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I. Trotter Hardy

William & Mary Law School

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Contracts, Copyright and Preemption in a Digital World

by I. Trotter Hardy

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Introduction

{1} Copyright is designed to provide some form of protection against unauthorized use of original informational materials. The rapid shift of information production and distribution to electronic form, with its corresponding ease of copying, naturally makes copyright-dependent industries nervous. Much talk in the news and on the "net"[1] these days is about the future of copyright law, a law developed in an age of print and now perhaps too tied to that medium to have ready application to today's information technology.[2]

{2} The fate of copyright may seem in doubt to some, but copyright has a long and durable history. It has survived countless technological changes over nearly two centuries, including the advent of photography, the phonograph, player pianos, motion pictures, audio tapes and cassettes, and computer programs--and it is still going strong. From this historical perspective, then, one might paraphrase Mark Twain by concluding that reports of copyright's death are greatly exaggerated.[3]

{3} But to expect that copyright will survive the new information technologies is not to expect that it will be unchanged, nor that those industries--publishing, music, computer software, etc.--that depend on copyright law will remain unchanged. To the contrary, pressure for change will build on both industry practices and the development of copyright doctrine. Indeed, one can expect industry practice and copyright doctrine to sharply intersect in several areas. One significant area, and the subject of this article, is that of copyright preemption of state contract law. For a combination of reasons, we can expect to see considerable emphasis in litigation on the preemption doctrine in the future.

Copyright Owners' View

Four forms of protection

{4} Copyright owners have a variety of rights under the Copyright Act, including the rights of reproduction,

and the rights of public distribution, performance, and display.[4] For convenience, let the term "copying" serve as a surrogate for all of these various rights.

{5} Copyright owners need a certain amount of protection against copying in order to make a profit at a given level and scale of business. "Protection" means an assurance that no more than some amount of copying of their works will take place once those works are released to others. Protection does not have to be, and will never be, absolute. That is, once a work of authorship is released to the public, as a practical matter some uncontrolled copying is possible and even likely. But without some practical, predictable limits on copying, copyright owners will not be willing to release commercial materials to the public in any substantial volume.

{6} Those who are steeped in copyright law will naturally and almost automatically think of those predictable limits as stemming from copyright law. Protection against copying does not depend solely on copyright's legal restrictions however. Those restrictions are but one of four forms of protection. A major practical limit not based on copyright law is the state of the copying art. For example, the publishers of *National Geographic* magazine, with its glossy photographs and typeset text, do not need to worry much about their market being eaten away by photocopy machines--photocopies of the *National Geographic* are just too inferior to the original to be competitive with it. This would remain true even if the cost of photocopy machines dropped low enough that every home had one. It would remain true *even in the absence of a copyright law* because for colorful, glossy magazines, the inferior quality of photocopies alone will ensure that copying will be at a minimum. To be sure, photocopying is only one technology for reproduction. Much higher quality reproduction is possible, using the same techniques used by magazines themselves--typsetting, etc. But use of these high quality printing techniques raises the cost of copying so high that it is cheaper to buy an original.

{7} Even when magazines move today to the on-line world, they have little to fear of a serious erosion in their paper subscription sales. Many glossy magazines are available over services such as America Online. For example, magazines such as *Time*, *Business Week* and *Scientific American* can be browsed online, and some are even accompanied by pictures. The slowness of browsing, the slowness of downloading the graphic images to a desktop computer, and the fact that many illustrations are not available, however, means that currently there is little competition between the computerized and the print versions of such periodicals. Once again, publishers can rely on the state of the copying art to control the reproduction of print versions.

{8} On the other hand, if the state of the photocopy art were to advance so that every home had a machine that could make a perfect copy of a magazine, then the publishers of the *National Geographic* and similar works would have a lot to worry about. In particular, they would have to look beyond the state of the copying art to achieve the limits on copying that are necessary to earn a profit.

