factor in the context of aggregation and publication of digital content. Thus, it is reported that when IBM produced a CD-ROM commemorating the 500th anniversary of the voyage of Columbus it spent over \$1,000,000 for “clearing rights,” out of which only \$10,000 was paid to the various copyright owners.¹¹⁷ Various configurations of the entitlements may structure the bargaining environment in different ways that produce different amounts of transaction costs. Given the reliance of the copyright system on market exchange for efficient allocation, the significance of transaction costs is twofold. First, the transaction costs, even when a bargain is eventually concluded, constitute a social waste of resources. Second, if high enough, transaction costs may frustrate the very occurrence of efficient exchanges and prevent the efficient allocation of resources. Thus, all other things being equal, a configuration of the entitlement that minimizes transaction costs should be preferred.

a. Opt-in, Opt-out and Transaction Cost

One structural feature of a legal entitlement that may have substantial effect on transaction cost is its opt-in/opt-out character. In an opt-in regime those who act inconsistently with the entitlement must

¹¹⁶ In some cases, transaction costs may also influence the first-order question of whether a particular entitlement should be protected under copyright. Thus one common, although often overly narrow, understanding of the fair use defense is as a mechanism for correcting market-failures. In other words, this view assumes that the fair use defense comes into play, and prevents a protection of a particular entitlement, only when market conditions would produce so much transaction costs as to frustrate efficient exchanges. See e.g. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in THE COMMODIFICATION OF INFORMATION (Niva Elkin-Koren and Neil Weinstock Netanel eds. 2002) (distinguishing between economists’ market failure, meaning imperfect market conditions, and market failure as “inherent market limitations,” meaning situations in which the market is not an acceptable institution for allocating resources).

¹¹⁷ Lesk, *supra* note 85, at 279.

obtain the owner's permission (have the owner opt-in) or be deemed violators. In an opt-out regime, others are free to act inconsistently with the entitlement with impunity as long as the owner has not provided notice of his objection (or opted-out). An opt-out rule, in other words, is a transformation rule.¹¹⁸ It defines two different configurations of entitlements and an event (notice) that triggers the shift from one configuration to the other. In a world which is not transaction-cost-free, the choice among these two mechanisms may have important implications.

In many cases it is plausible to assume that an opt-in structure would generate lower transaction costs than an opt-out one. Thus under ordinary conditions, protecting the entitlement to exclude others from unauthorized building on privately owned land would probably generate lower transaction costs under an opt-in regime. It is reasonable to assume that most owners would object to uncompensated, unauthorized building on their land. The cost of locating all potential builders and effectively notifying them of the objection is not trivial. Hence an opt-out regime would impose substantial cost. Conversely, it is usually reasonably inexpensive for potential builders to locate land owners and ascertain their preferences.

Yet opt-in is not necessarily and universally preferable. Think again about the access to websites example. While whether owners of publicly-available websites have any legal right to exclude unauthorized access is a hotly debated question, virtually all courts and commentators that advocate such a right maintain that permission to access is generally implied and would be revoked only by notice.¹¹⁹ In other words, supporters of an exclusion right advocate an opt-out regime. What is the difference from the previous example? One major reason for the dissimilar treatment of the two cases is the different ways in which the entitlement's structure is likely to affect transaction costs. Given common practices, social norms and economic models in this field, many website owners are likely to be interested in unfettered access to their websites. An opt-in regime may impose substantial cost on owners who wish to signify permission to others and it may even deter some wanted access altogether. Conversely, given the relative small number of exclusionist owners and the existence of inexpensive technological and verbal ways of signifying prohibition, an opt-out regime is likely to produce lower costs. Thus,

¹¹⁸ See *supra* aection I.C.

¹¹⁹ *Supra* text accompanying notes 75-78.

depending on circumstances, opt-in or opt-out may be preferable for minimizing transaction costs.

What is the optimal configuration in the case of uses of potentially-copyrighted materials by digital-libraries? In this context, inasmuch as transaction costs is concerned, closer to the trespass to land or to the unauthorized access to websites situation? In order to answer this question it is useful to first unpack the abstract category of transaction costs in the context of digital-libraries, elaborate some of the typical components of this cost, and explain the role of the copyright background-rules in shaping it.

Assume that Ronald is working on a digital-library project that requires, as virtually all digital-library projects do, the aggregation and use of numerous potentially copyrighted works. Assume that at least one use of each work, which is necessary for the library project, is infringing, in case that the work is protected by copyright. Under an opt-in copyright regime, Ronald is facing a potentially gigantic risk of liability. The risk is “gigantic” due to the combination of the large number of works implicated, almost by definition, in any digital-library project and copyright’s draconian remedies. Thus if Ronald is building a very modest library that includes 1000 items and there is a 50% chance that each item is protected by copyright, he is facing the risk of 500 violations. Under copyright’s statutory damages provision, Ronald may pay between \$750 to \$30,000 per violation, irrespective of whether the copyright owner is able to prove any actual damage.¹²⁰ Ronald, then, faces a risk that varies between \$375,000 and \$15,000,000. The reader may engage in the mathematical exercise of calculating the risk in the not uncommon case of digital-libraries that contain much larger quantities of potentially copyrighted works.

What does Ronald have to do in order to avoid the risk? Several things, each of which involves a non-trivial cost. There are three main components to this cost: Search cost; ascertainment of owner’s preferences cost; and negotiation cost.

1. *Search cost*— this cost has two main components: the cost of ascertaining each work’s status and the cost of ascertaining the identity of the owner of each work protected by copyright. Ronald will have to start by ascertaining the status of each work. In other words, he has to find out whether the work is protected by copyright. In the environment created by modern American copyright law, this is neither easy nor costless. There

¹²⁰ 17 U.S.C. §504(b).

are numerous legal features that complicate the task.¹²¹ Copyright owners are no longer required to affix copyright notice to the work as a precondition for protection, although there are some advantages in providing a notice and some copyright owners still do.¹²² Regarding a substantial number of works, however, the material copy used by the digital-library may be of little help in ascertaining the work's status. Under the 1976 Copyright Act, registration too is no longer required as a precondition for copyright protection. Again, although legal incentives and other reasons still induce some to register, many copyrighted works will not appear on the register.¹²³ As a result there may not be an accessible, cheap venue for ascertaining legal status.¹²⁴ Even if it is established that a

¹²¹ See generally Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

¹²² Copyright protection subsists in "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. §102. Notice or registration is not mentioned as one of the conditions of copyright protection. The statute explicitly provides that copyright notice "may be placed." 17 U.S.C. §§401(a), 402(a). The major inducement for affixing a notice is the disallowance of an "innocent infringement" defense by defendants, in mitigation of statutory damages. 17 U.S.C. §§401(d), 402(d).

¹²³ The Copyright Act explicitly provides that registration is "permissive" and that it "is not a condition of copyright protection." 17 U.S.C. §408(a). The major inducements to register include: prima facie evidence of validity, 17 U.S.C. 410(c); and ability to obtain statutory damages and attorney fees, 17 U.S.C. §412. Registration is also a formal prerequisite for initiating an infringement action concerning domestic works. 17 U.S.C. §411. It is very hard to assess what percentage of works is registered. The Copyright Office data only provide the numbers of registrations. In 2005 for example 661,469 copyrighted works were registered. UNITED STATES COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 6 (2004). Despite the large number, it seems safe to assume that many more works protected by copyright were created and published in that year. For an attempt to estimate the relative share of registered works in different periods see: Sprigman, *supra* note 121, at 503-15.

¹²⁴ The risk undertaken by a user of an unregistered work may be somewhat smaller since statutory damages do not apply to acts of infringement committed prior to registration. See 17 U.S.C. §412. The reduction of risk is not very significant, however. The scrupulous user who checks the register only attains certainty of immunity from statutory

work was originally protected by copyright, it may still be a complicated task to learn whether protection has elapsed. The duration of copyright protection is not uniform. It varies greatly, depending mainly on two parameters: the work's date of creation, and its status as a work made for hire.¹²⁵ Acquiring these various kinds of information, necessary to ascertain the work's status, is only the first costly stage.

In regard to each work that is protected by copyright, Ronald's next move will be to ascertain the identity of the current owner of the rights. Because modern copyright protects all works by default from the moment of fixation, without requiring any formalities or employing any other filtering mechanism, a large relative-share of the works used is likely to fall under this category and require this additional search. This would be the case even when the owners of the work lost or never had any interest in enforcing copyright in it.¹²⁶ In some cases ascertaining the identity of the owner may be a non-trivial task. Often the same search that yielded the status of the work would uncover its original copyright owner. Yet even if the identity of the original copyright owner is known—whether it is the author or, in case of a work made for hire a commissioning/employing entity—often this may be only the first stop for locating the present owner. Copyright entitlements may be assigned and reassigned with almost no limitation.¹²⁷ While a valid assignment requires a signed document,¹²⁸ it does not have to be recorded. Recording of copyright transfer is merely optional.¹²⁹ Thus finding a current owner

damages in regard to uses prior to the time of his search. In regard to future uses, users face the choice between the higher risk entailed by the possibility of later registration and an ongoing expense for periodical search of the register.

¹²⁵ Due to the numerous and complex extensions of copyright duration in the previous century, works created in different times are subject to different periods of protection. Post January 1, 1978 works are protected during the life of the author, plus 70 years, or during the shorter of 95 years from publication or 120 years from creation in the case of a work made for hire. Earlier works are protected for varying terms depending on date of publication and whether the copyright was renewed. See 17 U.S.C. §302.

¹²⁶ See Sprigman, *supra* note 121, at 502-24.

¹²⁷ 17 U.S.C. §201(d).

¹²⁸ 17 U.S.C. §204 (a).

¹²⁹ 17 U.S.C. §205(a). The main incentive to record transfers is that such a record creates a presumption of constructive notice of ownership, 17

down a potentially long chain of unrecorded assignments may be an expensive endeavor.

Other copyright rules may frequently complicate and further raise the cost of search regarding particular works. Derivative works, that is to say works that are based on or incorporate other works,¹³⁰ may include copyrighted material from the underlying work. In such cases Ronald's use may infringe not just the copyright of the derivative work but also that of the work on which it draws. Ascertaining whether a work is derivative and uncovering the relevant information about the underlying work involves additional cost. Even if the derivative work is registered and carries notice, this would be of limited help for the search of the underlying work. Another problem may arise in cases of works that involve only slight modifications of public domain works. Due to the very minimal standard of originality required for a valid copyright, it is enough to introduce minor changes to preexisting works, including works in the public domain, in order to receive protection to the new variant.¹³¹ Ronald then, would have to invest additional resources, in order to ascertain whether a particular used work is in the public domain or is, rather, a protected variant. In short, search cost is likely to be substantial, in no small part due to copyright's background-rules.

2. *Ascertainment of owner's preference cost*- Once the present owner is located Ronald would have to contact her and find out whether she would agree to permit the relevant use of her work in the digital-library.

U.S.C §205(c). Again the Copyright Office only provides data about recorded transfers. In 2005 there were 14,979 recorded transactions, the majority of which were copyright transfers. It seems safe to assume that there were many others that were not recorded. United States Copyright Office, *supra* note 123, at 8.

¹³⁰ See definition of "derivative work" in 17 U.S.C. §101.

¹³¹ The seminal case is *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2nd Cir. 1951). The decision by Judge Frank established the very minimal standard of "distinguishable variation" that new variants have to clear in order to satisfy copyright's originality requirement. There is some divergence among courts about how lenient this standard is, but even the stricter interpretations set the bar of originality rather low. See 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 158-167 (1994) ("just how much creativity is required depends upon which Second Circuit case is cited").

