

INFORMATION RIGHTS AND INTELLECTUAL FREEDOM

Julie E. Cohen

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Abstract

Intellectual freedom requires a sufficient degree of autonomy for individuals with respect to information flows to, by, and about them. The absence of state censorship is a necessary but not sufficient condition of intellectual freedom; private rights in information also may reduce informational autonomy to an unacceptable degree. Current legal and technological rules that govern information ownership, access, and use increasingly have this effect. Promoting intellectual freedom requires reexamination of the legal categories that are used to structure information rights and policy, and redefinition of those categories to promote both greater public access to information and stronger informational privacy protection for individuals.

1. Introduction

It is commonly argued that strengthening private intellectual property rights in information promotes intellectual freedom, but that strengthening informational privacy protection undermines that freedom. Western political theory predicts, and history confirms, that the most important legal and material condition of intellectual freedom is state restraint. The law must forbid the state from abridging the freedoms of expression and belief, and the state must honor the law. An oft-asserted corollary, however, is that the law should grant strong intellectual property protection to encourage the private production of learning unfettered by state control.¹ It is presumed that private restraints on access to and use of information rarely will constitute obstacles to intellectual freedom, and that in any case the state cannot legitimately interfere with most such private arrangements. A second corollary is that the state generally should not forbid the gathering and sharing of true information about the world, including true information about individuals. It is presumed that these sorts of restraints are more likely to undermine intellectual freedom than to promote it.²

Recent changes in the rules that govern access to and use of information in digital networked environments cast doubt on both presumptions. A combination of technology and strengthened legal protection enables vendors of digital content to exert tighter control over access to and use of that content, and enables trademark owners to exert tighter control over critical and even discursive references to their names, marks, and products. This increased control over inputs to creation and communication — and thus

¹ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556-60 (1985); MARCI HAMILTON, “The Historical and Philosophical Underpinnings of the Copyright Clause,” *Benjamin Cardozo School of Law Occasional Papers in Intellectual Property*, 1999, pp. 9-12.

² See, e.g., SOLVEIG SINGLETON, *Privacy as Censorship in the Private Sector* (Washington, D.C.: Cato Institute, 1998); EUGENE VOLOKH, “Freedom of Speech, Information, Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You,” *Stanford Law Review* 52 (2000): 1049-1124.

over social “meaning-making processes”³ — in turn seems likely to concentrate ownership of culture in the hands of large producers of standardized, mass-market content. Meanwhile, the terms and conditions of access to “proprietary” content increasingly require individuals to surrender significant amounts of personal information — information which in turn becomes the proprietary content of the entity that collected it, and which is used to create reductive profiles that channel standardized information back to individuals.

These new dynamics of the digital environment are likely to produce an information society characterized both by less variety and diversity of information and by less agency for individuals with respect to information, whether directed to, by, or about them. These conditions do not square with traditional assumptions about intellectual freedom, which presume a rich substrate of publicly accessible information and a substantial degree of autonomy, and of anonymity, for both authors and speakers, on the one hand, and readers and listeners, on the other. Preserving intellectual freedom in a networked information environment therefore requires reconsideration of arguments that equate intellectual freedom with strong intellectual property rights and weak informational privacy protections.

This article starts from the premise that intellectual freedom is a desired goal for a good and politically legitimate society, and undertakes three tasks. First, section 2 identifies the conditions that are necessary for intellectual freedom to exist and flourish. Section 3 evaluates how well (or poorly) current information law and practice create these conditions. Finally, section 4 examines the legal and philosophical conceptions of ownership, consent, and freedom of expression that have led to the rise of the current regime, and argues that these conceptions need to be rethought.

2. The positive conditions of intellectual freedom

Philosophically, the problem of intellectual freedom is a subset of the problem of autonomy. Autonomy, broadly speaking, concerns decisional independence with respect to all of life’s choices. Intellectual freedom, or informational autonomy, concerns decisional independence with respect to choices about information, thought, and expression. Inquiry into the conditions of intellectual freedom raises the two central questions that have occupied students of autonomy: Is intellectual freedom defined purely (or primarily) in negative terms, as an absence of overt restraint, or does an acceptable definition incorporate positive requirements? Is the test of intellectual freedom subjective, or are there objective, externally measurable preconditions? Here, I shall argue that intellectual freedom has positive and objectively measurable conditions, and that they relate to each of the three main directions (or dimensions) in which information flows: to, from, and about individuals.

The original account of autonomy supplied by liberal philosophy and political theory is a purely negative one. From Kant to Rawls, philosophers have defined autonomy in terms of the presence or

³ NIVA ELKIN-KOREN, “Copyright Law and the Social Dialog on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators,” *Cardozo Arts & Entertainment Law Journal* 13 (1995): 345-411, pp. 399-400.1994, pp. 399-400.

absence of overt restraint on willed conduct.⁴ Many theorists, however, have recognized that a purely negative account of autonomy is insufficient in two respects, both of which concern preconditions for autonomy that elites may be inclined to take for granted. First, autonomy requires a degree of freedom from resource and opportunity constraints that are felt in the daily lives of many human beings. Second, autonomy presumes the capability to make choices that promote one's own well-being. Thus, some philosophers have articulated a diffuse theory of human flourishing that identifies both basic human needs (such as housing) and a basic level of critical capability as essential requisites.⁵ Other philosophers have attempted to identify a narrower and more abstract set of conditions. Thus, for example, Joseph Raz identifies three conditions: mental capacity (including critical and self-critical ability), sufficient options, and independence of coercion or manipulation.⁶

Positive accounts of autonomy are not without difficulty, however. In particular, attempts to specify positive requirements or conditions for the exercise of autonomy have drawn charges of paternalism and worse. At the same time, it is difficult to quarrel with the conclusion that the autonomy enjoyed by, for example, people living in abject poverty may differ qualitatively from that enjoyed by the more fortunate. The difficulty lies in moving from the abstract and relative to the particular: in specifying when someone is autonomous, and in making respect for others' decisions turn on whether this threshold has been reached.

Richard Fallon complicates matters further by identifying two strands within each vision of autonomy: an objective, or "descriptive," strand that focuses on externally measurable constraints and a subjective, or "ascriptive" strand that focuses on perceived constraints.⁷ We evaluate freedom in part by whether we experience constraint, and as a result may resist mandatory measures intended to promote descriptive or de facto autonomy. We cannot evaluate autonomy solely by reference to this subjective measure, yet we also cannot ignore it. Perceived constraints on autonomy matter to individuals, and must be taken seriously.

Two important and related aspects of autonomy emerge from this debate.⁸ First, on either a positive or a negative view of autonomy, autonomy is a matter of degree. Except on the thinnest of definitions, we cannot simply say that an individual is or is not an autonomous actor or chooser. Rather, autonomy is a

⁴ See, e.g., ISAIAH BERLIN, *Four Essays on Liberty* (Oxford University Press, 1969). 1969.