{9} One such limitation, third after copyright law and the state of the copying art, is the use of special technical devices to limit reproduction. Though not common in the market for glossy magazines (they are not needed there), such devices do appear in industries where the state of the copying art does little to stop copying. In computer software and satellite transmission, for example, one sees a variety of special technologies implemented to control copying. Today satellite signals are commonly "scrambled" and require a "descrambler" at the receiving end to make use of them. This is a typical example of a technical device designed to defeat easy copying. Another example of special technical restrictions is that of a publisher selling a CD-ROM to a library but providing the CD-ROM in a personal computer that has no accessible floppy disk and from which the CD-ROM itself cannot be removed. Users are thereby prevented from copying the disk. These are examples of "arts" for which the state of the copying art does not function to limit copying. Rather, the scrambled signal and specially-configured computer are kinds of technical anti-copying devices that make up for what would otherwise be the possibility of easily achieved copying.

{10} Finally, in addition to the other forms of limitation on copying, the law of contracts can provide protection. Instead of using a special-purpose, no-copying computer, a publisher might sell CD-ROMs to a library for use in an ordinary computer, but contractually obligate the library to permit only a certain type or

extent of copying.

{ 11 } In sum, copyright owners rely for assurance against unauthorized copying not just on copyright law, but on the aggregate deterrence of all four methods for limiting copying of their works: copyright law, the state of the copying art, special technical devices, and contract law. We can think of these four factors as slices in a pie, where the overall size of the pie represents the publisher's assurance against undue copying. The balance of these factors providing protection for any given work may differ from those protecting another work, as the contrasting examples of the *National Geographic* magazine and the satellite signals illustrate. That simply means that the relative sizes of the "slices" of protection differ from one type of work to another.

Shifting mix of the four factors

{ 12 } A good deal of the changes in modern computer and communications technologies affect the "state of the copying art" factor. Today, digital communications increasingly permit faster, cheaper, and better copying of works of authorship. Many of the newer media for recording works of authorship, such as computer software on disk and digital tape recording, permit the nearly instantaneous creation of virtually perfect copies of the original.^[5] These improvements in the state of the copying art in the digital age mean that, all things being equal, the overall amount of protection a publisher can expect for digital materials relative to print materials will be dramatically less.

{ 13 } As noted earlier, other things may *not* be equal. One or more of the other three assurance factors may be able to assume an expanded role to make up for the decrease in protection that arises from the state of digital copying art. An expanded role for these other factors means that publishers currently in the print business, will, in a digital world, take certain steps to protect themselves. They will move toward trying to amend the Copyright Act to gain greater statutory protection, toward special technical devices to restrict copying, or toward stricter contract limits on copying. Only by increasing these other three "slices" of protection in the face of decreasing state-of-the-art protection can the overall amount of protection for publishers remain constant.

Statutory efforts

{ 14 } We see this shift beginning already in the realm of statutory amendments. The Commerce Department recently formed a working group to investigate several issues arising from the "National Information Infrastructure" or NII. This group formed a subgroup to address intellectual property issues. Last summer, the intellectual property subgroup issued a report known as the "[Green Paper](#)."^[6] The Green Paper proposed several changes to the Copyright Act to accommodate digital transmission technologies. One of the proposals calls for an additional right of the copyright owner to be defined: the right to distribute copies of a work to the public by transmission.^[7] Another of the proposals is to ban the sale of devices designed to overcome technical protections against unauthorized copying. A copyright owner whose works were distributed in a "scrambled" version could therefore sue the seller of an unauthorized "descrambling" device.^[8]

{ 15 } Statutory amendments like those proposed in the Green Paper are extremely important to the digital publishers of tomorrow. They are also controversial, as many groups of copyright users see them as hostile to the interests of readers, researchers, and other copyright "consumers."^[9] The hostility of copyright consumer interest groups, in fact, makes it quite likely that a full-scale battle of interest groups will take place concerning any attempts to amend the Copyright Act. This battle will likely force an elaborate compromise on the extension of copyright to the digital age. Such a compromise would mean that two of the four protection

factors--the changing state-of-the-art restrictions on copying and copyright law's restrictions--will fall short of providing all that publishers need to maintain the same level of profitability they currently enjoy with print media. These digital publishers will therefore turn to the remaining two factors of special technical restrictions and contractual restrictions in order to make up for what has been lost in technology and the legislative process.