3. *Negotiation cost*- In case the copyright owner does not simply agree unconditionally to the relevant use, Ronald if he is interested would have to try negotiating a licensing agreement. Any sum paid by Ronald for the right to engage in the desired activity would be simply a transfer, but the negotiation of the license would involve some cost.

In regard to how many of the works in his planned digital-library would Ronald have to incur these various costs? The two components of the search cost [category 1] will apply to different numbers of works. The cost of learning the work's status would be incurred on all the works which are candidates for use. The cost of uncovering the owner's identity would be incurred on the subset of the used works which are protected by copyright. Similarly, ascertainment of owner's preference cost [category 2] would be incurred only in regard to the subset of works that are protected by copyright. Negotiation cost [category 3], if relevant, would be incurred in regard to the subset of the used works which are protected by copyright and whose owners refuse to authorize unconditional use.

To be sure, the various costs involved may be dramatically different, depending on the context of each item. In the case of a 2005 registered work affixed with a notice that contains the name and contact information of the copyright owner, the total cost may be minimal. The task may be somewhat more expensive in the case of an unregistered, non-notice bearing, literary work published in 2001 containing the name of a famous scholar as its author. It will be even more expensive if the unregistered, non-notice-bearing, literary work is a poem published in 1990, whose named author is John Smith, a virtually unknown poet. The cost would be greater still regarding an unsigned, non-famous, and undated black and white photograph.

In relation to some of the works there may be facilitating mechanisms or organizations that specialize in search and clearing of rights. All of these mechanisms, however, are limited in efficacy or coverage. For a modest sum the copyright office would search for Ronald the status and owner of a particular work.¹³² The search, however, would be of little use in regard to non-registered works or works that were assigned without recording. As the Copyright Office cautions the public “[t]he complete absence of any information about a work, in the Office

¹³² Currently the Copyright Office charges \$75 per search hour or a fraction thereof. See www.copyright.gov/forms/search_estimate.html.

records does not mean that the work is unprotected.”¹³³ Moreover, the Copyright Office further explains that even if you follow all three major approaches it recommends for investigating copyright status, “the results may not be conclusive.”¹³⁴ Private clearing-house services would clear the rights in some works for a fee. Some of them may even offer easy to use online tools for speedy and easy clearance.¹³⁵ These services, however, would only apply to very limited classes of materials, compared to the pool of materials that could be used in digital-libraries. They would be of little help in regard to uncopyrighted works or works that are not commercially licensed by their copyright owners on a regular basis. Perhaps most importantly, it seems that copyright owners, at least at present, are highly reluctant to offer standardized and automated licensing for digital uses, which are, of course, exactly the kind of uses that are critical for a digital-library.¹³⁶ A particular work may also be attached with a Creative Commons license that permits the use in which Ronald is interested.¹³⁷ These, however, are likely to be only a small fraction of the works in which Ronald is interested.

¹³³ U.S. Copyright Office, How to Investigate Copyright Status of a Work, Copyright Office Circular num. 22. Available at: www.copyright.gov/circs/circ22.html.

¹³⁴ *Id.*

¹³⁵ See, for example, the “rightsphere” service offered online by the Copyright Clearing Center. The service promises to provide (for a fee) “permission to use millions of works in print and digital formats.” Available at: www.copyright.com.

¹³⁶ WILLIAM W. FISHER & WILLIAM MCGEVERAN, THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIAL IN THE DIGITAL AGE: A FOUNDATIONAL WHITE PAPER 80 (2006). On the limitations of lowering transaction costs for digital-libraries through digital licensing tools see also *infra* text accompanying notes 144-145.

¹³⁷ The Creative Commons is “a non-profit organization that offers flexible copyright licenses for creative works.” See mission statement at creativecommons.org. As the text implies, one of the bitter ironies produced by the Creative Commons is the fact that the organization that was founded on an ideology of openness may be used by some in order to justify a maximalist approach to intellectual property protection. The co-opting maximalist argument is simple, though far from being foolproof: since the Creative Commons lowers the cost of licensing and since those who are interested in no or modest protection for their works now have an

In the aggregate, the attempt to avoid the copyright risk would generate a substantial cost even for Ronald's very modest 1000 items library. This cost may result in several unfortunate outcomes. Ronald may be able and willing to expend this cost. In this case the digital-library would be created as planned, although substantial resources would be expended in the process. Given the cost, Ronald may be forced to abandon the project altogether. Finally, Ronald may change the outline of the project by focusing only on such materials that are likely to generate relatively little cost. This, however, would radically scale-down the project and would limit its coverage to only a fraction of the materials it could have used. Even if it would still be a useful and worthy project, by comparison to the original initiative it would be a very impoverished one.

How would an opt-in regime change the situation? Under an opt-in regime Ronald would run no risk of liability regarding works about which he received no notice of objection. Most of the transaction costs would now be incurred by copyright owners who would seek to police the use of their works. More specifically, we can expect three major kinds of cost: monitoring cost; notice cost; and negotiation cost.

1. *Monitoring cost*—this is the cost of informing copyright owners' of the use of their works. Monitoring cost has two main components: the user's cost of publishing the fact of his use, and the owners' cost of monitoring for uses of their works. In our example, Ronald may incur some cost in publishing his intended use of the relevant works. Copyright owners, in turn, would incur cost by attempting to find out whether their work would be used. Notice that these two components are directly related. To the extent that Ronald invests resources in effective means for publicizing his intended use and in empowering others to learn which works are included, copyright owners will have to invest fewer resources for monitoring. There will be one or more combinations of these two types of investments that would minimize total monitoring cost.

2. *Notice cost*—this is the cost of locating, contacting and notifying the user of an objection. It would be incurred by copyright owners who: a) learn that their works are used in Ronald's project; b) object to the use; and c) choose to exercise their opt-out option by informing Ronald of their objection.

easy way to achieve that goal, strong copyright protection as the default is justified.

3. *Negotiation cost*— when a copyright owner objects to a use of her work yet both Ronald and the copyright owner have an initial interest in a license this additional cost would be incurred in the process of negotiation.

In regard to how many works these various costs would be incurred? An opt-out regime is likely to entail a very large number of works and owners that would be implicated by the monitoring cost [category 1]. Works affected would, by no means, be limited to the 1000 that Ronald actually intends to use. Initially, owners of relevant works do not know which works are included in the project. Thus, many owners of copyrighted works for which there is a non-negligible probability of use who are interested in preventing such use would incur the monitoring cost. For example, if Ronald's library focuses on landscape photographs, there may be as many as 100,000 copyright owners in relevant items who have interest in policing such uses of their works. In short, the monitoring cost is likely to implicate many more works and owners than the ones actually included in the project.

The notice cost—that is the cost of contacting and notifying Ronald of an objection—would be incurred in regard to a smaller number of works than those Ronald intends to use. Out of the 1000 relevant works, an objection would be communicated only when: the work is protected by copyright; the owner still has some general interest in policing and enforcing her rights; and the owner objects to Ronald's use. Out of the 1000 works, some are likely to be in the public domain. Others may be works formally under copyright protection, in regard to which the current owner lost or never had any interest in policing or enforcing his rights. Others still, may be viable copyrighted works whose owners do not object to Ronald's use. This last category is not hypothetical or unlikely. It is very probable that among copyright owners of landscape photographs there would be some who would not object to inclusion of their work in a digital-library. There is a variety of motives for such behavior by copyright owners, ranging from altruism, to hope of leveraging exposure into reputational and future-monetary benefits. The net-result is that the notification cost would be incurred only in regard to a subset of all the works used in the project.

Finally, negotiation costs would be incurred in regard to a similar number of works as in the opt-in regime. This cost will be relevant only on the subset of works designated for the project whose owners object to unconditional use and regarding which both Ronald and the owners are interested in pursuing the possibility of licensing.

Opt-in		Opt-out	
Search	Ascertainment of status	Monitoring	User's notice
	Ascertainment of owner		Owner's monitoring
Ascertainment of owner's preference		Notice	
Negotiation		Negotiation	

Table 1 Opt-in/opt-out Transaction Cost

Which is preferable then, opt-in or opt-out? Which of these two options is likely to generate lower costs in our example, and can we draw useful generalizations about digital-libraries from it? Table 1 summarizes the main components of cost under each regime and allows easy comparison. Starting with the last identical category, each regime may generate some final-stage negotiation cost. As we saw, this negotiation cost is likely to be similar under either regime. Two other comparisons are left: a) Ascertainment of owner's preference cost under an opt-in regime as compared to the notice cost under an opt-out one; and b) Search cost under an opt-in regime as compared to the monitoring cost under an opt-out one. As for the first comparison, there are two relevant parameters: the average signaling cost per work, and the number of works subject to cost. In most cases the number of works subject to cost would be smaller in an opt-out regime. The reason is simple: an opt-in regime requires ascertainment of preference regarding all copyrighted works, while an opt-out regime necessitates signaling only regarding the subset of the copyrighted works whose owners retain enforcement interest and object to the use. In our example, if out of the 1000 works used 800 are subject to copyright and 700 of the copyright owners object to the use, ascertainment

of preference cost would be incurred 800 times, but notice cost would be incurred only 700 times. As a result, as long as the average notice cost is no greater than the average ascertainment of preference cost, this total component would be smaller under an opt-out regime.

As for the second comparison, there are two relevant parameters that point in opposite directions. As explained, instances in which owners incur monitoring cost generated by an opt-out regime would usually be more numerous than instances in which a user incurs search cost under an opt-in regime. Search cost is incurred only on the works the user intends to use in the project. Monitoring cost, however, is incurred in the case of all copyrighted works in regard to which there is a non-negligible probability of use and whose owners have a sufficient monitoring interest. On the other hand, the average monitoring cost is likely to be much smaller than the average search cost. Under current copyright background-rules, given an adequate disclosure by the user, it is likely to be much less expensive for an owner to find out whether a specific work is included in a particular project than for a user to ascertain a work's status and ownership. In addition, much of the investment of a copyright owner in monitoring would apply to multiple digital-library uses, thereby reducing the monitoring cost associated with each specific digital-library project.

The net-result is that the balance of this component would vary according to context. As the number of works in a digital-library increases, the gap between the number of works subject to cost under each regime decreases. In theory the number of works subject to search cost may even exceed the number of works whose owner would incur monitoring cost. Think, for example, of a case in which Ronald launches a project in which he uses 120,000 landscape photographs, but there are only 100,000 copyright owners who retain sufficient interest in monitoring and objecting to such uses. Moreover even in the more likely cases in which the instances of monitoring cost are more numerous, if the average monitoring cost is sufficiently low relative to the average search cost, total monitoring cost may still be lower. Assume, for example, that 1000 works are subject to search cost and 100,000 to monitoring cost. Assume further that due to the complexities described above, average search cost is as high as \$50 and that an optimal combination of actions by Ronald and copyright owners generates an average monitoring cost of only \$0.4. Total search cost would be \$50,000, while total monitoring cost would amount to \$40,000.

The discussion of the hypothetical example above gives rise to several useful generalizations about the conditions under which an opt-out regime is likely to be the less costly alternative.

First, as we saw, under an opt-in regime almost by definition fewer items will be subject to notice cost by comparison to the number of items subject to ascertainment of preference cost under an opt-in regime. The reason is that opt-out requires signaling only regarding the subset of used copyrighted works whose owners are sufficiently interested to monitor and object to the use, while an opt-in regime requires ascertaining the owner's preference regarding all used copyrighted works.

Second, to the extent that the mechanism for communicating a notice of objection to the user is cheap and simple, the higher are the chances that an opt-out regime will be the less costly alternative. Legal norms have an important role to play here. The opt-out rule should be structured as to stipulate the exemption to the user upon the existence of a cheap, accessible and easy mechanism for receiving objection notices.