⁵ MARTHA C. NUSSBAUM, "Aristotelian Social Democracy," in *Liberalism and the Good*, ed. R. BRUCE DOUGLASS, GERALD M. MARA, and HENRY S. RICHARDSON (New York: Routledge, 1990); MARTHA C. NUSSBAUM, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism," *Political Theory* 20 (1002): 202-245; 1990; MARGARET JANE RADIN, *Contested Commodities* (Cambridge, Mass.: Harvard University Press, 1996), pp. 54-78.

⁶ JOSEPH RAZ, *The Morality of Freedom* (Oxford: Clarendon Press, 1985), pp. 369-378.

⁷ RICHARD FALLON, "Two Senses of Autonomy," *Stanford Law Review* 46 (1994): 875-905, pp. 876-878. 1994, pp. 876-878.

⁸ For an argument along similar lines, see YOCHAI BENKLER, "Siren Songs and Amish Children: Autonomy, Information, and Law," *New York University Law Review* 76 (forthcoming 2001; draft article on file with the author).

function of the extent to which circumstances (including law) permit or prohibit choice, and of the extent to which the individual perceives his or her choice to be constrained by exogenous factors.

Second — and this is where positive and negative visions of autonomy collide — autonomy is contingent, but only to a degree, and may not be experienced as contingent at all. Every individual is to an extent a product of his or her environment, but only to an extent; there remains scope (though how broad or narrow is disputed) for conscious choice. Additionally, individuals may be disinclined to understand their own choices as (wholly or even partly) socially constructed. Not coincidentally, this is also the point at which the modern/liberal archetype of the autonomous individual collides with postmodernism.⁹ Theories of the autonomous self and theories of the radical contingency of meaning have yet to arrive at a satisfactory (postliberal?) rapprochement. This article posits that the solution lies partly in evolving legal rules designed to preserve sufficient scope, or “breathing space,” for conscious choices about consumption and use of the primary modality of social construction: information.¹⁰ To accommodate the paradox of contingent autonomy, and avoid the paternalism trap, a legal regime concerned with promoting autonomy should focus on identifying and creating the second-order conditions, or social parameters, most likely to help individuals attain it.¹¹

How might these insights and disagreements about the nature of autonomy shape our understanding of the conditions required for informational autonomy, or intellectual freedom? Three interrelated conditions emerge. To determine whether current information law and practice further or frustrate intellectual freedom, we must consider each of the ways that an individual interacts with the information environment — as a recipient of information, as an originator of information, and as the subject (or object) of information communicated between others.

2.1 Information flows to individuals

Just as autonomy requires sufficient options to constitute a domain for the exercise of will and choice, intellectual freedom requires sufficient options to constitute a domain for the exercise of will and choice with respect to information. This in turn requires at least a minimal diversity and variety of information flowing to individuals. As the foregoing discussion suggests, however, it is not enough simply to say that a diversity of information sources must exist. To take an easy example, if a government keeps dissidents and their writings under lock and key, or behind a digital firewall, individuals within that society will be deprived of

⁹ For helpful discussions of the unresolved interplay between modernism and postmodernism, see ALBERT BORGMANN, *Crossing the Postmodern Divide* (Chicago University of Chicago Press, 1992) and JEREMY RIFKIN, *The Age of Access* (New York: Jeremy P. Tarcher/Putnam, 2000) pp. 186-217.

¹⁰ Compare the contribution of Gijs van Oenen in this volume.

¹¹ In a postmodern era, the problem of paternalism cannot be completely avoided. Information constructs meaning, and societies make choices about required exposure to particular sorts of information all the time. That, however, is a subject for another day.

access to diverse points of view. But there are other sorts of restrictions as well. We also must consider the ways in which information is accessed and experienced by the individuals whose intellectual freedom it is expected to advance.

The extent to which informational options are perceived as real ones is a function of the conditions of access, and of the information that the individual has about them prior to access. Information cannot advance intellectual freedom if people do not know of its existence, or cannot easily learn about it once they learn that it exists. The rules governing information ownership and access must enable individuals to identify and locate relevant or desired information, and must facilitate informed decisions about whether to read further. For certain kinds of information, or for certain kinds of uses, informed decisionmaking may require the ability to browse the information directly.

Intellectual freedom also depends upon the extent to which one attained at least a minimal capacity for processing the available information, and for maintaining sufficient skepticism or critical distance from it.¹² To a degree, the ready accessibility of a diversity of information promotes these values; critical capability is more easily acquired via exposure to varied content and divergent perspectives. However, the attainment of critical capacity and independence of thought may require more. The rules governing information ownership and access must not lend themselves indirectly to the construction of orthodoxies. The information that is readily accessible to individuals must include the work of critics and parodists.

Finally, an autonomy-centered regime of information law and policy should seek to ensure an ongoing, sustainable diversity of information. It is not enough to say that an accessible diversity of information sources exists now. Societies change, and so do the intellectual, artistic, and cultural currencies within them. Other things being equal, a regime that contains a diverse variety of sources and viewpoints will produce a more diverse variety of creative output than a regime in which only limited, standardized information exists. As authors, literary critics, and intellectual property scholars — and tyrants and political propagandists — have recognized for centuries, human creativity builds on what has gone before it. But the rules that govern information ownership and access also affect the production of new information. Different rules may yield different changes.

Identifying the best way to ensure an ongoing diversity of both creators and content requires an inquiry into the process of creation, and thus partially anticipates the subject of the next section. Here, however, we are concerned with the aggregate output of the creative processes within society. Recent work in the economic theory of copyright suggests that the best way to ensure that this output remains diverse is an incompletely propertized system that allows some uncompensated use of preexisting information. Requiring compensation for every input to the creative process disadvantages both certain types of creators and certain types of content. A regime of information law that allows less uncompensated use will increase the cost of creative inputs and thus will confer a substantial advantage on existing intellectual property owners. Such a regime will favor large media conglomerates that produce large

¹² In Raz's definition, these concerns are reflected in the first and third factors, mental capacity and independence of manipulation. RAZ, *Morality of Freedom*, 369-378.

amounts of standardized, mass-market content and can reuse their own content at no cost.¹³ In addition, a system of rules that allows owners to appropriate more of the benefits that their works generate, and requires second-comers to internalize the full costs of their uses, systematically disfavors certain types of creation. In particular, such a regime will underproduce information goods that generate diffuse social benefits, because creators of these information goods will not be able to recover their costs in the market.¹⁴ It follows that an information regime concerned with sustainable diversity should safeguard at least a minimal degree of uncompensated use of inputs to the creative process.