{16} Special technical restrictions such as [encryption](#), limited access central sites, and so on are certainly possible. These technical devices are nevertheless beyond the scope of this article's orientation to legal concerns. Contracts, however, will be increasingly important and are the focus of this article. Contracts, for good or ill, will not just be increasingly important in the days ahead--they will be increasingly disputed.

{17} First, contracts assume greater importance in copyright transactions because they will in part be relied on, as discussed above, to take up where state-of-the-art restrictions on copying leave off. Second, the advent of online services, the Internet, electronic mail, and all the other as-yet-unforeseen developments in computer communications have the overriding effect of reducing the cost of communicating. Because contracting requires communication during the negotiation phase as well as any later monitoring of contracted-for performance, reduced communication costs mean lower transaction costs both for contracting and for the monitoring of contractual agreements. Hence, all other things being equal, modern communications technologies will have the effect of making contracts cheaper to form and to monitor, and will therefore encourage more contracting than occurred when communication costs were greater.

{18} In particular, contracts that monitor performance at a very fine-grained level of detail will be possible if the monitoring can be accomplished by computer. For example, today many products or services are sold for "lump sums" or at a flat rate. Nails for building, e.g., are usually sold either by the pound, or by large containers such as kegs. These types of sales are done in bulk instead of charging by the individual nail because the transaction cost of buying by the nail are too high to be practical. But if a computer functioned as the monitor and accounting device, the transaction costs of charging per unit might be so much lower that charging by the nail would be feasible.

{19} Similarly, access to reading material is today done on a kind of "flat rate" basis. One buys a book, then reads it as many times as one likes. Though this economic arrangement has existed for hundreds of years, it is in no sense foreordained or inevitable. Rather, it reflects the fact that no practical means of monitoring has ever existed to charge readers per view, per page or by any other per-use measure. The costs of monitoring (stationing a clerk in each buyer's home, for example, to observe the number of pages that that buyer reads) would dwarf the value of the book in the first place.

{20} But if computer technology permitted very inexpensive monitoring of each "page" read, then per-page pricing might be feasible. Access to computerized materials, particularly over a computer network like the Internet, indeed makes this sort of charging quite feasible because the computer can keep a log of each "page" visited. Such per-view pricing must be arranged by contract, of course. More to the point, continued access and the charges for that access will require a continuing contractual agreement between publisher and consumer. Absent such an arrangement, publishers will not be able to make the fine-grained adjustments to their pricing schemes.

{21} One might ask why publishers of copyrighted material would want to bother with such pricing, when the history of books shows that a flat rate, one-time sale is enough to earn a profit. The short answer is simply that variable pricing permits the producer of a good to price the good at different amounts for different consumers, and that such pricing means greater profits for the producer.[\[10\]](#)

Copyright Preemption

{22} A reliance on contracts for protection, the declining cost of contracting, and the incentive to price at a fine-grained level that varies for each buyer, bring us to the issue of the enforceability of contracts for the use of digital works. Contract law itself, of course, provides some limits to the enforceability of contracts: fraud, duress, and the like are always concerns whether for digital works or anything else. But works of authorship have their own special contractual problems arising from the possibility that copyright law might preempt the terms of a contract.

{23} The Copyright Act expressly provides that in some situations, a state law or right will be preempted, leaving copyright law itself as the only applicable rule.^[11] Section 301 of the Copyright Act preempts any attempt under state law to protect something when two conditions are met. First, the "something" must fall under the subject matter of copyright as an original work of authorship fixed in a tangible medium of expression. Second, the state law at issue must provide rights that are "equivalent" to those provided by copyright. In addition to this "statutory" preemption of state law, preemption may also be available under a general analysis relying on the Constitution's Supremacy Clause.^[12] This latter approach asks whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress";^[13] if so, the state law may be preempted even though the preemption prerequisites of section 301 are not satisfied.^[14]

{24} Though obviously grounded in the need to avoid conflicts between federal and state law, the preemption doctrine has experienced at best an inconsistent interpretation by the courts, as other commentators have noted.^[15] Preemption questions under copyright law can arise with regard to nearly any state law that might apply to informational works. For example, cases have dealt with trade secret law,^[16] unfair competition law,^[17] invasion of privacy,^[18] conversion^[19] and the right of publicity,^[20] as well as the law of contract.