Third, the larger number of items used in a digital-library, the greater is the likelihood that search cost would exceed monitoring cost. A large number of items used, then, is an indicator that an opt-out structure may be less costly.¹³⁸

Fourth, to the extent that the monitoring mechanism is cheap and efficient, the greater are the chances that monitoring cost would be smaller than search cost and hence that opt-out is preferable. Again legal norms

¹³⁸ A large number of items in a digital-library is only a crude indicator of search cost exceeding monitoring cost. The analysis in the text assumes that search cost is increased by each additional work added to the library while monitoring cost remains constant. The latter assumption may not be strictly accurate. Larger libraries are likely to draw more end-users, pose more risk from the point of view of right-holders, and create a larger interest in monitoring. Thus, monitoring cost may be influenced by size. Nevertheless, as long as the marginal search cost added by each additional item in the library exceeds the added marginal monitoring cost, size can still function as an indicator. This is likely to be the case because monitoring copyright owners are unlikely to be very sensitive to size in the digital environment. The correlation between size and popularity of a digital-library is only partial and many right-holders concerned about a digital leak of their work in an unsecured format will have a sufficient enforcement interest even in small size libraries. Thus, large size seems to be a useful, albeit crude, proxy for search cost exceeding monitoring cost.

have a role to play here. As explained, minimal monitoring cost is a function of an optimal combination of the mechanism employed by the user in order to publicize the use and allow owners to acquire information and the monitoring means employed by the copyright owner. Thus the opt-out rule should create proper incentives to the user by limiting the exemption to those cases in which the user employs an adequate notice mechanism.

It is important to add to the analysis above the issue of the allocation of the cost. Opt-out and opt-in regimes differ not only in the amount of cost they generate, but also as to the division of the burden. This division has important broader implications. Those broader implications, however, cut in both directions. On the one hand, one has to take into account not just the direct cost generated by an opt-out regime but also the indirect effect of that cost. In an opt-out regime copyright owners shoulder much, though not all, of the transaction costs involved. In addition to actual resources expended, copyright owners may suffer other loss, relative to an opt-in regime. Imperfect monitoring may result in a delayed notice of objection and the interim use may cause damage to the copyright owner. In some cases it may be irrational to invest even a very small monitoring cost, again resulting in some (though probably small) damage to the copyright owner. All of these effects on the private welfare of copyright owners are relevant within the economic copyright framework inasmuch as they affect the ex-ante incentive of creators to create copyrightable works. Presumably, creators of copyrighted works who know ex-ante that their work's stream of profit would be subject to these various prejudicial effects and costs would incur *some* reduction of ex-ante incentive to create.

On the other hand, an opt-in regime too has broader implications. In an opt-in regime most of the transaction costs is shouldered by the creator of the digital-library. In addition to expended resources the cost may result in complete frustration of digital-library projects or in the scaling down of others. The frustration of projects affects not just the library builder but a much broader group of people. A large number of potential end-users of the non-existent or scaled-down digital-library are prejudicially affected. Future creation that could have been empowered by the availability of the library's materials is chilled. Copyright owners and authors of works who stood to receive a net-benefit from the inclusion of their works in the project are adversely affected. These secondary costs of frustrated and scaled-down projects are likely to be particularly acute in the case of open and non-commercial models of digital libraries, because

entities operating under such models are likely to be internalizing only a small fraction of the social benefit they produce.¹³⁹ Thus to the extent that in open models the library builder internalizes a smaller share of its value, compared to an exclusionary model, the probability of frustration by transaction cost is high. In the case of non-commercial, open models this probability is even higher.

At the end, the broader social cost of an opt-out regime should be weighed against that of the opt-in alternative. It is far from clear a-priori that an opt-out regime would have larger harmful effects of this kind than an opt-in one. On the whole, it seems that a properly crafted opt-out regime, applied in the suitable circumstances, is likely to minimize social cost in the form of transaction costs and related social harm.

b. Opt-Out as an Information-Forcing Mechanism

An alternative way of understanding the advantages of an opt-out regime in the context of digital-libraries is to consider it as an information-forcing mechanism. Much of the cost generated by the combination of copyright's background-rules and the character of digital-libraries projects is a result of information gaps. In most cases substantial gaps exist in information which is vital for avoiding the infringement risk: the status of works, the identity of their owners, the interest of the copyright owner in enforcing his rights, and the preferences of the owner regarding use in the digital-library project. Typically copyright owners have superior information about all of these issues compared to users. It is exactly the informational gaps between copyright owners and users that create the high transaction cost and its secondary effect of frustrated and scaled-down projects. Under an opt-in regime the lion-share of this cost is the result of attempts by digital-libraries to obtain the missing information in order to avoid the risk of infringement.

An opt-out rule is an information-forcing mechanism. It is a default rule that creates incentives to parties with superior information to step forward and reveal that information to those in an inferior informational position. Unlike many familiar information-forcing mechanisms, however, an opt-out rule does not deal with the problem of

¹³⁹ See Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1812 (2000); Lemley, *supra* note 114, at 1056-58.

concealed private information during negotiation.¹⁴⁰ It deals, instead, with a non-negotiation setting in which a party with superior information has suboptimal incentive to reveal itself and the information he possesses. In another respect the opt-out rule is similar to one familiar type of information-forcing rules: it forces the disclosure of the information by imposing a “penalty” of an undesired outcome on the better informed party.¹⁴¹

The gist of the issue is the fact that an opt-out regime, by allowing a user to use a copyrighted work in the absence of notice, threatens copyright owners who object to the use with the unwanted result of the legal use of their works. The “penalty” of legal use motivates copyright owners to act and forces the hidden information out. To see the full informational advantage of an opt-out regime, consider the effect of the opt-in/opt-out rule on the various classes of works and copyright owners relevant to a digital-library project.

Under an opt-in regime, owners of copyrighted works who object to the use of their works are likely to have suboptimal incentives to contact the user and inform him of the status of the work and their preference. Some copyright owners may monitor for undesired uses of their works, notify users, and be content if the use ceases following the notice. But not all copyright owners are likely to behave that way. Why for example did the plaintiffs in the Google Prints Library cases choose to sue rather than just give notice and opt-out? One answer is that some copyright owners, especially repeat players, prefer the long-term deterrence effect. Establishing a clear rule and a credible threat of a lawsuit deters others from future uses and may substantially reduce the monitoring cost required from owners. For other plaintiffs the prospect of statutory damages that may be disconnected from any actual damage suffered may create a temptation to sue.¹⁴² As a result users are kept in the

¹⁴⁰ For an analysis of information-forcing rules in the context of negotiation see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 97 YALE L. J. 89 (1987); Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Cosean Trade*, 104 YALE L. J. 1027 (1995).

¹⁴¹ Ayers & Gertner, *supra* note 140.

¹⁴² This possibility is particularly relevant in view of the likely applicability of class-actions to digital-library situations. Statutory damages may be too small to induce any specific party to launch an

dark. Each unauthorized use of a copyrighted work may simply induce a notice from the objecting copyright owner and thus reveal the relevant information. It may also result, however, in a costly lawsuit.

What about copyright owners who do not object to the use of their works? Wouldn't these have sufficient incentive to opt-in and disperse the informational fog? After all, the user can rely on an opt-in scheme for interested copyright owners, rather than an opt-out one for objectors.¹⁴³ The drawback of this possibility is that opting-in owners reveal information only about their own works, leaving all other works in the dark. Consider a digital-library project that uses 400 copyrighted works whose owners object to the use, 200 works whose owners agree, and 400 works in the public domain or regarding which owners lost enforcement interest. Even if all willing copyright owners opt-in, 800 works would be left in an informational fog.

It is exactly on this point that an opt-out regime is superior. Under an opt-out rule those who have sufficient incentive to reveal information to the user would uncover the entire informational picture. In the above example the 400 objectors would notify the user of their objection while no information would be communicated about the other 600 works. Nevertheless, the information received would be enough to create certainty regarding all 1000 works. The user would have all relevant information because in an opt-out regime silence means permissible use. Thus the user would have all pertinent information about 400 works, and a silent signal about 600 works that may be safely relied on.

This analysis also helps to see why the future possibility of cheap and easy digital licensing tools¹⁴⁴ is only a partial solution to the transaction costs problems discussed above. To be sure, a ubiquitous use of such tools may dramatically reduce the cost involved under an opt-in regime with acquiring necessary information about some of the works used in digital libraries. Yet the search and ascertainment of owner preferences costs would be reduced only in regard to the works included in

individual lawsuit. A class-action, however, may provide a strong incentive to sue and the aggregate damages in an action involving numerous works, may be very substantial.

¹⁴³ Google's "Partner Program" in which publishers are invited to license their works for use on Google's Book Search is such an opt-in scheme. See "Partner Program- an online book marketing and sales program;" available at books.google.com/googlebooks.publisher.html.

¹⁴⁴ See *supra* text accompanying note 135-136.

such licensing schemes. Even in a world of ubiquitous use of digital licensing the pool of potentially copyrighted works is likely to be much larger than the subset of those works offered through digital licensing. A substantial number of works including public domain works, and works not routinely commercially exploited by their owners will not be part of these licensing schemes, no matter how comprehensive or ubiquitous. The saving of information-related cost would thus be partial. Information about digitally licensed works would be cheaply available, but all other works would still be in the dark and would either be ignored or generate a substantial informational cost. An opt-out regime, by contrast, would induce the discovery of information revealing the entire informational picture about the entire pool of relevant works. Thus even in a world of ubiquitous digital licensing, given a cheap and efficient opt-out scheme, an opt-out regime is still likely to be less costly in generating information about the entire pool of relevant works than an opt-in rule.¹⁴⁵

As the foregoing analysis implied, the information-forcing function of an opt-out regime is merely an aspect of the above transaction costs analysis.¹⁴⁶ Information-forcing rules are always transaction cost saving mechanisms.¹⁴⁷ They are desirable inasmuch as alternative ways for revealing the information are more costly. The question, then, is: which regime entails more overall cost in obtaining the necessary information for digital-library projects? At this point the discussion converges with the transaction cost analysis above. As shown, an opt-out regime is likely to be a less costly alternative, given certain circumstances. Accordingly it is the preferable mechanism for stimulating the disclosure of information crucial for digital-library projects.

c. Opt-out, Transaction Cost and Uncertainty

The foregoing analysis is bound to be somewhat speculative. In the absence of empirical data it is impossible to predict with absolute certainty

¹⁴⁵ Of course, the above analysis would change if digital copyright-clearing tools offered comprehensive and reliable information not just about works which are regularly commercially exploited, but about the entire pool of potentially copyrighted works. Given the incentives of the private actors who develop digital-clearing systems and the vast scope of copyright protection, the availability of such comprehensive tools in the near future seems unlikely.

¹⁴⁶ See *supra*, section II.B.2.a.

¹⁴⁷ Ayres & Talley, *supra* note 140, at 1030.

that an opt-out regime would generate lower transaction costs than an opt-in regime in the context of digital-libraries. Moreover, the exact effect of the legal rules will change in each case, depending on various characteristics of the digital-library project and the works it uses. Nevertheless, the discussion yields some important conclusions. First, we can safely estimate that there is a high probability that in many cases of digital-library projects opt-out would be overall the less costly alternative. Second we have isolated the conditions that reduce the cost generated by an opt-out rule and are likely to make it preferable. These conditions include: a proper publication by the user, a cheap and easy channel for objection notices, and a large number of used items. We also saw the features of the legal regime that can facilitate these conditions. A properly crafted opt-out rule would limit the user-exemption to the identified circumstances where opt-out can offer a cheaper alternative and thus serve as a proxy for capturing only situations when opt-out is the optimal rule.