2.2 Information flows from individuals

Intellectual freedom requires sufficient agency for individuals not only as readers and listeners, but also as speakers and writers. Once again, this agency requires more than the absence of direct government censorship. Because human creativity is cumulative, we must consider both the legal rules governing access to existing information and the rules governing (re)use of this information. Thus, the problem of fostering autonomous creation by individuals implicates the same factors that bear on autonomous reading: the conditions of access, the development of critical capacity, and the cumulative nature of human creativity.

First, the nature of the creative process requires both planned and fortuitous access to information. Because creativity is cumulative and iterative, a sound information policy must make a variety of information sources available. Yet creativity is also unpredictable, both substantively and temporally.¹⁵ One cannot tell when inspiration will strike or what form it will take, and the creative output of authors and speakers is in part a function of cumulative exposure to a lifetime's worth of information. Therefore, the pathways for searching and browsing between and among available information sources must be flexible and open-ended.

Second, intellectual freedom requires critical capacity and independence of manipulation. The point is the same here as above: a legal regime that seeks to foster expression and creativity must afford the freedom to criticize.

Finally, creativity requires the freedom to use and reuse inputs that are basic building blocks of communication and "meaning-making" within society. Here, the argument is slightly different than the one

¹³ YOCHAI BENKLER, "Free as the Air to Common Use: First Amendment Constraint on the Enclosure of the Public Domain," *New York University Law Review* 74 (1999): 354-446, pp. 400-412; YOCHAI BENKLER, *Intellectual Property and the Organization of Information Production* (1999); working paper, available at <<http://www.law.nyu.edu/benkler/Ipec.pdf>>).

¹⁴ JULIE E. COHEN, "Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management,'" *Michigan Law Review* 97 (1998): 462-563, pp. 542-551; MARK A. LEMLEY, "The Economics of Improvement in Intellectual Property Law," *Texas Law Review* 75 (1997): 989-1084, pp. 1056-1058; LYDIA PALLAS LOREN, "Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems," *Journal of Intellectual Property Law* 5 (1997): 1-58, pp. 49056.

¹⁵ COHEN "Lochner in Cyberspace," pp. 556-557; JULIE E. COHEN, "Copyright and the Perfect Curve," *Vanderbilt Law Review* 53 (2000): 1799-1819, pp. 1816-1817.

above about aggregate creative output — that argument is instrumental, and this one is not — but its ultimate thrust is the same. Promoting the autonomy of individuals as creators requires a public domain, and also requires some latitude for use of others' expression — for example, in the context of criticism or comment.¹⁶

2.3 *Information flows about individuals*

Finally, intellectual freedom depends on the degree of informational privacy that individuals enjoy. The relationship here is indirect and less intuitively obvious. On a purely negative view of autonomy, mere communication about individuals poses no threat, because it does not require the individual who is the subject of communication between others to think or act differently.¹⁷ Yet to the extent that this argument posits a clear dichotomy between “sticks and stones” on the one hand and “mere words” on the other, it is too simplistic. Social practices concerning the collection and use of personal information affect intellectual freedom not in any direct or prohibitive sense, but because they construct the ways that individuals see each other and also the ways that individuals see themselves. The widespread availability of detailed information about an individual's personal and intellectual habits enables others to form distinct opinions and preconceptions about him or her. This information can be used, in turn, to structure the universe of information and opportunities presented to (or withheld from) the individual, creating feedback loops that reinforce some choices and undermine or discourage others.

These practices of social construction have direct bearing on individual decisions regarding both consumption and creation of information. The prospect of external scrutiny of reading habits may cause some individuals to forego the opportunity to experiment with novel or unorthodox beliefs. Informational privacy shields this process of experimentation with different personas, tastes, and ideas.¹⁸ Similarly, there will be less variety and diversity of creative output by individuals whose every action and thought are recorded, or who believe that they are subject to this sort of ongoing monitoring. Informational privacy (or its absence) also affects the attainment of critical capacity and independence of thought in decisions about

¹⁶ On the public domain, see BENKLER, “Free as the Air” and JESSICA LITMAN, “The Public Domain,” *Emory Law Journal* 39 (1989): 965-1023. On the use of other content, see ROCHELLE COOPER DREYFUSS, “Expressive Generosity: Trademarks as Language in the Pepsi Generation,” *Notre Dame Law Review* 65 (1990): 397-424 and NEIL WEINSTOCK NETANEL, “Copyright and a Democratic Civil Society,” *Yale Law Journal* 106 (1996): 283-387.

¹⁷ See, e.g., JEFFREY ROSEN, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000), pp. 166-167.

¹⁸ ANITA ALLEN, “Coercing Privacy,” *William and Mary Law Review* 40 (1999): 723-757, pp. 754-755; JULIE E. COHEN, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace,” *Connecticut Law Review* 28 (1996): 981-1039, pp. 1004-1007; JULIE E. COHEN, “Examined Lives: Informational Privacy and the Subject as Object,” *Stanford Law Review* 52 (2000): 1373-1438, pp. 1424-1426; SETH F. KREIMER, “Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law,” *University of Pennsylvania Law Review* 140 (1991): 1-47, pp. 59-71.

both consumption and creation of information. A degree of freedom from external scrutiny enables at least partial avoidance of the practice of classification and the social construction that classification imposes.¹⁹

3. Intellectual freedom in the new information economy: Evaluating trends

Ideally, the legal and technical rules governing information ownership, access, and use should promote intellectual freedom, or informational autonomy, with respect to information communicated by, to, and about individuals. In fact, as we shall see, they increasingly do not. Individuals lack a significant degree of autonomy with respect to all three types of information flows, and there are enormous pressures to reduce informational autonomy still further in the interest of protecting intellectual property and promoting electronic commerce.

3.1 Information flows to individuals: Persistent access controls and search restrictions

As Section 2 explained, the diversity and quality of information flows to individuals are critical determinants of the degree of intellectual freedom experienced by individuals within a society. Moreover, the discussion in Section 2 suggests that the test of sufficiency cannot be merely negative or subjective freedom; the information that individuals want, or require to foster critical capacity and independence of manipulation, may be information they do not yet know about. Here, the rules governing information ownership and accessibility are vitally important. Legal rules about information ownership may create an environment in which information is more (or less) accessible, and in which the pathways of access are more (or less) flexible in accommodating searching and browsing.

Current information law and practice, however, are moving in the direction of diminished accessibility. Within copyright law, doctrinal developments intended to adapt copyright to the digital age have given copyright owners an unprecedented degree of control over the conditions of access to their works. In the U.S., courts have concluded that the reproduction in RAM that occurs automatically whenever a digital work is accessed constitutes copying. The European Union is pursuing a similar route.²⁰ If every use of a digital work is an infringement, the copyright owner has a correspondingly stronger claim to control both initial access and any subsequent rendering of the work. The Digital Millennium Copyright Act reinforces these arguments by barring circumvention of access control technologies, and by forbidding

¹⁹ COHEN, "Examined Lives," pp. 1406-1408; JED RUBENFELD, "The Right of Privacy," *Harvard Law Review* 102 (1989): 737-807, pp. 781-782, 797-798.