{25} The preemption issue arises when authors' or users' copyright rights appear to be either enlarged or reduced by contract. To the general question whether contracts may deal with copyrighted material, the answer is obviously yes. After all, the Act gives copyright holders the exclusive right to reproduce their works. Nevertheless, authors sell or assign that right to publishers by means of contractual agreements all the time. Indeed, even the Act's legislative history reveals that "nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract."^[21]

{26} A simple transfer of rights is therefore unlikely to be challenged on preemption grounds because such transfers are the revenue-generating means of authors' creative efforts. The preemption challenges are more likely to relate to the attempted contractual extension of copyright rights beyond those granted by the Copyright Act, or the reduction of the rights that users have traditionally enjoyed apart from contract.

{27} The following contrasting cases illustrate the problem, and show that courts have yet to reconcile the notion of contracts and copyrights.^[22] In *Warner Bros., Inc. v. Wilkinson*,^[23] the district court held that states may impose restraints on what would otherwise be valid contracts relating to copyright rights. However, in *Vault Corp. v. Quaid Software Ltd.*,^[24] the Fifth Circuit held that states may not authorize contracts that restrain otherwise valid copyright rights.

{28} *Warner Bros.* involved "blind bidding," a common practice in the motion picture industry. With "blind bidding," motion picture distributors require that theater owners agree to certain conditions before offering a movie to the viewing public. Such conditions are not themselves surprising, but with blind bidding, the theaters must agree to the conditions *before* they are allowed to view the entire movie. For example, the conditions may include guaranteeing certain minimum royalty fees. This practice has been considered so odious to theater owners that in many states, the theater owners persuaded the state legislatures to enact statutes forbidding or curtailing the practice. Motion picture owners and distributors then challenged the statutes on federal preemption grounds, claiming that they so impermissibly interfered with the copyright rights of distribution and public performance that they conflicted with federal copyright policy.

{29} The challenges, brought in several states, by and large failed. The essential judicial response was that copyright interests are not affected when states govern the terms of commercial transactions, including the terms of contracts.[\[25\]](#)

{30} *Vault v. Quaid* involved the opposite situation. Instead of a state statute prohibiting certain contractual terms, as in *Warner Bros.*, *Vault* featured a state statute that expressly validated a particular type of contract: the "shrink wrap" license. A "shrink wrap" license is simply a set of terms printed inside the heat-shrunk wrapping of the commercial software. These terms constitute an "offer" that the buyer is said to accept by the act of tearing open the plastic wrapping. Evidently concerned that such license agreements could be challenged as adhesion contracts or invalidated on grounds of unequal bargaining strength, the Louisiana legislature expressly validated them.[\[26\]](#)

{31} The dispute in *Vault* arose when a software developer, Vault, Inc., produced a computer program called "Prolok" that rendered other commercial software impossible to copy (a feature desired by software companies to reduce the "piracy" of their programs). Relying on the validity of such licenses, Vault sold Prolok with a shrink-wrap notice that expressly forbade "reverse engineering" or similar analyses of its copy-protection scheme.