At a minimum, it was established that in this context there is no reason to assume that from an efficiency standpoint opt-in is superior to opt-out. The peculiar circumstances of digital-libraries negate the common presumption of the law in favor of opt-in. While property law, as a generalizing proxy, usually prefers opt-in as a less costly alternative, in our context the opposite proxy of opt-out is, at the very least, just as plausible. If one is uncomfortable relying on a tentative case and insufficient empirical data for supporting opt-out, one has to remember that in our context the case for opt-in is just as, and probably more, precarious. A habit is not a good enough reason for choosing the opt-in alternative.

The fact that efficiency analysis is either just tentatively supportive of an opt-out rule or simply inconclusive should be dismaying only to those for whom narrowly-defined economic efficiency is the only relevant value behind copyright law. This, however, would be an odd position. The moment we realize that there are other social goals and values implicated, the vacuum left by the uncertain results of economic analysis is filled up. I turn now to supply an alternative normative vision for explaining and justifying copyright law and apply it to the question of digital-libraries and the opt-out mechanism.

3. Digital-Libraries and Cultural Democracy

a. Cultural Democracy

There are values and social purposes other than economic efficiency that are relevant to evaluating opt-out rules. It is sometimes remarked that fencing-out regimes, described above,¹⁴⁸ are political decisions.¹⁴⁹ The reference to “politics” and its derogatory implications completely ignores the fact that a “political decision” may be exactly the point in this case: namely, a normative decision to preserve and cultivate a way of life and a social system, whether it is optimally efficient or not. Similarly, opt-out arrangements in class-actions may be efficient, but they also serve other, independently important social values: access to justice, overcoming public apathy, and just desert to wrongdoers.¹⁵⁰ Opt-out, in short may serve important social values and goals.

Out of the several common contenders¹⁵¹ I will focus here on an eclectic yet loosely connected group of normative accounts of intellectual property I will call “cultural democracy.”¹⁵² These various accounts do not form one coherent and uniform theory. Their proponents emphasize various issues and disagree over others. Nevertheless these accounts do share a strong family resemblance and many common features, arguments and commitments. In this section I synthesize the most important typical features shared by these normative accounts of intellectual property. In the

¹⁴⁸ See *supra* text accompanying notes 72-74.

¹⁴⁹ For a nuanced description of the politics of open vs. closed range regimes in one county see Elickson, *supra*, note 72, at 643-53.

¹⁵⁰ For a detailed analysis of the opt-out mechanism in the context of class actions see Mattioli, *supra* note 10, at 19-27.

¹⁵¹ The two other most common theories of intellectual property, which will be bracketed here, are: labor-desert theory, and the personality justification. See Fisher *supra* note 115, at 168-173.

¹⁵² See, e.g., Fisher, *supra* note 115, at 1744-66; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace*, 14 CARDOZO ARTS & ENT. L. J. 215, 224-232 (1996); Netanel, *supra* note 67; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Benkler, *supra* note 104.

following section I apply these principles to the question of opt-out and digital-libraries.

The intellectual starting point of the approaches I group together under the heading of cultural democracy is an explicit or implicit vision of the good society: a utopian account of a just and attractive society or those aspects of society implicated by copyright.¹⁵³ Once such a vision is supplied or assumed the various accounts proceed to examine which legal rules are most likely to foster this utopian goal. When it comes to the substance of such models, many of the accounts contain similar themes and features that interlock and overlap with each other. The most significant of these features are as follows:

A rich concept of human and social welfare. Most writers in this vein do not reject the maximization of human welfare as an important social goal to be pursued in the field of copyright. Virtually all of them, however, challenge to different degrees the prevalent law and economics criterion for maximization of human welfare as overly-narrow, impoverished or even misguided.¹⁵⁴ Human welfare cannot be reduced to consumer surplus and maximizing of social welfare is not synonymous with allocation of resources to those who are willing and able to pay the most for them. This narrow definition of allocative efficiency is not a neutral criterion, but rather one among many possible definitions, which already makes important value and distributive choices.¹⁵⁵ Some emphasize that certain aspects of human welfare are not adequate for market treatment and should not be subjected to market forces.¹⁵⁶ Others simply offer a rich set of values and purposes that should both supplement efficiency and play a role in its definition. Many of the other common features of cultural democracy scholarship derive from such attempts of pouring richer substantive content into the concept of social welfare and human flourishing.

Pluralism. Many emphasize the social value of a variety, of views, ideas, meanings and options. A society with diverse and antagonistic sources of information and views is a better society.¹⁵⁷ Copyright, as seen from this

¹⁵³ Fisher, *supra* note 115, at 172; *idem*, *supra* note 115, at 1744-5.

¹⁵⁴ Fisher *supra* note 115, at 172.

¹⁵⁵ Boyle, *supra* note 111, at 14-15.

¹⁵⁶ Cohen, *supra* note 70, at 552-59.

¹⁵⁷ Fisher, *supra* note 115, at 192; Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L. J. 561, 565-68 (2000).

perspective, is not just an instrument for maximizing the quantity of available information. Part of the purpose of copyright is also to assure the quality of available information: to create structural conditions that facilitate variety and leave breathing space for the innovative, the different and the non-conformist.¹⁵⁸

Active Participation. A recurring important value in cultural democracy writings is the active participation by all members of society in the process of making and transforming cultural meaning. The ideal is that of active participants who have meaningful opportunities to interact with the cultural artifacts (e.g. ideas, symbols, images, views) of their culture, rework them and imbue them with new meaning, rather than passive consumers of informational items created by others.

Why are diversity and participation important social goals? There are two strands of answers to this question in the scholarship. The two do not form a clear-cut binary distinction and the various writers are probably best understood as placing varying degrees of emphasis on either theme. One understanding of the value of diversity and participation draws on the notion of civil society and the public sphere as an essential element of a democracy. According to this view, the democratic form of government is not merely a majoritarian procedure of elections that aggregates preexisting individual preferences. It is, rather, an ongoing process of rational preference formation. This process involves public deliberation of important public issues conducted by an involved and informed citizenry. Under ideal speech conditions, this public deliberation would be open to numerous and diverse competing views and arguments. Participation would be as free as possible from hierarchical relations of power, either public or private. Such a vibrant discursive sphere would also have the additional benefit of cultivating in the citizenry habits and character traits that are prerequisites of a healthy democracy: political awareness, active involvement, social responsibility and discursive skills. Participation and diversity are thus seen as essential conditions for the democratic political process: they ensure that all relevant information, views, arguments and

¹⁵⁸ Cohen, *supra* note 139, at 1813-14 (2000); Michael D. Birnhack, *More or Better? Shaping the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 59 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

options are placed before the public, considered and deliberated, and they cultivate an empowered sovereign citizenry.¹⁵⁹

Under the second framework, participation and diversity are not seen as merely instrumental of a political democratic process. Rather, these two features constitute what it means for a society to be democratic. This approach expands the notion of democracy beyond just a form of government in the narrow, ordinary sense to encompass everyday practices within all aspects of life. A society is democratic to the extent it has democratic practices or a democratic culture in which all people have fair and equal opportunities to participate in the self-governance of their individual and collective lives. In the cultural sphere, now broadly understood to go well beyond public or political debate, this means a meaningful opportunity for all individuals to take part in a dialogical process of shaping culture. Some writers emphasize the special importance of democratic practices in the cultural sphere broadly defined. Culture, according to this view, is what “we are made of;” it is what shapes our fundamental understanding of the world and what constitutes us as individuals and groups. Taking part in the dialectical process of shaping the structures that shape one’s own individuality and group identity is thus self-governance in the most profound sense.¹⁶⁰

In sum, diversity and participation in the cultural-discursive sphere are major values due to two related reasons: a) they are facilitative of a democratic political process; and b) they form the heart of a society and culture which is truly democratic.

¹⁵⁹ See Netanel, *supra* note 67, at 341-64; Elkin-Koren, *supra* note 152, at 224-32; Birinhack, *supra* note 158; Benkler, *supra* note 104, at 176-272 (developing a similar argument under the title of “political freedom”).

¹⁶⁰ Coombe, *supra* note 152; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 812 CALF. L. REV. 125 (1993); Balkin, *supra* note 152; Elkin-Koren, *supra* note 152, at 232-235; David L. Langue, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millenium*, L. & CONTMP. PROB. 147 (1981); Benkler, *supra* note 104, at 273-300 (developing a similar argument under the title of “cultural freedom”). William Fisher, following popular culture theorist John Fiske, refers to this brand of arguments as espousing the view of “semiotic democracy.” Fisher, *supra* note 115, at 193; Wiliam Fisher III, *Property and Contract on the Internet*, 73 CHI. KENT L. REV. 1203, 1217 (1998).

Autonomy. Another important theme of cultural democracy is the maximization and empowerment of individual autonomy. Autonomy means here the ability of individuals to make choices and decide for themselves, how to act, what to think, and what to experience.¹⁶¹ In part, individual autonomy means in the cultural context the ability to choose what materials to experience and consume and a variety of such materials to choose from.¹⁶² An additional aspect of autonomy converges with the theme of participation: individual autonomy includes the freedom to interact in an active way with existing cultural materials, to recreate and reshape them, and to express one's own voice through a dialogue with those of others. This is the freedom to be more than just a passive consumer of cultural materials created and shaped by others.¹⁶³

This rich notion of autonomy is intertwined with some of the other themes of cultural democracy. Pluralism and participation facilitate autonomy. It is within a society that provides a rich and diverse set of options from which to choose and from which to reconstruct one's own projects, in a society that nourishes and creates opportunities for active participation, that individuals would have more freedom both to consume and interact.¹⁶⁴ At the same time, autonomy promotes diversity and participation and the democratic vision that underlies these values. Individuals who enjoy a broad domain of personal choice and whose character was forged through a habit of such active choice are likely to produce a diverse, vibrant and participatory cultural sphere.

Distributive justice. One, final feature of the good society as seen by advocates of cultural democracy is distributive justice.¹⁶⁵ A just and attractive society is one in which resources are distributed equitably among its members.¹⁶⁶ Distributive justice and equality are complex and

¹⁶¹ Most scholarship in the vein of cultural democracy does not subscribe to a naïve notion of a completely autonomous individuals making absolutely subjective choices. Instead, it develops various versions of acknowledging the dialectic between individual identity and choice on the one hand, and their social construction on the other.

¹⁶² See Fisher, *supra* note 115, at 1748-1750.

¹⁶³ Benkler, *supra* note 104, at 133-175.

¹⁶⁴ Fisher, *supra* note 115, at 192; Fisher, *supra* note 115, at 1751-52.

¹⁶⁵ See generally Shaffer Van Houweling, *supra* note 152.

¹⁶⁶ See ARISTOTLE, NICOMECHAN ETHICS, bk. V, ch. 2, in THE BASIC WORKS OF ARISTOTLE (R. McKeon ed. 1941).

open-ended criteria, subject to many competing accounts and views.¹⁶⁷ For our purposes, it suffices to define a distributively just society in a loose and purposefully vague manner as: a society in which realizable and meaningful—as opposed to just formal—expressive opportunities are broadly available to all individuals. There are two dimensions to the relevant expressive opportunities. First, all members of society, irrespective of status or financial ability, should have access to experiencing and consuming cultural materials of sufficient quantity, quality and diversity.¹⁶⁸ Second, all members of society should have meaningful opportunities to engage in creative activities and access the resources needed for such activities.¹⁶⁹ Copyright according to this criterion is not just about “the more the better.” It is not just about the size of the pie, but also about its distribution both among diners and cooks.