²⁰ Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 21 May 1999, COM (1999) 250 final; LEE A. BYGRAVE and KAMIEL J. KOELMAN, "Privacy, Data Processing and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems," in *Copyright and Electronic Commerce*, ed. P. BRENT HUGENHOLTZ (The Hague/London/Boston: Kluwer Law International, 2000) pp. 106-107.

the manufacture and distribution of circumvention tools.²¹ Content providers are developing persistent access controls capable of metering and imposing a fractional fee for each act of access and use.²² When these technologies are in place, “access” will refer not only to the initial act of authorized access (as with a book that one has purchased), but also to each subsequent rendering of the content. Attempts to read or browse without being metered will require the circumvention of access controls using banned technologies, and will be characterized as unlawful “stealing” of access, rather than as lawful browsing or sharing of an already-purchased work.

Persistent access controls and the economic model they presuppose are both new and old. The post-Enlightenment model of information distribution signals a return to medieval information regimes in which learning was encoded in another tongue and accessible only to those who had the key. Then, the “code” was Latin, and access required an elite education, as well as physical proximity to a repository of hand-copied manuscripts. In the emerging “information economy,” the code is digital encryption, and access will require sufficient credit. For well-to-do individuals, the monetary costs of metered information access will be trivial. For others accustomed to a more varied framework of public and customary institutions designed to facilitate information access and use — public library patrons, used book purchasers, students, academic researchers, and so on — persistent access controls threaten to alter substantially the patterns of information flow.

Access also refers more broadly to the process by which individuals locate relevant or desired information — that is, to the acts of searching and finding. The Internet has been described as a medium that allows anyone to be a publisher and enables everyone to find the best prices and the mix of information best suited to his or her tastes. This rosy description increasingly falls short of the truth; instead, the Internet plays host to a series of efforts designed to prevent comparison shopping and funnel individual users to content sponsored by the same large media companies that dominate nondigital publishing. Thus, trademark owners charge that competitors’ and critics’ uses of trademarked terms as searchable metatags or components in domain names (e.g., “disneysucks.com”) constitute infringement or dilution of their trademark rights. This argument has failed in some cases but has succeeded in others.²³ Internet shopping

²¹ See Digital Millennium Copyright Act, 17 U.S.C. § 1201(a).

²² BYGRAVE and KOELMAN, “Privacy, Data Protection and Copyright,” pp. 60-63, 108-109.

²³ On metatext, compare *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999) (use of competitor’s trademark in searchable metatext infringes the mark because it uses the mark to get customers’ initial attention), with *Playboy Enterprises, Inc. v. Welles*, 7 F. Supp. 2d 1098 (S.D. Cal.), *affirmed without opinion*, 162 F.3d 1169 (9th Cir. 1998) (descriptive use of “playboy” and “playmate” by former Playmate of the Year not infringement), and *Playboy Enterprises, Inc. v. Netscape Communication Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal. 1999) (search engine’s display of advertising by other adult entertainment providers in response to user entry of “playboy” and “playmate” as search terms not infringement, but result might change if service were marketed to competitors based on this capability). On domain names, compare *Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale*, WIPO Arbitration & Mediation Center Case No. D2000-0662 (19 Sept. 2000) (“wal-martsucks.com” identical or confusingly similar to the Wal-Mart trademark and registered and used in bad faith), with *Bally Total Fitness Holding Corp.*, 29 F. Supp. 2d 1161 (C.D.

sites that wish to prevent competitors from attracting their customers are invoking trespass law to prevent data aggregators from collecting comparative price information.²⁴ If successful, these lawsuits will make it more time-consuming and difficult for individual consumers to compare prices and other terms offered by different vendors, including vendors of information.

Finally, access is a function of network design, and the design of the network is changing. The major Internet service providers have become full-service “portal” sites offering licensed content from the major media companies.²⁵ Meanwhile, the move to broadband Internet access provided by full-service telecommunications companies threatens to eliminate many smaller, independent providers of Internet access, and to consolidate control over the technical architectures of digital content delivery.²⁶ Major copyright interests are attempting to outlaw new peer-to-peer networking technologies that might allow network users to locate and exchange content without centralized directory systems and servers.²⁷ All of these changes seem likely to make it more difficult to search for and find a broad diversity of information, especially information produced by critics and dissenters.

3.2 Information flows from individuals: Legal and technical usage controls and third-party policing

A regime of information rights that assigns individuals the role of passive users of information is undesirable for both instrumental and noninstrumental reasons. Individuals play an important role in ensuring a continuing stream of new creation, and the freedom of expression is an essential component of intellectual freedom, or informational autonomy. Therefore, information law and practice must not unduly restrict the ability of individuals to become originators of information. Even absent direct state prohibition, such constraints may flow indirectly from public rules that assign ownership and control of information and its permissible uses to (some and not other) private parties. Here again, current information law and practice score poorly.

First, the persistent access controls discussed above will significantly change not only the process of reading, but also the process of creating. As subsection 2.2 explained, restrictions on information access will affect the nature and variety of the information that is created within society. As a practical matter these restrictions will burden lower-income users most heavily; therefore, future creators will be less likely to

Cal. 1998) (use of “ballysucks” in Web address not infringement).

²⁴ eBay, Inc. v. Bidders’ Edge, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), appeal pending.

²⁵ RIFKIN, *Age of Access*, pp. 178-179.

²⁶ DAVID CLARK and MARJORY BLUMENTHAL, *Rethinking the Design of the Internet: The End-to-End Arguments vs. the Brave New World* (2000); working paper, available at <<http://www.tprc.org/abstracts00/rethinking.pdf>>; MARK A. LEMLEY and LAWRENCE LESSIG, “Preserving the End-to-End Architecture of the Internet in the Broadband Era,” *UCLA Law Review* 48 (forthcoming 2001).

²⁷ A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), appeal pending.

come from this class.²⁸ Even as to other users, though, the imposition of metered usage requirements will significantly change the creative process, both by imposing cost constraints and by reducing serendipitous discovery and browsing. As reading patterns change to accommodate metering, both the volume and diversity of creative output may suffer gradual attrition.

Second, an expanding legal and technological regime of usage controls will constrain the use of information, and therefore new creation, both by constricting and enclosing the public domain and by facilitating private censorship. Copyright and trademark law historically have contained limitations and exceptions designed to avoid these risks, but these limitations and exceptions are being systematically whittled away.