{32} Another software company, Quaid, Inc., nonetheless made copies of the Prolok program precisely to reverse engineer its anti-copying scheme. Quaid then sold its software that disabled the Prolok anti-copy mechanism and permitted copying. Vault sued Quaid for copyright infringement and lost. The court held that [section 117](#) of the Copyright Act specifically allows the copying of computer software when such copying is (1) an essential step in the use of the software and (2) accomplished as part of the process of running the program. Using this interpretation, the court found Quaid's actions to be permissible, even though they violated the license restrictions. The Louisiana statute that effectively prevented the running of such programs by validating Vault's license restrictions therefore conflicted with the Copyright Act and was preempted.[\[27\]](#)

Impact of *Warner* and *Vault*

{33} *Vault* applied copyright's preemption doctrine not directly to a contract, but rather to a statute that dealt with contracts. A contract is valid only if state law makes it valid. For purposes of this article it matters little whether the court's finding of preemption was directed toward the legislature or toward the parties to the contract: the result is the same. What would otherwise have been a valid agreement under state law was struck down on the grounds that it conflicted with the federal copyright statute.

{34} Other contracts cases involving copyright preemption have generally shied away from the conclusion reached by the *Vault* court. The reasoning in these cases is that preemption should not apply when the state law at issue requires elements of proof not required by or relevant to the Copyright Act.[\[28\]](#) Contracts require offer and acceptance and these elements are not required under copyright law. This doctrine of "different elements" would seem to minimize the number of copyright preemption cases involving contracts. Yet, the *Vault* case indicates that preemption and contract doctrine are far from being comfortably settled.

{35} Moreover, at least some courts have indicated that copyright preemption need not be based exclusively on the words of [section 301](#).[\[29\]](#) This notion derives from a series of Supreme Court cases that have dealt with patent law.[\[30\]](#) These cases note that the Constitution acknowledges the possibility of federal-state conflicts, and the supremacy of federal law forces the state law to yield--statute or no statute. In short, these cases suggest the existence of a general, constitutional-level preemption doctrine that does not depend on the copyright statute. Because it is as yet unsettled whether or not this more general doctrine of preemption exists independently of the Copyright Act's section 301, the possibility that it may be used to invalidate certain contractual provisions remains strong.

Two views of copyright law

{36} The murkiness of the copyright preemption doctrine is only one factor that bodes ill for future contract disputes. A second is the subtle change in the prevailing view over the centuries regarding the purpose of copyright. This view has evolved in a way that ensures more preemption disputes. Almost certainly the contract-preemption issue would not have arisen a generation or two ago. But the perception of "copyright" and the process by which copyright laws are enacted has changed dramatically over the years. An examination of these changes demonstrates why the preemption issue is so much more crucial today. What follows is an oversimplification of those changes, but their general import should be clear.

{37} Copyright law was originally conceived as a mechanism for creating property rights in intangibles. Once Congress created such a right, it was to be exercised like any other property right, in any way the owner saw fit, with a correspondingly wide scope for contractual variation in license terms, fees or sales price.^[31] This is apparently what Madison had in mind when he noted that the "public good fully coincides . . . [with] the claims of individuals"^[32] with regards to the proposed copyright clause for the Constitution. The presumption of a congruence between public and private good arises from a reliance on property rights as the principal feature of commerce. The presumption is that voluntary exchange will benefit both buyer and seller, and voluntary exchange is facilitated by property rights. In the copyright context, that presumption would mean that both the author and the public would benefit from the existence of a property right in information.

{38} Today, there is a tendency to see copyright law less as a simple mechanism to establish a general property right in intangibles, and more as a means of defining specific rights and duties with regard to the use of intangibles. Another way to express these two views is that the traditional, property view sees the copyright statute as simply providing a backdrop for individual bargains and negotiations over licenses, whereas the modern view sees the statute as specifying what are essentially the actual quite specific terms of large classes of "bargains" over the use of intellectual property.^[33]

{39} A particularly clear example of the latter view is copyright's compulsory licensing provision for sound recordings.^[34] Briefly, if artists want to make a "cover" recording of a song that has already been commercially distributed, they may do so upon payment of a congressionally-prescribed fee. The owner of the song's copyright may not object. Compulsory licensing, also a feature of other parts of the Act,^[35] represents a Congressionally-defined bargain that falls at the far end of the spectrum from a property-rights approach; the latter approach would simply provide rights to the author with the expectation that the author would use them to form whatever bargains the author could reach with others.