The eclectic character of cultural democracy theories of copyright is a source of both power and weakness. It is the richness of the various interlocking values advocated by cultural democracy that makes its utopian perspective particularly compelling. Often these various values and purposes reinforce each other. At other times, however, specific choices involve conflicts and tradeoffs between these various goals. In those cases supporters of cultural democracy face complex questions of comparison and priority.¹⁷⁰

What is the relation between the cultural democracy justification of copyright presented in this section and the economic perspective that was the premise of the previous one? The utilitarian imperative of maximizing creation and dissemination of intellectual works is an integral part of the cultural democracy prescription. Enlarging the pie of creative works is an essential, although not sufficient, condition for many of the goals described above.¹⁷¹ The narrow utilitarian imperative, however, is only

¹⁶⁷ See MICHAEL WALZER, SPHERES OF JUSTICE 3-4, 21 (1983).

¹⁶⁸ Fisher, *supra* note 115, at 193; Fisher, *supra* note 115, at 1756-1761.

¹⁶⁹ Shaffer Van Houweling, *supra* note 152, at 1539-1550; Benkler, *supra* note 104, at 13-15.

¹⁷⁰ Cultural democracy theories of intellectual property are not unique in facing such grave difficulties. All major justifications of intellectual property suffer from serious defects and shortcomings. The main difference is that the defects of some of the other theories are either less readily apparent or more commonly concealed and overlooked. See Fisher, *supra* note 115, at 194.

¹⁷¹ Fisher, *supra* note 115, at 192.

one ingredient. It often has to be balanced and moderated in light of the other goals. Thus, society A which is substantially superior to society B in terms of pluralism, participation, individual autonomy and distributive justice would be unequivocally preferred from the point of view of cultural democracy, even if in society B the total pie of creative works, as measured by the criterion of consumers' willingness and ability to pay, is somewhat larger. In a similar fashion, cultural democracy advocates do not eschew the market. They see it as an important mechanism for allocating resources and for promoting some of their goals. But the market is accorded neither an exclusive status as the only relevant mechanism nor a normative superiority as the only legitimate arbiter of allocative choices.¹⁷² Moreover, writers in this vein usually see "the market" as structured and constituted by the law, and thus as always involving many options that already incorporate value choices.¹⁷³

In our case the differences between a strict utilitarian view and the cultural democracy perspective entails no difficult choices. As I have shown above, economic analysis provides support for an appropriately drawn opt-out rule. To be sure, given the absence of empirical data this support is somewhat attenuated. At the very least, however, the common presumption in favor of opt-in does not apply. In the next section I will argue that cultural democracy provides strong, unequivocal support for opt-out in this context as facilitative of many of its values. The end result is a happy convergence: the position of one normative perspective is in between light support and agnosticism, while the other generates strong support for an opt-out rule.

b. Opt-Out and Cultural Democracy

What does a seemingly technical issue such as an opt-out rule for digital-libraries have to do with cultural democracy? To answer we first need to elaborate briefly the tremendous promise of digital-libraries for many of the values of cultural democracy. Network-based digital-libraries create unprecedented opportunities for access to and dissemination of information of every kind. This technology offers for the first time the specter of a rich library which is not "just nibbled by a few."¹⁷⁴ Digital-

¹⁷² Netanel, *supra* note 67, at 288, 341 ("Copyright... is in but not entirely of the market").

¹⁷³ See e.g. Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000).

¹⁷⁴ Bush, *supra* note 1, at 101.

libraries can supply comprehensive collections of every imaginable kind of information. Their search capabilities offer powerful and easy to use retrieval possibilities. Access to such collections is not limited to a small group in the academic ivory-tower or to well-financed professional elites. Rather, at least inasmuch as open models digital-libraries are concerned, they are open to all those who can clear the bar of access to a computer and Internet connectivity. Moreover, network-based libraries can also overcome disparities and gaps generated by geographic and time limitations. Any computer user, wherever she is located can access and experience a wealth of information, be it civil-rights era photographs or a list of books that mention the word “democracy.” The benefits to individual autonomy—or more accurately, to individual freedom to access and consume a variety of materials—is obvious. A thriving sphere of digital libraries also serves distributive justice by opening up opportunities for such access to broad segments of society.¹⁷⁵ Finally, the ideal of an informed and empowered citizenry that underlies many of the cultural democracy accounts is promoted by digital-libraries. In the words of Madison: “A popular government without popular information or means of acquiring it is but a prologue for a farce or tragedy; or perhaps both... a people who mean to be their own governors must arm themselves with the power which knowledge gives.”¹⁷⁶

Access, however, is only part of the benefit of a flourishing sphere of digital-libraries. A related set of advantages consists of facilitating participation and creation. The creative process, it is widely acknowledged, is cumulative and appropriative.¹⁷⁷ Almost any creative or expressive work draws to some extent and in different ways on previous works. No creator fits the romantic myth of the author *ex nihilo*.¹⁷⁸ Thus the broad and easy access to a wealth of materials created by digital-libraries is likely to fuel not just consumption, but also interaction and

¹⁷⁵ As mentioned before, to be truly equalizing proliferation of digital-libraries will have to be accompanied by measures that will insure to broad segments of society proper access to the basic resources needed in order to use such libraries, including computers and Internet connectivity.

¹⁷⁶ Letter from James Madison to W.T. Barry (August 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 1819-1836 103 (Galliard Hunt ed., 1910).

¹⁷⁷ See, e.g., Netanel *supra* note 173, at 1900 (Market Hierarchy); Benkler, *supra* note 157, at 569-70.

¹⁷⁸ See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996).

subsequent creation. Digital-libraries have the potential to “help the active mind, the active citizen, rather than feed the passive emotions and inactive spectatorism that television generally encourages.”¹⁷⁹ Existing materials may serve as the fulcrum for future creation in various ways. They supply the essential raw materials for creation, to be used, rearranged, redefined and challenged: general ideas, themes, analogies, techniques, norms of a genre, and objects for reference and dialogue. Some forms of expression that have become particularly popular and ubiquitous in the digital world draw in an even more explicit and apparent way on existing works: parodies, collages, sampling, mash-ups and other forms of appropriative works. As we move along the continuum toward works of a more appropriative character, the debate becomes stronger about whether subsequent uses of existing works should be banned as copyright infringement or allowed as valuable new creation. Proponents of cultural democracy, however, are firmly located on the freedom to appropriate side of the debate. Appropriative expression, they explain, is not only not different in kind and no less valuable than other works, it is also the most promising avenue for diverse, independent and original creation in a world of concentrated mass media and powerful control of cultural meaning by corporate hierarchies.¹⁸⁰

Given this appropriative character of creation in general, and particularly of “popular” creation in the modern age, digital-libraries are likely to play a crucial stimulating role. The affluence of cultural materials offered by such libraries does more than fuel consumption. It also supplies the resources and opportunity for subsequent creation and participation in the process of cultural meaning-making. Broad and easy access is only part of the power of digital-libraries in this regard. Another important aspect is the kind of accesses, search and uses that are enabled by digital formats and tools. In this sense digital-libraries are much more than traditional libraries which are meaningfully open to all, at all times and places.

Think for example about how highly manipulable digital formats of image, sound and video empower high quality, appropriative creation

¹⁷⁹ Billington, *supra* note 105, at 35.

¹⁸⁰ See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademark as Language in the Pepsi Generation*, 65 NOTRE DAMN L. REV. 397 (1990); Balkin *supra* note 152, at 10-11 (referring to the strategy of “glomming on”); Coombe, *supra* note 152, at 1861-64 (discussing “appropriation” and “recoding”).

and places participation in it within the reach of many. Given the appropriate materials in digital form, it has never been so easy for so many to produce a high quality Star Wars parody¹⁸¹ or a short documentary.¹⁸² Think for example of what the recent availability of digital archives of texts from the adoption of the constitution period is doing to history writing in this field.¹⁸³ Materials and evidence that previously were available only to a handful of specialist at the cost of years of work, substantial mileage of travel and high technical skills are now available to all, almost instantaneously. These developments do not only widen the circle of professionals working on such topics, and make their work easier; they also radically democratize and globalize constitutional history writing. Numerous people worldwide, who previously could not access the relevant materials, unless they were affiliated with a particularly rich research library, are now engaged with the available evidence and produce research in the field.

Some, especially those who are little familiar with it, may downplay the value of non-professional works or “non-original” forms of expression. Others, especially professional elites, may doubt the value of “amateurs” meddling with what used to be their exclusive domain. From the point of view of cultural democracy, however, these are highly

¹⁸¹ There is an elaborate and rich universe of Star Wars fan-films. Lucasfilms has a complex relationship to this phenomenon: cultivating some fan creation by using carrots such as the Star Wars Fan Film Award, and threatening others through the stick of copyright lawsuits. One of the earliest and most successful films in this vein is *Troops* by Kevin Rubio. The 1997 film is a parody of the television show *COPS* set in the Star Wars universe. It is available at:

<http://www.theforce.net/fanfilms/shortfilms/troops/>.

¹⁸² See for example, the films submitted to the Moving Image Contest conducted by the Center for the Study of the Public Domain in Duke Law School. The contest rules asked participants to create short films demonstrating some of the tensions between art and intellectual property law. The results can be seen here:

<http://www.law.duke.edu/cspd/contest/finalists/>

¹⁸³ See Calvin Johnson, *Really Cool Stuff: Digital Searches in the Constitutional Period* (forthcoming). To be sure, most documents in archives on this topic are relatively unburdened by copyright concerns. For other collections, however, dealing with topics and materials from the twentieth century most secondary and primary materials would be under the copyright cloud and would involve the problems discussed here.

encouraging and promising developments. Digital-libraries seem to empower individual autonomy not just in its passive-access aspect but also in its interactive-participatory mode. The technology has the potential of fostering a participatory culture with a rich plurality of voices and expressions, thereby realizing the democratic vision that underlies these values. Finally, digital-libraries promise to distribute all of these benefits in a broad and just way, assuring large parts of society an opportunity to partake in them.

At this point the opt-in/opt-out choice comes into the picture. An opt-out rule has an important role in helping to realize the vast democratic potential of digital libraries. As we have seen, an opt-in regime would have a substantial chilling effect on the development and flourishing of digital libraries.¹⁸⁴ The need to clear rights in numerous individual items combined with the background-rules of copyright that make the uncovering of information particularly costly is likely to impose substantial cost on the builders of digital-libraries. In many cases this cost would be so high that digital-library projects would either not take place or be dramatically scaled-down, thereby impeding the realization of their cultural-democratic promise. An opt-out regime, on the other hand, would substantially shrink the cost imposed on digital-libraries and the resultant chilling effect. An opt-out rule, however, would impose monitoring cost on some copyright owners and it may result in some reduction of incentive to create.

As argued earlier, under proper conditions, this tradeoff is likely to be beneficial even from a strict efficiency perspective. When considered from the point of view of cultural democracy, however, the opt-out regime wins by a knock-out rather than by points. The cultural democracy approach is interested in more than the exact comparison of costs and benefits under either alternative. It has much interest in the questions of how the burdens and benefits are distributed, and what the likely social results of each distribution are. To be sure, this normative approach is not completely indifferent to a decrease in the benefits to creators supplied by copyright protection. Severe and broad reduction in the ability of creators to internalize some of the value of their works may result in an impoverished expressive sphere and may be prejudicial to many of the purposes held dear by proponents of cultural democracy. The important difference from the efficiency approach is that the criterion for evaluation of various alternatives is no longer a strict comparison of total cost and

¹⁸⁴ See *supra* text accompanying notes 120-137.

benefits as measured by market value. Thus while advocates of cultural democracy would be alarmed by measures that might severely injure production of cultural materials, they would be happy to endorse society A in which expressive opportunities to consume and create are broadly distributed and which is superior by way of diversity and widespread participation by comparison to society B. They would be happy to do so even if it could be shown unequivocally that the total market value of works produced in society B would be somewhat higher. Better, in other words, a society with a much more egalitarian, pluralistic and participatory cultural sphere than an additional billion dollars invested in the special effects of Hollywood movies, or an additional ten million dollars in annual sales of platinum music albums.