Within the U.S. legal system, the fair use doctrine traditionally has excused many unauthorized uses of copyrighted content — e.g., scholarly or critical commentary, parody, and reverse engineering of computer software to discover uncopyrightable functionality — on the ground that such uses are socially beneficial. This doctrine, however, is in the process of being substantially narrowed. One of the factors relevant to a fair use inquiry is whether the challenged use, if widespread, would affect the potential market for the work. Several influential court decisions have found significant market harm, and thus no fair use, based solely on copyright owners' stated desire to create a market for disputed uses that traditionally had been considered fair.²⁹ In addition, copyright owners have argued, with mixed success, that in light of the ease of copying digital files and the development of new technologies for licensing access and use, the law should no longer excuse personal use copying of digital works, either as fair use or under any other rationale. The "market expectation" test also is assuming a greater role in the fabric of international copyright law and trade policy. The test was recently invoked by a dispute resolution panel of the World Trade Organization to invalidate a U.S. copyright exception permitting small restaurateurs to play radio broadcasts.³⁰ The decision sets a precedent for the invalidation of other exceptions to copyright that defeat new digital markets, including the personal use exceptions required in many European countries.

Even where the fair use doctrine would apply, though, the same contractual and technological developments that strengthen private control of access to information also strengthen private control over information use. Copyright owners seeking to prohibit uses permitted by copyright law, such as reverse engineering or critical commentary, are turning to "click-wrap" licenses to implement these restrictions. For example, Microsoft recently used this technique to stifle critics who charged it with corrupting software standards. When challenged to reveal its implementation of the Kerberos security standard, it posted the requested material on the Internet subject to click-wrap restrictions that forbade those who gained access from commenting on what they had read. In addition, many copyright owners (as well as those who wish to exploit public domain works or uncopyrightable factual content) also seek to implement more direct,

²⁸ COHEN, "Perfect Curve," pp. 1801-1804, 1816-1817.

²⁹ *Princeton University Press, Inc. v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994).

³⁰ Report of the Panel, United States — Section 110(5) of the US Copyright Act, WT/DS160/R, 15 June 2000.

technological control of uses. Although the Digital Millennium Copyright Act does not forbid circumvention of usage controls (as distinct from access controls) where necessary to engage in conduct allowed by copyright law, it effectively achieves the same result by barring the manufacture and distribution of tools for circumventing usage controls.³¹

A parallel expansion of owner control is occurring within trademark law. Like copyright, trademarks traditionally have been incomplete or quasi-property rights. Trademark rights do not entitle the owner to police all uses of a mark, but only those uses that might tend to cause consumer confusion. Thus, under traditional trademark law, one may use a trademark to criticize the trademark owner, to report the news, to advertise a compatible product or service, and so on. More recently, however, the dilution doctrine has created liability for many uses of trademarks that would not be actionable under a confusion standard, on the theory that these uses “blur” or “tarnish” the distinctive associations that consumers make with famous marks. Many of these uses are fundamentally expressive in nature; they are demonstrations of cultural literacy rather than threats to goodwill.³² Thus, the current expansion of the dilution doctrine diminishes the ability of individuals to comment on important social and cultural issues. Relatedly, “anticybersquatting” statutes place in jeopardy many Internet domain registrations originally intended for protest or critical commentary.³³

Finally, as with access controls, intellectual property rights have fueled movements to coopt network standard-setting organizations and other third parties in enforcement efforts directed at unauthorized uses of information. In the trademark context, such efforts led to the adoption of a uniform arbitration procedure to which all Internet domain name registrants must accede and which has produced results dramatically tilted in favor of trademark owners.³⁴ Pressures to strengthen copyright protection, meanwhile, have resulted in the expansion of indirect copyright liability for online service providers. The U.S. has enacted so-called “safe harbor” provisions that grant immunity from damage awards contingent on service provider removal of user-posted material. With these provisions, copyright law now gives content owners new powers to silence creators of unauthorized expression, including fair use expression.³⁵ The campaign against peer-to-peer networking, noted above, is expressly intended to prevent the development of new kinds of networks that are not amenable to centralized control.

³¹ Digital Millennium Copyright Act, 17 U.S.C. § 1201(b).

³² DREYFUSS, “Expressive Genericity,” pp. 400-403, 412-417; JESSICA LITMAN, “Breakfast with Batman: The Public Interest in the Advertising Age,” *Yale Law Journal* 108 (1999): 1717-1735, pp. 1726-1733.

³³ Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d); see note 23 above.

³⁴ MILTON MÜLLER, *Rough Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy* (2000; working paper on file with the author); also available <<http://dec.syr.edu.roughjustice.htm>>.

³⁵ Microsoft invoked these recently enacted “safe harbor” provisions to pressure its critics’ service provider to remove the material relating to MS Kerberos.

3.3 Information flows about individuals: Monitoring and profiling by applications and networks

Digital network technologies enable the collection of unprecedented amounts of information about individual tastes and activities, for two reasons. First, they expose far more activity to scrutiny, because every online action generates a digital record that can be made permanent.³⁶ Second, the “knowledge” that digital networks collect and construct is relatively seamless. Before the advent of networked databases, the availability of “discrete social spheres” for individual activity allowed greater flexibility for the process of self-construction.³⁷ Historically, defamation and invasion of privacy law had evolved to permit individuals to speak and publish true information about each other, subject to certain exceptions. Yet these mechanisms contained built-in limitations on their scope: the amount and variety of data available for use were smaller, and the medium (gossip or printed text) reflected the spatial and temporal limits of human cognition. Networked databases and advanced data mining techniques have the capability to dissolve both the boundaries of our discrete social spheres and the inherent cognitive and medium-based limits on the kinds and amount of information that can be assimilated and reused.³⁸

The impact of these new profiling and data mining practices is particularly acute with respect to intellectual autonomy. An increasing amount of the new information that is captured via digital networks is information about intellectual activity as reflected in access to and use of information.³⁹ In the nondigital world, most of this information is not captured at all, and much that is captured is protected by strict privacy protections that bind libraries and other purveyors of information.⁴⁰ In the digital world, however, both the politics of intellectual property and the technologies of persistent access control presume a right to collect and store large quantities of personal information about readers, viewers, and listeners.⁴¹ In addition, automated access and usage control technologies invert the ordinary presumption that conduct within private spaces — including conduct relating to the accessing and use of books, videos, and other intellectual

³⁶ JERRY KANG, “Information Privacy in Cyberspace Transactions,” *Stanford Law Review* 50 (1998): 1193-1294, pp. 1198-1199, 1223-1230.

³⁷ HELEN NISSENBAUM, “Protecting Privacy in an Information Age: The Problem of Privacy in Public,” *Law & Philosophy* 17 (1998): 559-596; JONATHAN SCHONSHECK, “Privacy and Discrete ‘Social Spheres,’” *Ethics & Behavior* 7 (1997): 221-228.