{40} The practical difference between these two views is that under the "copyright as property" view, individuals are free to make virtually any contract over copyrighted materials they choose. Such contracts could easily put limits on what would otherwise be a "fair use" of copyrighted material,^[36] or limit what would otherwise be the "first sale" right of buyers.^[37] Recall that when the subject matter at issue is electronic, contract limits are a natural recourse for copyright owners in many sales transactions because the "state of the copying art" limitations on copying are so much less than they are with paper materials.^[38] In short, when copyright is property, contracts are expected and encouraged to be the mechanism by which that property is exploited.

{41} Under the alternative interpretation of copyright, what might be called the "copyright as liability" view, contracts that limit what would otherwise be a fair use, a first sale, or other users' right of copyrighted material may perhaps not be allowed. Such limits are likely to be challenged on grounds of federal preemption. The argument is that if Congress has already defined in detail the proper uses of a work, including its proper "fair" uses, then Congress's definition reflects a careful balance of interests. If Congress

has made its own careful balance, then individuals are not free to undo the resulting scheme. In particular, if Congress has said that a user is not liable for a certain "fair use" of copyrighted material, then it should not be within the seller's power to redefine that liability. The mechanism for reaching that result--that individual sellers and buyers of copyrighted material may not define their own contractual alterations to the fair use doctrine--is the preemption doctrine.

{42} Contemporary politics certainly support the role of Congress as the "balancer of interests." The real world of legislation is full of interest groups that lobby for particular provisions. Much of what Congress does in these situations is to attempt to serve as a "go-between" for these competing interest groups, striving to reach a settlement that will typically offer some benefit to each side. Under such circumstances, the belief that copyright is, in fact, a congressional balancing of interests is eminently defensible.

{43} The belief that copyright is primarily the creation of a property right is also defensible. The structure of the statute supports both notions. Section 106 of the Act grants sweeping rights to copyright owners to control reproduction, public performances and displays, and adaptations.^[39] This section looks like the creation of a broad property right, much like the "bundle of sticks" that real property law creates. Yet the remaining sub-sections, sections 107 through 120 are quite detailed and specific in their restrictions, conditions, and even compulsory licenses that qualify the broad grant of rights in section 106.^[40] The Act is therefore susceptible to either the "property" or "liability" interpretation.

{44} Whether either interpretation is "correct" in any sense is not the point of this article. Rather it is to demonstrate that the two views are different, that they lead to dramatically different conclusions about the issue of preemption of state law, and that there has been a slow evolution over the years away from the property view and toward the liability view. Hence there has evolved a more aggressive interpretation of copyright's preemption clause.

Conclusion

{45} Copyright law in an era of digital publishing is certainly a matter for concern. The astonishing ease of reproducing digitized materials, and the ease of forwarding such materials over computer networks, may be pushing the notion of authorial control to its limits. But it is not just the general issue of copyright that will draw attention in the years ahead. One very specific area of copyright law will undergo special, though not obvious, stress: the copyright doctrine of preemption of state law.

{46} The state of the copying art for digitized materials is rapidly becoming a facilitator, not a barrier, to unauthorized copying. With practicality no longer a limit, digital publishers will be forced to turn to other forms of protection: special technical restrictions, like "scrambling" devices; amendments to the Copyright Act that expand the definition of "infringement" in the digital world; and contractual restrictions. Contractual restrictions will be especially favored for two reasons. First, the usual political battle of interest groups before Congress will prevent publishers from gaining all that they want from statutory amendments, making contracts an attractive option. Second, as communication costs drop, the transaction costs of contracting--search costs, negotiation costs and the like--will drop as well, making contracts cheaper to form and hence raising the demand for contractual protection of intellectual property. Finally, sellers of any product would prefer to be able to charge different prices to different consumers, since doing so brings greater revenues. With print publications this is typically not possible. With computer controlled access and monitoring, however, charging "per view" or "per use" of copyrighted materials is feasible; it will therefore be sought by publishers, but doing so will still require contractual agreements ahead of time to arrange the charging mechanism.