Understood in this light, the more radical solution to the chilling effect imposed on digital-libraries under an opt-in copyright regime would be a complete exemption from copyright liability to digital-library uses. Such an exemption may be justified from a cultural-democracy perspective, especially in those cases when the risk and cost imposed by the digital-library use on copyright owners is relatively small. It is beyond the scope of this article to examine the desirability of this solution in regard to any particular digital-library configuration. Still the complete exemption alternative may hold a substantial risk even for proponents of cultural democracy: if the burden laid on some copyright owners by the completely free use of their works in digital-libraries is severe enough, it may result in serious impoverishment of the cultural and expressive spheres.

An opt-out rule is a more moderate and less risky alternative. An opt-out rule offers digital-libraries relief which is more limited but still very substantial. Digital-libraries would still have to incur the cost of enabling opt-out and refrain from use in case of objection, but they would be able to use all other materials free from the crashing cost of clearing rights or the risk of liability. As for the subset of copyright owners who object to the use of their works, these would incur a non-trivial monitoring cost which in turn may lead to some ex-ante reduction in the incentive to create. Nevertheless, this burden imposed on copyright owners is much smaller than that of a complete exemption and the risk of serious impoverishment of the cultural sphere is much lower. The tradeoff then is: a substantial, although not maximal, boost to the flourishing of digital-libraries and their accompanying social benefits, accompanied by a burden on copyright owners which is unlikely to have a devastating effect on cultural production. For advocates of cultural democracy, who are quite

willing to incur some decrease in the value of created works in order to attain other social purposes, an opt-out rule is thus highly attractive.

The attractiveness of an opt-out rule varies in regard to the various types of digital-libraries described above.¹⁸⁵ The strongest case for such a rule is in relation to *non-commercial, open* libraries, whether public or private. The reason is twofold. First, non-commercial libraries are likely to be most susceptible to the prejudicial effect of the cost of clearing-rights. In a non-commercial model the entity behind the library internalizes little of its value and hence it is unlikely to be able to incur substantial cost. As a result many non-commercial projects would not happen or be scaled-down. Second, the open character of the library is especially conducive to the values of cultural-democracy. It insures broad and relatively equal access and distribution of the library's beneficial effects. In other words, *non-commercial, open* digital-libraries promise the largest benefit and are subject to the greatest risk. Within this group decentralized digital-libraries occupy an even more privileged status. Decentralized libraries, in whose creation users play an active role, spur broad participation and a chance for interactivity not just as a side-effect of the library's accessibility but as part of the library's project itself.

Commercial, open libraries constitute a somewhat weaker but still compelling case for an opt-out rule. The commercial character of the project means that the entity behind the library has a chance to internalize a non-trivial fraction of its value and it may be capable of incurring at least some of the associated cost. Accordingly the pernicious effect of this cost may be moderated somewhat. The open character of such libraries, however, still strongly tilts the balance in favor of opt-out. To the extent that open models typically enable libraries to internalize only a small part of their value, inability to meet substantial cost may still be a severe problem. More importantly, just as in the case of non-commercial libraries the non-exclusionary character of open libraries is highly facilitative of the purposes of cultural democracy.

The weakest case for opt-out is in the context of *commercial, exclusionary* libraries. Under such models the library entity internalizes a substantial part of the library's value to its users. The benefit of such libraries from the point of view of cultural democracy is limited. While contributing to the flow of information, exclusionary libraries only enable access and related benefits to those who are willing and able to pay, which is often a limited group. The cost of clearing rights may be a serious

¹⁸⁵ See *supra* text accompanying notes 97-109.

problem that justifies an opt-out mechanism even in this context. Due to the lower risk of frustration and the lower social benefits, however, the case for such a rule is weaker.

In sum, an opt-out rule seems to be an effective and essential mechanism for realizing much of the promise of digital-libraries for the values of cultural-democracy. While some cases may justify a complete exemption from copyright liability, an opt-out rule is a more modest tool that imposes a smaller burden on copyright owners while still creating substantial benefits. Thus commitment to the values of cultural-democracy offers a strong support for an appropriately crafted opt-out regime to govern uses by digital-libraries.

III. What Should Be Done?

The previous section developed two normative justifications for an opt-out rule in relation to digital-libraries. It also outlined some of the important features of an optimal configuration of such a rule, and the factual circumstances in which the case for it would be particularly compelling. There is, however, a gap between abstract theory and practice. Trying to craft actual legal norms for putting the opt-out rule into practice is bound to involve imperfections and tradeoffs. Can a satisfactory, workable regime created nevertheless?

This section suggests two alternatives for creating an opt-out legal regime to govern digital-libraries. The first is incorporation of the opt-out rule into copyright's fair use doctrine. The second is a tailored statutory regime. The statutory regime may also be accompanied by an administrative discretion component. Both alternatives have substantial advantages, but also serious shortcomings. The last part of this section briefly suggests that a hybrid regime that combines the two alternatives may be the optimal solution.

A. The Fair Use Doctrine

The easiest way to implement an opt-out rule for digital-libraries uses is to incorporate it into the existing fair use defense.¹⁸⁶ Under This option the fair use doctrine would be used to create a safe-haven whenever an appropriate opt-out option was given by a digital-library user. In such cases any allegedly infringing use by the digital-library that occurs prior to

¹⁸⁶ 17 U.S.C. §107.

a notice of objection from the copyright owner would be deemed a fair use and hence non-infringing. Alternatively, the existence of proper opt-out option can be treated not as preemptively decisive, but rather as an important factor to be accorded heavy weight when considered alongside the other fair use factors.¹⁸⁷ Under this approach, an opt-out option would not guarantee a fair use finding in all circumstance, but it would tilt the balance in many cases.

Technically, incorporating an opt-out rule into the fair-use doctrine is easy. A court may consider the relevant circumstance either under the first fair use factor—the purpose and character of the use,¹⁸⁸ or as an independent factor, supplemental to the four statutory ones.¹⁸⁹ In addition to this technical smoothness implementing opt-out through the fair use doctrine has several advantages. The most important relevant merit is flexibility. Fair use is an open-ended standard that leaves ample room for court’s discretion in applying the doctrine to new situations and in fine-tuning it to deal with the specific circumstances of cases. This is an important feature because the factual situations of digital-libraries and the justification for an opt-out safe-haven may vary greatly. We have already seen that the number of items used, the character of the notice to copyright owners, and the cost and ease of the opt-out mechanism affect the appropriateness of an opt-out rule.¹⁹⁰ We have also seen that both efficiency¹⁹¹ and cultural democracy¹⁹² considerations form a stronger case for opt-out to the extent that the digital-library is non-commercial and open. Other, more case-specific circumstances would also influence the

¹⁸⁷ The four, non-exhaustive, factors that a court is guided to consider when making a fair use decision are: 1) the purpose and character of the use; 2) the nature of the copyrighted work,; 3) the amount and substantiality of the portion used; 4) the effect of the use on the potential market for or the value of the copyrighted work. 17 U.S.C. §107.

¹⁸⁸ 17 U.S.C. §107(1). For a proposal in this spirit see Mattioli, *supra* note 10, at 38-40.

¹⁸⁹ It is generally acknowledged that the four statutory fair use factors are not exhaustive and that courts are allowed to consider other relevant facts and circumstances when determining a fair use question. See *Campbell v. Acuff-Rose Music Inc.* 510 U.S. 569, 577 (1994); *Castle Rock Enter. v. Carol Pub. Group Inc.*, 150 F. 3d 132, 141 (2nd Cir. 1998); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.05[A] (1997).

¹⁹⁰ See *supra* part II.B.2.a.

¹⁹¹ See *supra* text accompanying note 139.

¹⁹² See *supra* text accompanying note 185.

magnitude of the problem created by an opt-in regime and the extent to which an opt-out rule is the optimal solution. A digital-library of fifty sound-recordings of hit songs from the last five years, the copyright in all of which is registered makes a much weaker case for opt-out than a 200,000 item digital-library of sound-recordings from the twentieth century. The flexibility of the fair use doctrine would enable a court to be sensitive to all of these various circumstances and generate a determination that is optimally suited for the specific case.

In addition, the statutory fair use factors seem to mesh well with the opt-out considerations. Some of the typical considerations relevant for the opt-out question can be classified neatly under one of these four statutory factors. Thus the open or exclusionary character of the library and its commercial nature¹⁹³ can be easily considered under the character and purpose of the use fair use factor.¹⁹⁴ More importantly, the circumstances that go to the opt-out question can be aggregated with those that affect the general fair use analysis. Assume, for example, that a court finds under the fourth fair use factor¹⁹⁵ that the effect of a particular use on the copyrighted work's market would be small. Assume further that in itself this finding makes only a borderline fair use case. Finally, assume that the same court finds that an opt-in regime would create severe transaction costs problems to the relevant digital-library, but is hesitant to grant an exemption on that basis alone. Aggregating the two findings would make a very strong case for the opt-out version of a fair use finding; that is to say, a finding of non-infringement, at least until the moment of objection notice.

Unfortunately, alongside its advantages, the fair use doctrine also suffers from serious drawbacks as a mechanism for implementing an opt-out rule. The source of the meritorious flexibility of fair use—its open-ended and discretionary character—is also the main cause of its

¹⁹³ In order to fit the normative analysis that made the commercial character issue relevant in the first place, the specific meaning given to the term “commercial” in our context would have to be narrower than the expansive interpretations of some courts. See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 68 U.C.DAVIS L. REV. 465, 502-503 (2005).

¹⁹⁴ 17 U.S.C. §107(1).

¹⁹⁵ 17 U.S.C. §107(4).

deficiencies. Most courts today treat fair use as an affirmative defense,¹⁹⁶ protests from some scholars and courts notwithstanding.¹⁹⁷ This means that a user carries the burden of both arguing and establishing that a particular use is fair. Fair use thus has a strong ex-post nature. More importantly, the application of fair use in specific cases is notoriously volatile and unpredictable.¹⁹⁸ A well-known cartoon aptly summarizes this situation. The cartoon depicts a weary climber as he reaches a snow-capped summit and humbly asks a wise-looking monk the ultimate question: “what is fair use?”¹⁹⁹

The situation in practice is not much different from the cartoon. The open-ended fair use standard leaves much room for discretion and for changes from one case to the other. Most courts consciously treat fair use as a case by case determination and reject or doubt the possibility of broadly applicable interpretations.²⁰⁰ The statutory factors that are

¹⁹⁶ See Campbell, 510 U.S. 590; 4 Nimmer, *supra* note 189, §13.05 (with the reservation that “this writer, speaking only for himself, is of the opinion that it [fair use] is better viewed as a right granted by the Copyright Act of 1976, *id.* n. 4). Some courts went further and placed the burden of proof in respect to fair use on the defendant in the preliminary injunction stage. See *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1014 n.3 (9th Cir. 2001).

¹⁹⁷ Glynn S. Lunney, *Fair Use and Market Failure: Sony Revisited*, 82 B.U.L. REV. 975, 989 & n. 70 (2002); *Bateman v. Mnemonics Inc.*, 79 F. 3d 1532, 1542 n. 22 (11th Cir. 1996); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1260 n. 3 (11th Cir. 2001).

¹⁹⁸ Fisher, *supra* note 115, at 1692-95; Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 612 (1997); Pierre N. Leval *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105-07 (1990); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright has in Common with Anti-Pornography Laws, Campaign Finance Reform and Telecommunication Regulation*, 42 B.C.L. REV. 1, 24 (2000); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201, 1215-16 (2005).

¹⁹⁹ A cartoon by Bion Smalley in EDWARD SAMUELS THE ILLUSTRATED STORY OF COPYRIGHT 190 (2000).