³⁸ A. MICHAEL FROOMKIN, “Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases,” *Journal of Law & Commerce* 15 (1996): 395-507, pp. 479-505; OSCAR H. GANDY, JR., *The Panoptic Sort: A Political Economy of Personal Information* (Boulder, Colo.: Westview Press, 1993), pp. 53-94.

³⁹ COHEN, “Right to Read Anonymously,” pp. 983-986.

⁴⁰ *Ibid.*, pp. 1031-1032.

⁴¹ In the U.S., the Digital Millennium Copyright Act allows limited use of circumvention technology to defeat cookies and other technologies for monitoring online browsing activity. See Digital Millennium Copyright Act, 17 U.S.C. §1201(i). However, the law does not limit the ability of content vendors to collect, use, and sell personal information concerning those individuals who become customers.

goods and conduct relating generally to the use of chattels — may be freely chosen.⁴² As a result, even those who experience no fiscal constraints as a result of metered access may experience psychic constraints that translate into changes in their reading and speaking activities. This, too, harks back to pre-Enlightenment modes of social ordering; just as vassals had no tenable claims of ownership or privacy against their lords, so readers are losing tenable claims of privacy against their information providers, not only in the virtual equivalents of books, but also in the places where they read.⁴³

In addition to changes in the monitoring and profiling techniques employed by individual vendors, the last several years have witnessed a series of attempts to redesign basic network protocols to make it even easier to identify and track individuals across the entire Internet. These developments are driven not only by the imperatives of direct marketing,⁴⁴ but also by calls for increased security from both commercial and law enforcement interests.⁴⁵ On the law enforcement side, nation-states and enforcement agencies have invoked recurring hacker scares to justify mandating enhanced wiretapping capabilities. On the commercial side, Internet vendors have seen unique identifiers and perfect traceability as means of reducing fraud. The now-infamous Intel Processor Serial Number was conceived as a way of increasing the security of online transactions; similarly, the sixth version of the networking protocol TCP/IP (“IPv6”), still a work-in-progress, was conceived by the Internet Engineering Task Force as a way of adding (desirable) authentication capabilities to digital communications.⁴⁶ In the case of intellectual property, law enforcement and commercial interests merge; it is intellectual property owners who have raised the loudest demands for network technologies that will make it easier to track, prevent, and punish unauthorized use. For example, in response to the controversy over peer-to-peer networking technologies, several industry leaders have urged the elimination of online anonymity through technologies designed to ensure that every Internet user has the equivalent of a driver’s license.

⁴² JULIE E. COHEN, “Copyright and the Jurisprudence of Self-Help,” *Berkeley Technology Law Journal* 13 (1998): 1089-1143, pp. 1101-1117.

⁴³ Rifkin characterizes the new millennium as an “age of access” in which social ordering is driven by access to services, experiences, and networks rather than by property relationships. (RIFKIN, *Age of Access*). Whether or not this is the best way to understand the emerging information economy — intellectual property owners, certainly, would beg to differ — it is clear both that access to information and digital networks is assuming increasing economic and social importance and that “access” is a two-way street. The currency of access to information and digital networks increasingly is access to individuals. It is worth juxtaposing Rifkin’s vision with Henry Maine’s classic description of the evolution of English common law as a shift “from status to contract,” (HENRY SUMNER MAINE, *Ancient Law* [London: J. Murray, 1861], pp. 163-165, and considering the “age of access” as a shift (back? forward?) to a hybrid condition of contract-based status *vis-à-vis* information service providers.

⁴⁴ GANDY, *Panoptic Sort*, pp. 95-122.

⁴⁵ SHAWN C. HELMS, “Translating Privacy Values with Technology,” *Boston University Journal of Science and Technology Law* 7 (Forthcoming 2001; draft article on file with the author), draft pp. 42-45.

⁴⁶ HELMS, “Translating Privacy Values,” draft pp. 13-15.

Any unique identifier system for the Internet will dramatically increase the degree to which the network facilitates the collection and processing of personal information, and will also increase the degree to which the network facilitates control of access to and dissemination of information by individuals. This is so, moreover, for both private entities and governments; thus, even those who believe that nation-states are the primary threat to informational autonomy, and that private actions pose little threat, would do well to rethink support for multi-purpose commercial architectures of control that could be adapted to serve official ends.⁴⁷

Whether such a control-oriented architecture will be imposed on the network itself (as distinct from particular applications within the network) is still unclear. A variety of innovative efforts are being designed to offer anonymous browsing and communication, and even Web publishing⁴⁸ and purchasing; any of these nascent protocols, if widely adopted, would restore a significant degree of informational autonomy to individuals. No law currently prohibits these technologies. Commercial needs (or wants) have substantial impact on the market for privacy,⁴⁹ but the success of one architecture or another also will turn in part on the arguments advanced to convince vendors, states, and individual users to support it. Thus, Section 4 will consider the sorts of arguments that are made about the relationship between information rights and freedom, including intellectual freedom.

4. Legal categories and the conditions of intellectual freedom

The developments described in section 3 do very little to advance intellectual freedom, or informational autonomy, as I have defined it. Instead, pressures to protect intellectual property and promote electronic commerce are reconfiguring the networked digital environment in a variety of ways that seem likely to undermine the conditions of intellectual freedom. Since Western society purports to value intellectual freedom, and to enjoy a diverse, vibrant, and iconoclastic intellectual culture, this is an odd result. Explaining it requires an excursion into legal theory, and examination of the core legal and philosophical concepts that underlie debates about information law and policy. As noted at the outset, it is commonly argued that stronger intellectual property protection and weaker informational privacy protection promote freedom, including intellectual freedom. These arguments are grounded in a set of foundational assumptions about the meaning of information ownership, the nature and importance of consent in structuring interactions, and the meaning of freedom of speech. This final section of the article examines these assumptions, and argues that they need to be rethought.

⁴⁷ LAWRENCE LESSIG, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), pp. 85-99.

⁴⁸ MARC WALDMAN, AVIEL RUBIN and LORRIE FAITH CRANOR, *Publius: A Robust, Tamper-Evident, Censorship-Resistant, Web Publishing System*, in *Proceedings of the Ninth USENIX Security Symposium* (2000; <<http://www.usenix.org/>>).

⁴⁹ HELMS, "Translating Privacy Values," draft pp. 42-45.