{47} Paralleling the strong pressures on publishers to turn more and more to contracts to control the reproduction of digital materials are several forces making consumers less willing to accept such contractual

restrictions. First, the murkiness of the copyright preemption doctrine makes it a natural tool for attacking contractual restrictions: if courts have been unable to develop a consistent and predictable view of the doctrine, then litigants have an opportunity to argue the doctrine to their advantage. Second, the contemporary view of the Copyright Act is that it is less a property-creating statute than a liability-defining one. That is, copyright is widely seen today as defining a laundry-list of rights and duties of copyright publishers and consumers, not just establishing the framework within which parties reach their own bargains. In short, the Copyright Act is often seen as setting the terms of copyright contracts with some specificity--a congressional balancing of interests. This view naturally leads to the conclusion that contracts between individuals must not deviate from the terms that have been congressionally defined. In short, litigants will argue that contracts purporting to accomplish more than a simple transfer of rights should be preempted.

{48} The interests of copyright consumers will thus be seen as directly opposing those of copyright publishers, in marked contrast to the Founders' view of copyright as a coincidence of publishers' and consumers' interests. This conflict of interests will meet on the ground of copyright's preemption doctrine, soon to be one of the central problems of copyright in tomorrow's digital world.

{{END}}

Footnotes

[]NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2 (1995) at <http://www.richmond.edu/jolt/v1i1/hardy.html>.

[1] By "net" I mean of course the "Internet," the loosely coordinated collection of computer communications devices that now circles the globe, enabling rapid access to information located almost anywhere.

[2] John P. Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, *WIRED*, Mar. 1994, at 86.

[3] THE OXFORD DICTIONARY OF QUOTATIONS 554 (3d ed. 1979) ("The report of my death was an exaggeration."). Upon hearing reports of his own death, Mark Twain responded with a cable from London to the Associated Press in 1897.

[4] 17 U.S.C. § 106 (1988 & Supp. IV 1992).

[5] Congress responded to the problems of digital music recording with the Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (Supp. V 1993).

[6] INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE WORKING GROUP ON INTELLECTUAL

PROPERTY RIGHTS (July 1994) [hereinafter Green Paper].

[7] *Id.* at 120-123.

[8] *Id.* at 125-130.

[9] Jeff Leeds, *Cyberspace Copyright Proposal Draws Praise*, L.A. TIMES, July 8, 1994, at D1. *See generally* Jessica Litman, *The Herbert Tenzer Memorial Conference: Copyright in the Twenty-First Century: The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994) (discussing the proposals of the Working Group).

[10] Suppose a book sells for \$25. Some people would buy the book if it were only \$20, but they will not pay the extra \$5. The book seller loses such sales entirely, even if a sale at \$20 would still earn a modest profit. Other people would perhaps be willing to pay \$30, but will not have to because the "going" price is \$25. The seller loses the possibility of earning an extra \$5 on those sales. But now suppose that a technique existed by which the seller could charge exactly what each buyer was willing to pay: to those who would only pay \$20, the seller could charge \$20; to the majority of buyers, willing to pay \$25, the seller could charge \$25; and to those willing to pay more than \$25, the seller could charge more than \$25. It should be obvious that with the latter scheme, by which the seller "discriminates" among buyers in pricing, the seller will earn greater revenue.

[11] [17 U.S.C. § 301](#) (1988).

[12] [U.S. CONST. art. VI](#).

[13] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *reaffirmed in* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, *reh'g denied*, 376 U.S. 973 (1964).

[14] *See* Deborah Kemp, *Preemption of State Law by Copyright Law*, 9 COMPUTER/L. J. 375, 379-380 (1989). *But see* Langdon Jorgensen & Mary McIntyre-Cecil, *The Evolution of the Preemption Doctrine and its Effect on Common Law Remedies*, 19 IDAHO L. REV. 85, 100 (1983).