²⁰⁰ See *Basic Books Inc. v. Kinko’s Graphics Corp.*, 785 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (The search for a coherent, predictable interpretation applicable to all cases remains elusive, and the common law

supposed to supply some guidance and generate a modicum of predictability are open to many conflicting interpretations that may result in very different applications to specific cases.²⁰¹ Often it seems that these factors are more rhetorical building-blocks for constructing justifications after the fact, rather than rules that determine or even guide the decision.²⁰² Thus fair use decisions are hotly contested and difficult to make and predict. Fair use cases that make it up the judicial hierarchy are often reversed, and sometimes re-reversed.²⁰³ Precedents are of limited utility, both because of the fact-specific nature of the determination and the willingness of many courts to draw fine, sometimes hairsplitting, distinctions from previous cases.²⁰⁴

The result is that the fair use defense is highly unpredictable and a shaky ex-ante support to users. Consequently fair use is particularly ill-

proceeds on a case by case basis); *Campbell*, 510 U.S. 577 (the statute like the doctrine it recognizes calls for a case by case analysis).

²⁰¹ Fisher, *supra* note 115, at 1669-86.

²⁰² David Nimmer, “*Fairest of them All*” and other Fairy Tales of Fair Use, 66 L. & CONTEMP. PROBS. 263 (2003).

²⁰³ For example, all three major fair use cases that arrived to the Supreme Court were overturned at each level of review. Two of these Supreme-Court decisions also involved strong dissenting opinions. See *Sony Corp. v. Universal Studio Inc.*, 464 U.S. 417 (1984); *Harper & Row, Publishers Inc. v. Nation Enter.*, 471 U.S. 539 (1985); *Campbell v. Acuff-Rose Music Inc.* 510 U.S. 569 (1994). For other reversals and split-decisions see Leval *supra* note 199, at n. 9-10.

²⁰⁴ One recent example is *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (D.Cal. 2006) where a federal district court in California found that thumbnail versions of copyrighted images displayed by an image search engine were infringing. The court reached that decision despite the fact that the 9th circuit found in an earlier decision that search engine thumbnails constituted fair use. *Kelly v. Arriba Soft. Corp.*, 336 F. 3d 811(9th Cir. 2003). The district court acknowledged the relevant precedent but distinguished the case before it on two grounds: 1) the defendant, through its banner-ad program, had a commercial relationship with a few of the websites displaying infringing full-size copies of the copyrighted images; 2) there was evidence of an emerging licensing market of thumbnail images for cell-phone use. Whether the district court conclusion was correct is debatable. The important point here, however, is the very narrow factual distinctions on the basis of which it distinguished with no hesitation a superior court precedent, exactly on point.

suites to serve as the basis of an opt-out safe-haven for digital-libraries. Instead of a firm safe-haven that creates certainty, reduces risk and chilling of innovation, a fair-use-based opt-out rule would function as a black box or a lottery ticket. In order to find out whether a specific use is exempted one would have to be willing to go to court after the fact, under conditions of high uncertainty, while running a risk of gigantic statutory damages. Given these conditions, it is easy to imagine the lawyers' advice to clients inquiring whether an opt-out scheme could be relied on to guarantee a fair use exemption. The more cautious lawyers would simply advise against any such reliance. The adventurous ones might provide a 50% of success assessments, accompanied by heavy waivers and qualifications.

Such a result would miss altogether the purpose of the opt-out rule. An opt-out regime can significantly reduce transaction costs and facilitate the benefits of digital-libraries only if it is based on a firm and certain safe-haven. An unpredictable and risky exemption would be of limited use only to very few entities that are willing to take the ex-ante risk and are able to bear the cost of a lengthy and complex litigation. Moreover, those few entities are likely to be those whose models of operation typically promise the lesser benefits from the point of view of cultural democracy. It is the large, rich repeat players who internalize a large part of the social value of their library through commercial and exclusionary models that would, on occasion, be able to take the risk. Smaller, decentralized, non-commercial and open-models entities can be expected to be left out of the game.

The shortcomings of the fair use doctrine as a basis for an opt-out scheme could be significantly ameliorated. Courts could follow a more patterned and predictable approach to fair use, develop broader and more stable categories of protected uses, and refuse to distinguish precedents on the basis of highly specific circumstances.²⁰⁵ Private individuals and organizations in the field could develop statements of "best practices"—consensual guidelines for fair use by digital-libraries. If developed within the proper procedural settings, such guidelines may fare better than the controversial Guidelines for Classroom Copying²⁰⁶ in achieving two

²⁰⁵ See, e.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

²⁰⁶ Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals, H.R. Rep. No. 94-1476, at 68-70 (1976). The Guidelines for Classroom Copying

goals: provide practical guidance and predictability to players in the field; and guide courts as a source of bottom-up customary practices that inform the legal standard of fair use.²⁰⁷ However, absent such developments, and particularly given the current typical judicial approach, the defects of fair use as a vehicle for opt-out are substantial. The unpredictability and the ex-post discretionary nature of the present doctrine make it a highly unsuitable foundation on which to build a proper opt-out regime for digital-libraries.

B. A Statutory Safe-Haven

1. A Pure Statutory Scheme

An opt-out safe-haven could be implemented through a statutory scheme specifically tailored for that purpose. This mechanism is not foreign to the Copyright Act. Section 512(c) that creates safe-havens to Internet service providers operating as hosts is, in effect, an opt-out scheme.²⁰⁸ Although the rationale of that section is somewhat different than in our case, its statutory safe-havens in conjunction with the “notice and take down” provisions,²⁰⁹ create an exemption from monetary copyright liability, absent a notice of objection from the copyright owner. A statutory scheme for digital libraries would have a similar structure: it would define conditions under which digital libraries enjoy an exemption from copyright liability and would stipulate the exemption upon

have been criticized as creating a chilling-effect due to their transformation from an intended minimum to a de facto maximum of allowed fair use. See, e.g., Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 162-63 (1998); Gregory K. Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999).

²⁰⁷ See Fisher & McGeeveran, *supra* note 136, at 103-106. A recent example of an effort to develop a functioning best practices statement is the effort of the Center for Social Media in the field of documentary films. See http://www.centerforsocialmedia.org/resources/fair_use.

²⁰⁸ 17 U.S.C. §512(c).

²⁰⁹ The “notice and take down” provisions stipulate the safe-haven upon maintaining a proper agent for purposes of notices from copyright owners and prompt compliance upon the reception of such a notice. See 17 U.S.C. §§512(c)(1)(A)(iii), 512(c)(1)(C), 512(C)(2)-(3).

maintaining a satisfactory mechanism for receiving notices of objection and upon compliance with such notices.

One potential advantage of a statutory scheme is the potential of avoiding ex-ante unpredictability and its prejudicial effect.²¹⁰ In order to avoid replicating the pitfalls of the fair use doctrine the statutory safe-haven will have to be located close to the rule end of the standard/rule continuum.²¹¹ In other words, it would have to include not vague and open-ended criteria, but rather bright-line rules: exact definitions of specific factual conditions that give rise to concrete legal outcomes. The conditions for the safe-haven should function as proxies for capturing the circumstance that make opt-out the optimal solution under either the efficiency or the cultural-democracy justification. Thus there should be a threshold of a minimal number of items used,²¹² as well as requirements of proper and effective publication of the use by the library,²¹³ and of appropriate, easy and non-elusive opt-out channel.²¹⁴ It may also be appropriate to limit the safe-haven to libraries that use non-exclusionary models, since these are likely to encounter the more serious difficulties and promise the larger social benefit.²¹⁵ Categorically excluding commercial uses is more problematic. Although commercial models may entail somewhat smaller transaction costs problems,²¹⁶ a sweeping exclusion may leave out many digital-libraries that still encounter serious difficulties and promise substantial benefit. Even if commercial uses are excluded, the definition of this term has to be drawn narrowly, as to avoid

²¹⁰ See *supra* text accompanying notes 198-204.

²¹¹ The literature on the jurisprudential rule/standard distinction is immense. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 185 (1976); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE* (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

²¹² The more numerous the items used the more likely it is that an opt-out rule is preferable. See *supra* part II.B.2.a.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *supra* text accompanying notes 139, 185.

²¹⁶ See *supra* part II.B.2.a.

sweeping in most of the relevant entities and pulling the rug under the entire safe-haven scheme.²¹⁷

The second major advantage of a tailored statutory scheme is the fact that it can create facilitative, administrative mechanisms. The most significant mechanism of this kind is a central register. The reader would remember that a major stipulation for making an opt-out regime a workable solution was the existence of an inexpensive and easy way for digital-libraries users to publish the fact of the use of works and for copyright owners to learn of it. Cheap, accessible publication minimizes the monitoring cost, the total transaction cost generated, and the portion of this cost which is imposed on copyright owners.²¹⁸ A central register is a familiar and proven device to achieve exactly this result. Given proper public announcement and accessibility, it may be an easy task for copyright owners to learn of projects of the order of magnitude and notoriety/fame of Google's Print Library project and to find out whether their work is included. It might be much more expensive and difficult to monitor for dozens of potential uses many of which may be much more marginal and less known. A register provides a central accessible location where digital-library uses can be published by users and monitored by copyright owners.

In order to make the register an effective device, the safe-haven for digital-libraries should be conditioned upon registration of all used works. Monitoring would simply involve checking the opt-out register. If a copyright owner's work is not registered, the highly reliable conclusion is that there is no digital-library use protected by the safe-haven taking place. Both registration by digital-libraries and monitoring the register by copyright owners can easily be made available via the Internet. A digital-library user would simply have to pay a small fee and go through an on-line registration process. A copyright owner would simply have to use a search function on the Copyright Office website.²¹⁹ Moreover, given an

²¹⁷ For the problem of an overbroad definition of "commercial use" see *supra* note 193.

²¹⁸ See *supra* part II.B.2.a.

²¹⁹ Note that the register would be most effective in regard to works that are easily identifiable by convention-based textual metadata. Thus for example, a digital search by anyone familiar with the title or author of a book would quickly bear fruit if the database contains these two items of metadata about the particular book. It would be a more complicated task in regard to an image or sound recording whose registration may not contain

appropriate architecture of the system, software agents can automatically make periodic checks of the register and alert copyright owners.²²⁰ Monitoring can be as effortless as installing a simple application on a computer connected to the Internet and instructing it to periodically search the Copyright Office database for a particular title.

In short, a rule-like statutory safe-haven combined with an efficient register promises to remedy the problem of ex-ante uncertainty and create conditions for optimizing the opt-out process. Unfortunately, such a scheme would not be free from shortcomings. The most important difficulty would be the rigidity produced by bright-line statutory rules. The exact, discretion-minimizing statutory phrasing, required to avoid the unpredictability problem, would produce substantial underinclusion—factual situations that fit the safe-haven’s rationale but are not encompassed by it, and overinclusion—factual situation that are encompassed by the safe-haven contrary to its rationale. The tradeoff

such exact and conventional metadata. Even in those more complicated cases, however, digital searches of a central database may be far from useless. Methods for searching and identifying information such as a known image or sound, with no reference to metadata are constantly being developed and perfected. It does not seem unfeasible that in the near-future one would be able to effectively search for a particular image or sound-recording in a database that contains hash-values representing actual informational items rather than metadata. A hash value can be thought of as a unique fingerprint that represents an informational item. A hash value is created by an algorithm called a hash function. Given a database of hash values and access to the hash-function used to create it, it is possible to effectively search and retrieve data such as sound and image with no reference to metadata. See Lesk, *supra* note 85, at 44-48, 100-107. The availability of reliable search and retrieval systems of this kind at reasonable cost seems to be close at hand. Thus for example, private enterprises like Shazam.com already offer consumers song recognition services based on such technology. See www.shazam.com.