4.1 The meaning of information ownership

The relationship between information ownership and intellectual freedom is complex. A political and social regime that values intellectual freedom, as defined above, is one that seeks to promote both the creation and the consumption of a diverse variety of intellectual products. As Netanel has explained, intellectual property protection has both production and structural functions within such a regime.⁵⁰ Legal protection supplies incentives to produce and market intellectual goods, and also promotes intellectual freedom by keeping information producers independent of government influence.⁵¹ As section 2 demonstrated, however, the incentives question is complicated, and greater control is not always better. A system of intellectual property rules and rights designed to promote intellectual freedom also must consider the conditions of public access to and use of intellectual goods. This inquiry cannot be strictly quantitative, but must consider diversity of both authorship and content.

The rhetoric of intellectual property ownership and the emerging legal and technological vehicles for digital distribution of intellectual goods increasingly do not accommodate notions of balance and diversity. It has become conventional to equate ownership of intellectual property with perfect control, and to justify the equation by saying that maximizing the *scope* of protection of intellectual property for existing intellectual property owners also maximizes ongoing creation, and so intellectual freedom. In the context of intellectual property, however, the economic justification for ownership-as-perfect-control is contested. Welfare-based economic arguments for increased control measure only increases in the private welfare of current intellectual property owners. In fact, for the reasons already discussed, there is good reason to think that increased private control of information products will reduce overall social welfare. In the longer term, these legally constructed patterns of cultural production will reduce both new creation and public access to a diverse variety of information.⁵² Defining ownership as perfect control forecloses evaluation of these shifts in the distribution of costs and benefits flowing from the intellectual property regime and the resulting effects on intellectual freedom.

Debates about ownership of personal information also rest on normative assumptions about the nature of the control that ownership requires. Providers of digital intellectual property assume that their (presumptively unlimited) right to set the conditions of access carries with it the right to demand personal information from individuals, and further to demand that network technologies be designed to foreclose user anonymity and unmonitored peer-to-peer interaction. Both intellectual property owners and other data

⁵⁰ NETANEL, “Democratic Civil Society,” pp. 347-364.

⁵¹ HAMILTON, “Historical Underpinnings,” pp. 9-12; NETANEL, “Democratic Civil Society,” pp. 352-359. The incentive effect of intellectual property protection is almost certainly overstated. For example, academic creators are rarely motivated by the simple availability of copyright or patent protection. Nonetheless, it seems equally certain that intellectual property protection has at least a marginal incentive effect, and that owners of intellectual property will have at least some incentive to set reasonably affordable prices for their works.

⁵² See Sections 2.1 and 2.2; BENKLER, “Free as the Air,” pp. 400-412; COHEN, “Perfect Curce,” 1808-1814.

processors assume that individuals cannot assert any legally or theoretically cognizable claim to control their personal information on an ongoing basis once someone else has acquired possession of it. In fact, the existence of intellectual property contradicts this latter assumption, for intellectual property rights confer precisely the power to exert ongoing control over certain uses of information.⁵³ The costs imposed on data processors by a rule allowing ongoing control would be similar to the costs now imposed on users of intellectual property by rules that vest ongoing control in intellectual property owners. But the ownership argument against individual control of personal information assumes, finally, that it is the essence of property to be tradable, and traded, in markets. This requires assignment of ownership, or at the very least an unencumbered transfer of ownership, to data processors.

This series of assumptions about the meaning and effects of ownership precludes reasoned evaluation of the costs and benefits (and the distribution of costs and benefits) that would be produced by different ownership rules. There is nothing inherent about “ownership” as a legal construct that requires either perfect control or perfect tradability for information. Just as with ownership rights in land, the assignment and delineation of ownership rights in information reflects policy decisions about who should have freedom to control information flows and who should bear the costs of others’ freedom. In the case of intellectual products, assigning perfect control to “owners” shifts costs to individual users and future creators. Assigning ownership rights in personal information to data processors similarly shifts costs to individuals. To the extent that such rules produce a higher-than-desirable degree of passivity, uniformity, and conformity within the intellectual landscape, they also shift costs to society. If intellectual freedom rather than ownership is the first-order good that society seeks to promote, these results suggest a need to reevaluate the manner in which information ownership is conceived and assigned.

4.2 The nature and importance of consent

Because arguments from ownership assume that welfare-enhancing exchanges of information will occur through licensing, they also incorporate important presumptions about the nature and importance of consent in structuring social interaction. In the case of intellectual property, the consent is to licensing; those who support more perfect control of intellectual property argue that owners will license both access and use on reasonable terms. Individual users of intellectual property, meanwhile, can withhold consent if they find prices too high or terms too onerous.⁵⁴ In the case of informational privacy, the consent is that of individuals to the (unremunerated) use of their personal information; those who oppose informational privacy protection argue that individuals can simply refuse to enter transactions if the treatment of personal information is not to their liking. Data processors, meanwhile, will be forced by market pressures to adopt (and adhere to) reasonable practices. Like the arguments from control discussed above, these arguments are mirror images

⁵³ For a more extended discussion of this point, see COHEN, “Examined Lives,” pp. 1384-1391.

⁵⁴ See, e.g., DAVID FRIEDMAN, “In Defense of Private Orderings: Comments on Julie Cohen’s ‘Copyright and the Jurisprudence of Self-Help,’” *Berkeley Technology Law Journal* 12 (1998): 1151-1172. 1998.

of each other; they assign to information vendors and processors the power to decide terms, and to individuals only the power to refuse them.

Consent-based arguments that place individuals on an equal footing with large commercial vendors and processors of information rely heavily on a background presumption of market equilibration that is demonstrably inadequate. First, consent-based theories of information policy typically fail to consider the institutional dynamics that shape the standard terms that govern information access and use. Firms organize more effectively in markets than do individuals, and thus vendors in consumer mass markets may enjoy substantial market power even absent commanding market share.⁵⁵ Second, consent-based arguments do not consider the cognitive limits on individual ability to enter contracts. In the case of intellectual property, it may be difficult to make *ex ante* decisions about the value of informational works; thus, having to pay before browsing may substantially reduce individual willingness to experiment with new types or sources of information.⁵⁶ In the case of informational privacy, individuals do not have enough information about possible future uses of their personal information to make informed decisions.⁵⁷

Consent-based approaches to information rights are weak, more fundamentally, because they do not recognize parameter-setting acts of consent or refusal by society as a whole. Problems of market power and cognitive disability could be offset to a degree by corrective legislation.⁵⁸ However, arguments from consent are rooted in claims about the preeminence of negative liberty. Consent is definitionally atomistic, and the political process is definitionally coercive. On this view, the constitutive rules that govern human interaction are simply the sum of the rules agreed in individual transactions. Even as a theoretical matter, this argument is doubtful; if individuals must be free to choose, then logically they must be free to choose to subject themselves to the authority of a collective decisionmaking process and abide by the decisions it produces. Collective decisions bind some who would not have agreed to them, but so too do market processes that set prices and terms.⁵⁹ Theoretical considerations aside, if intellectual freedom is the desired goal, the question should not be what rules best correspond to a particular abstract ideal of consent, but what rules will produce the conditions of intellectual freedom. In particular, if limits on the marketplace behavior of atomistic entities are necessary to guarantee sufficient options, or independence of coercion or manipulation, society may conclude that those limits are justified.