[15] Kemp, *supra* [note 14](#), at 380-384; Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 511-512 (1983); David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common Law Alternatives, and Federal Preemption*, 63 N.C. L. REV. 125, 181 (1984); Carole P. Sadler, Comment, *Federal Copyright Protection and State Trade Secret Protection: the Case for Partial Preemption*, 33 AM. U. L. REV. 667, 675-678 (1984).

[16] *See, e.g.*, *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993).

[17] *See, e.g.*, *Daboub v. Ginnons*, 42 F.3d 285 (5th Cir. 1995).

[18] *See, e.g.*, *Nat'l Car Rental Sys. v. Computer Assocs. Int'l*, 991 F.2d 426 (8th Cir.), *cert. denied*, 114 S. Ct. 176 (1993).

[19] *See, e.g.*, *G.S. Rasmussen & Assocs. v. Kalitta Flying Serv.*, 958 F.2d 896 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2927 (1993).

[20] *See, e.g.*, *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

[21] H.R. REP. No. 1476, 94th Cong., 2d Sess. 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

[22] Other cases have raised the same issues; the two discussed here are simply good illustrations.

[23] 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed*, 782 F.2d 136 (10th Cir. 1985).

[24] 847 F.2d 255 (5th Cir. 1988).

[25] *Associated Film Distrib. Corp. v. Thornburgh*, 683 F.2d 808 (3rd Cir. 1982), *cert. denied*, 408 U.S. 933 (1987); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part, rev'd in part*, 679 F.2d 656 (6th Cir. 1982); *Warner Bros. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed*, 782 F.2d 136 (10th Cir. 1985).

[26] LA. CIV. CODE ANN. art. 1963 (West 1987).

[27] *Vault*, 847 F.2d at 270.

[28] *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993); *Nat'l Car Rental Systems v. Computer Assocs. Int'l*, 991 F.2d 426 (8th Cir.), *cert. denied*, 114 S. Ct. 176 (1993); *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772 (9th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *Acorn Structures v. Swantz*, 846 F.2d 923 (4th Cir. 1988).

[29] *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973); *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969).

[30] See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, *reh'g denied*, 376 U.S. 973 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, *reh'g denied*, 377 U.S. 913 (1964); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

[31] I PAUL GOLDSTEIN, *COPYRIGHT* § 1.1, at 5 (1989) ("The constitutional clause empowering Congress to enact a copyright statute reflects the belief that property rights, properly limited, will serve the general public interest in an abounding national culture.").

[32] I *Id.*, at n.5 (citing [THE FEDERALIST No. 43](#), at 267 (James Madison) (H.C. Lodge ed., 1888)).

[33] Readers will look in vain for citations to authority for the views expressed in this section, for the views are my own. I derive them from countless conversations with librarians and other copyright users, whose adamancy about the balance of rights that Congress has created in the Act has gradually led me to understand the issue in the ways expressed in this article.

[34] [17 U.S.C. § 115](#) (1988). Note, however, that this particular compulsory license has been in the Act since 1909. Act of Mar. 4, 1909, Ch. 320, 35 Stat. 1075, § 1(e).

[35] See, e.g., [17 U.S.C. § 111](#) (1988 & Supp. IV 1992) (provisions for cable television).

[36] [17 U.S.C. § 107](#) (1988 & Supp. IV 1992). Section 107 of the Copyright Act specifies that certain uses of copyrighted works may be made without the payment of a fee to the copyright holder. Therefore, fair use is itself a kind of compulsory license, with a prescribed royalty of zero. As the section notes, such uses typically fall in the categories of "criticism, comment, news reporting, teaching, ... scholarship, or research" *Id.*

[37] [17 U.S.C. § 109](#) (1988). Section 109 of the Copyright Act provides that once an author parts with a copy of a work (that is, with the tangible fixation of a work: a book, a tape, a disk, etc.) the author may not object to further distribution of that copy. Thus the author controls the "first sale" of a copy, but not subsequent

sales.

[38] *See infra* ¶¶ [12](#), [17](#)-22.

[39] [17 U.S.C. § 106](#).

[40] [17 U.S.C. §§ 107](#)-120 (1988 & Supp. IV 1992).

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