²²⁰ Software agents are computer programs that facilitate user choice and action. Among, other things, software agents can be used to retrieve information and make decisions according to criteria predetermined by the user. See Christopher Fry et al, *Static and Dynamic Semantics of the Web*, in *SPINNING THE SEMANTIC WEB: BRINGING THE WORLD WIDE WEB TO ITS FULL POTENTIAL* 382-83 (Dieter Fensel et al eds., 2005); Tim Berners-Lee, James Hendler and Ora Lassila, *The Semantic Web*, SCIENTIFIC AMERICAN (May, 2001).

between ex-ante certainty and over and underinclusion in crafting legal norms is well known.²²¹ What is particularly troubling is that our case bears many of the typical characteristics that make the inaccuracy of rules problem especially acute. The applications of the opt-out norm are likely to be numerous—a fact that ordinarily would supply some support for a rule rather than a standard.²²² However, the individual applications are likely to govern highly heterogeneous factual patterns. Opt-out determinations are very context-sensitive and may be materially affected by even slight variation in circumstances. Under such conditions, numerous applications notwithstanding, the deficiencies of rules tend to be particularly strong.²²³ Moreover, the determination of when and under which conditions an opt-out norm is optimal is complex and dependent upon many factual variables. It also requires much relevant information. These traits make it very hard and costly to craft rigid statutory categories that would serve as reasonable proxies.²²⁴ As a result, the rate of over and underinclusion is likely to be high and the regime might miss its mark altogether: often granting opt-out exemptions with no justification and failing to do so when opt-out is optimal.

This problem is somewhat less acute from the perspective of cultural-democracy compared to that of efficiency. The latter involves a strict comparison of costs and benefits and thus it would be particularly ill-served by a norm that often misses the exact mark. The former criterion is less closely dependent upon strict minimization of total social cost: due to the benefits to other values it may justify a statutory opt-out regime, despite the fact that such a regime frequently fails the strict minimization

²²¹ See Kennedy *supra* note 211, at 1695; Schauer, *supra* note 211, at 31-34. For a refined version of this point and reservations see Kaplow, *supra* note 211, at 586-596.

²²² Rules are preferable when applications are numerous because rules typically have high promulgation cost and low application cost while standards have low promulgation cost and high application cost. Kaplow, *supra* note 211, at 563, 579-586.

²²³ Heterogeneous fact-patterns undercut the advantages of rules because in such cases seemingly numerous applications are really aggregates of subcategories of applications, each containing relatively few cases and requiring different arrangements. Under such circumstances the value of a detailed ex-ante resolution by a rule is limited. See Kaplow, *supra* note 211, at 563-64; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 74-75 (1983).

²²⁴ Diver, *supra* note 223, at 79.

of cost test. Still, the statutory rule may be so grossly inaccurate as to lose much of its appeal even in the eyes of cultural-democracy proponents. Finally, the obvious fact that the rule-standard choice is not a binary one should be pointed out. It is possible that along the continuum that stretches between strict rules and open-ended standards a reasonably satisfactory, although not free from imperfections, balancing point could be found.

2. A Variation on the Theme: A Regulatory Scheme

It seems that the attempt to implement an opt-out regime is caught between the Scylla of unpredictability and the Charybdis of inaccuracy. A third institutional option, which is a variation on the statutory regime, may offer a partial way out. Instead of directly drawing the lines of the safe-haven, a statutory scheme can define its contours in broad strokes and delegate the power to grant exemptions in specific cases to an administrative authority. Adding such an administrative discretion component would be in line with the general modern trend toward “regulatory copyright.”²²⁵ The discretion would not be complete. The statutory scheme would define in general terms the situations where an opt-out safe-haven should be granted and it may provide guidance to the administrative authority on how to make its decision. There would be, however, some discretion left in the hands of the administrative agent to apply the safe-haven and tailor its specific conditions.

The most significant merit of an administrative discretion competent has little to do with the commonly mentioned institutional advantages of administrative agencies compared to the legislature.²²⁶ The

²²⁵ Joseph O. Liu, *Regulatory Copyright*, 83 NORTH CAROLINA L. REV. 87 (2004). The advantages of an administrative scheme detailed below correspond to some of the major reasons Liu identifies for the general shift toward regulatory copyright. Liu mentions the increased complexity and diversity of the social and economic context governed by copyright and the increasing value of relevant markets that justifies the cost of more detailed and context-attuned arrangements. *Id.*, at 129-130. As explained below, one of the major advantages of an administrative safe-haven scheme is the ability to optimize the solution according to heterogenous and complex fact patterns. See also WILLIAM FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 184-6 (2004).

²²⁶ See generally1 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 7-14 (3d ed. 1994).

most likely administrative agents in our case—the Copyright Office or the Librarian of Congress—do not currently seem to have superior relevant expertise by comparison to Congress. Nor are they more likely to draw on the services of experts. These actors also do not seem to have significant relative advantages in terms of the time and resources they can devote to safe-haven determinations. To be sure, given adequate institutional design and resources, these characteristics could be changed, but even in the absence of such change an administrative agency still has an important relative advantage in our context. The source of this advantage is the point on the timeline in which the administrative decision takes place. Like the legislature producing rules, an administrative agent would make its determination *ex-ante*, before the use by the digital-library takes place. This avoids the problems of unpredictability, the risk assumed by digital-libraries under conditions of uncertainty, and the resultant chilling effect. The administrative determination is even more certain than legislative rules: it explicitly governs a specific case, leaving no room for doubt whether a particular use is protected by the safe-haven. At the same time, like an *ex-post* judicial decision an administrative determination can be sensitive to the circumstances of each case and take into account all relevant contextual factors. An administrative agency may also be empowered to tailor the terms of the safe-haven to the specific case. In a complex and highly heterogeneous context like that of digital-libraries, where subtle differences may change the optimal legal treatment, this flexibility is very beneficial. As a result of such flexibility the administrative decision would avoid the over and underinclusive character of legislative rules and tailor the optimal arrangement for each case.

An administrative-discretion-based opt-out scheme seems to combine the advantages of the fair use alternative and those of the pure legislative option. It can create *ex-ante* certainty for users, while minimizing over and underinclusiveness and enabling per-case optimization.²²⁷ This scheme too, however, is not free from difficulties. First, optimal administrative decisions as to granting opt-out exemptions and tailoring its conditions requires substantial detailed information. It is far from clear that the currently relevant administrative agents are well equipped for obtaining and processing such information.²²⁸ Making and

²²⁷ Liu mentions certainty and context-tailored arrangements as two of the main benefits of “regulatory copyright.” Liu, *supra* note 225, at 133-34. He also calls for more flexible statutory schemes that allow administrative agency involvement. *Id.* at 138-9, 147-61.

²²⁸ Liu, *supra* note 225, at 136.

operating the institutional changes required to rectify this problem may involve substantial administrative cost. Second, and more importantly, an administrative process, especially one that involves ad-hoc tailored arrangements runs the risk of becoming long, complex, hard to master and expensive for the regulated.²²⁹ This possibility is particularly troubling because it is likely to have a disproportional effect on small, non-commercial and open-models digital-libraries. Such entities are likely to be less well-financed, unable to draw on effective professional advice in order to navigate bureaucratic and legal labyrinths and unlikely to enjoy the advantages of an experienced repeat player. For such digital-liberalities, which are exactly those that make the best case for opt-out, the administrative scheme is likely to stay theoretical: locked behind inaccessible barriers of cost and procedure. Finally, an administrative agency may also suffer from the problem of “capture,” at least in a soft sense of this term.²³⁰ The danger is not so much that of the regulated taking over the regulator, but rather the existence within the administrative agency of institutional culture and norms which are not conducive to the purposes of the opt-out scheme. To the extent that the opt-out safe-haven is seen by the administrative agents as an extreme and odd exception, to, the extent, in other words, that the “nature of copyright” spirit is prevalent the discretionary administrative system may be biased against digital-libraries and fail to be effective.²³¹

There are partial remedies to these problems. The administrative system has to be consciously designed as to ensure a fast and simple procedure, low-cost to users and no need to resort to expensive professional advice. The statutory scheme could contain firm and clear definition of its purposes and constrain, to some extent, the administrative discretion. An appeal procedure, though it would be probably rarely used, may be created as another disciplining mechanism. At the end, however, the problems of administrative discretion will not be completely

²²⁹ *Id.*, at 135.

²³⁰ The term “capture” is used in this context to describe a situation in which a regulating agency comes to favor and serve the interests of the entities it is supposed to regulate. See, e.g., RICHARD J. PIERCE ET. AL., ADMINISTRATIVE LAW AND PROCESS 18-19 (4th ed., 2004).

²³¹ On the role of cultural and ideological biases in distorting the administrative process see JERRY L. MASHAW ET. AL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS 45 (5th ed., 2003) and sources cited there.

eliminated, and they should be carefully considered when this option is compared to the two other institutional alternatives.

C. A Hybrid

It should be briefly mentioned that the choice between the fair use doctrine and a statutory scheme (including its administrative variant) does not have to be a strict either/or decision. The two legal mechanisms could operate side by side. The strategy of combining exact rules and open-ended standards is familiar and there are indications that it may be optimal in our case. The technical way of achieving this outcome is to create a statutory safe-haven that explicitly preserves all other defenses and exemptions including fair use.²³² Courts would be left free to apply the fair use defense in cases that fall outside the ambit of the statutory safe-haven.

Substantively, there are good reasons that support such a hybrid regime. The fair use option, despite its deficiencies, would function as a corrective mechanism that can be operated whenever the shortcomings of the statutory regime come into play. While in most cases the statutory arrangement would govern particular cases, the flexibility of the fair use standard would operate on the margin to correct the underinclusiveness of rules. In those cases where the inaccuracy of the statutory rules causes the safe-haven to be denied although it was optimal to apply it, a fair use finding by a court would achieve that outcome. To be sure, the effectiveness of the fair use doctrine would be limited, for all the reasons explained above.²³³ Nevertheless the doctrine can be relied on to correct the omissions of statutory rules, at least in the more glaring and obvious cases. Similarly, the value of fair use precedents in this field would be limited, due to the tendency of courts to draw hairsplitting distinctions. Nevertheless, precedents, once created, would still establish a small, relatively safe zone for future uses that fall outside the statutory safe-haven but bear close resemblance to already decided cases. In sum, although the fair use doctrine is not a complete remedy to the deficiencies

²³² A recent decision reached a similar outcome in regard to section's 512 safe-havens even in the absence of an explicit statutory stipulation. See *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544(4th Cir 2004) (An online service provider, hosting materials, was exempted from copyright liability on the basis of general copyright principles, irrespective of its eligibility for the statutory safe-haven).

²³³ See *supra* text accompanying notes 196-204.

of a statutory regime, a combination of the two seems to be the optimal alternative that minimizes imperfections.

IV. Conclusion

Libraries which are not nibbled by a few but consumed by and empower the many are within our reach. A more democratic, egalitarian and free society that such libraries would cultivate is within our grasp. We need to create the conditions that will enable the business-models, technological systems and social interactions needed to achieve these goals. This article argued that an opt-out structure to copyright entitlements in this context is an important part of creating a legal environment conducive to such developments. The nature of property or of copyright is not an impediment for such a legal structure. Copyright, has no nature that one can get backwards. The real questions are about the social purposes one seeks to promote, and the legal architecture which is best suited for achieving these purposes. The foregoing analysis suggested that if one adopts the traditional economic approach to copyright, and even more so if one is persuaded by the vision of cultural democracy, an opt-out scheme for digital-libraries is an attractive legal device. Despite the unavoidable imperfections, a reasonable opt-out scheme could be put into practice in this area, using familiar legal doctrines and institutional tools. Such a regime would go a long way in helping digital-libraries to flourish. A technicality, the lawyers among us will be happy to hear, can take us at least some of the way toward utopia.