⁵⁵ For a more extended discussion of this point, see COHEN, “*Lochner* in Cyberspace,” pp. 523-530.

⁵⁶ COHEN, “*Lochner* in Cyberspace,” pp. 556-557.

⁵⁷ COHEN, “Examined Lives,” pp. 1397-1398.

⁵⁸ The legislative process, of course, is not perfect either. Legislatures are subject to interest group influence and capture. The question is which institution — legislatures, courts, or markets — is best able, relative to the others, to address particular problems.

⁵⁹ For more thorough development of this point, see COHEN, “*Lochner* in Cyberspace,” pp. 534-538, 552-555, and COHEN, “Examined Lives,” pp. 1394-1396.

4.3 The meaning of freedom of speech

As Section 2 demonstrated, intellectual freedom and freedom of speech are closely related; expressive freedom is a necessary (though not sufficient) condition for intellectual freedom. As with information ownership, however, the relationship between intellectual freedom and freedom of speech also presents a need for balance. There are strong speech-related reasons for providing incentives and freedom to create intellectual property, but also for limiting the freedom of intellectual property owners to control access and use by others. There are strong speech-related reasons for protecting the freedom to share certain kinds of information about individuals (for example, in news reporting), but also for limiting the collection, exchange, and processing of personal information about individuals. Within U.S. first amendment jurisprudence, however, the prevailing understanding of speech rights equates freedom of speech with the right to control the market disposition of informational property. Because property arguments are used to bootstrap the asserted speech rights, the application of speech reasoning to debates about information rights tends to produce extremely one-sided results.

In the case of intellectual property, copyright owners' speech rights, including a right not to speak, supply additional justification for monitoring of access and use and for private censorship. Similarly, trademark owners assert their rights not to speak when seeking to prevent use of their marks in ideologically controversial contexts. Recent expansions of copyright and trademark protection facilitate these arguments. The adoption of broad antidilution protection for famous trademarks makes it easier to see unauthorized expressive uses of trademarks as effectuating legally cognizable harm.⁶⁰ The formal elimination of a "publication" threshold for copyright protection in the U.S. and the consequent extension of copyright protection to trade secret material make it easier to see contractually and technologically imposed access and use restrictions as both speech-promoting and consistent with the larger framework of intellectual property law.⁶¹ In both settings, the rhetoric of "speech" conceals a gradual reconceptualization of intellectual property rights as special rights tailored to the desires of the information "owner" rather than to any overarching societal policy concerning the promotion of speech freedoms more generally. As a result, courts routinely sweep aside first amendment arguments *against* strong copyright and trademark protection on the ground that such protection inherently promotes expressive freedom.

In the case of informational privacy, ownership rights also structure and predetermine speech reasoning.⁶² Courts and commentators presume both that personal information is the property of the entity

⁶⁰ Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c), 1127; LITMAN, "Breakfast with Batman," pp. 1724-25, 1728-1730.

⁶¹ U.S. Copyright Act, 17 U.S.C. § 102(a).

⁶² COHEN, "Examined Lives," pp. 1409-1416.

that collects it and that databases of personal information are “speech.”⁶³ From there it is a short step to the conclusion that limiting the freedom of data processors to exchange “their” information also infringes their freedom of speech. This conclusion is much less straightforward if either of its foundational assumptions fails. If individuals have legally cognizable interests in their personal information, one must resort to some other criterion for evaluating privacy regulation. If some information exchanges are not speech — or, more precisely, if some information exchanges occur for non-speech reasons — then these information exchanges may be regulated without threatening expressive freedom.

In addition, libertarian opponents of informational privacy protection rely on a pair of outcome-determining metaphors, or “paradigm case” analogies, that equate commercial profiling with socially valuable speech by and to humans. First, they equate the collection and use of personal information with gossip, and then argue that privacy protection would stifle speech about one’s neighbors.⁶⁴ This equation of pervasive and unseen systems of classification with the informal but highly accountable process of norm regulation that obtains within small communities is a category error of immense proportions. The effects of commercial profiling are confined neither to particular communities nor to particular aspects of one’s life, and commercial profiling firms are almost wholly insulated from accountability. For both reasons, commercial profiling has a qualitatively different impact on individual autonomy and intellectual freedom. The two systems may serve overlapping regulatory functions, but that does not make them similar. Second, libertarian opponents of informational privacy protection also cite harm to press freedoms.⁶⁵ Here again, though, there does not seem to be an inevitable progression from laws restricting commercial profiling — i.e., the nonpublic exchange and processing of trade secret databases containing transactional and preference records for hundreds or thousands of individuals — to more comprehensive restrictions on news reporting about particular individuals or groups. The goal of commercial profiling operations is not to enhance the store of common knowledge or contribute to the debate on matters of public concern, but to hold the information as a proprietary trade secret.

Arguments from freedom of expression dictate particular approaches to intellectual property and informational privacy questions only if one tethers speech interests to informational property interests, or if one posits that all exchanges of information are equivalent in some meaningful way to human-to-human communication. Either approach obscures the difficult nature of the inquiry required where (as here) there are expressive interests on both sides of the equation. Solving for intellectual freedom requires balancing. The inquiry should focus on how the particular type of information exchange at issue is likely to affect information flows to, by, and about individuals. Once again, if intellectual freedom is the first-order goal that society wishes to promote, definitions of what constitutes “speech” are a tool and not the goal itself.

⁶³ *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), *rev’d sub nom on other grounds*. *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S.32 (1999); *U.S. West v. Federal Communications Commission*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1240 (2000).

⁶⁴ SINGLETON, *Privacy as Censorship*; VOLOKH, “Freedom of Speech.”

⁶⁵ SINGLETON, *Privacy as Censorship*; VOLOKH, “Freedom of Speech.”

5. Conclusion

Intellectual freedom is a function of the autonomy that individuals enjoy with respect to information flows to, from, and about them. The legal rules that govern information ownership, access, and use substantially affect the degree of intellectual freedom enjoyed by individuals within a society. These rules are not fixed, but are a function of the legal categories employed to define ownership and its limits. In the emerging information society, these rules have become ends in themselves, and increasingly foreclose critical evaluation of their effects — that is, of the degree to which they contribute to a rich diversity of information and to a set of information practices that foster intellectual freedom in fact, not just in theory. If intellectual freedom, rather than the legal categories themselves, is the good that society wishes to pursue, then the categories that structure information law and policy must be subjected to closer scrutiny.

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