1996

The Ancient Doctrine of Trespass to Web Sites

I. Trotter Hardy

William & Mary Law School

Repository Citation

Hardy, I. Trotter, "The Ancient Doctrine of Trespass to Web Sites" (1996). Faculty Publications. 1198.
https://scholarship.law.wm.edu/facpubs/1198

Copyright © 1996 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/facpubs
Abstract

{par. 1} The common law action of trespass to real property served to establish and preserve the very notion of “property” in land. Many of the words used to describe Web sites have a basis in real property: the word “site” itself is one, as are such expressions as “home” pages, “visiting” Web sites, “traveling” to a site and the like. This usage suggests that the trespass action might appropriately be applied to Web sites as well. The question is not academic, for the “obvious” protections—technology and copyright law—may not work. That analogies to real property trespass can be made does not suggest, however, that they should be made. The fundamental issue is whether the treatment of Web sites as property makes sense in light of the justifications for the institution of property
generally. Four strands of property theory—Locke’s natural rights, Bentham’s utilitarianism, Hardin’s “tragedy of the commons,” and Radin’s “property as personhood”—turn out to yield strong justifications for treating Web sites as property and hence for the application to them of the common law of trespass.

Introduction

(par. 2) Tens of thousands, if not millions, of computers can now be accessed over the Internet. Much of that access lately has been through software packages known as “browsers,” such as Netscape, Mosaic, the Internet Explorer, and others provided by commercial services such as America Online and Prodigy. With these “browser” software tools, owners of computers on the Internet can put specially formatted documents onto their computer. Anyone anywhere else on the Internet can then gain access to and read the documents. These documents can contain “pointers” to other such documents on other computers. The user of the browser software can then “travel” from document to document in cyberspace, looking at and reading from places that may be thousands of miles apart.

(par. 3) The first “page” or screenful of information in such documents is usually called the “home page.” The totality of these documents and the means of accessing them is often called the “World Wide Web,” or “WWW” or sometimes just “the Web.” Conventionally each computer-plus-document combination is known as a “site” on the Web. The use of browsing software to access these sites is often referred to as “visiting” or “traveling” to the site. Like the term “cyberspace” itself, the terms “site,” “visit,” and “travel” draw explicitly on a physical metaphor: that “cyberspace” and the Web are physical locations that a computer user can “go to” to get information. The physical metaphor raises a number of
interesting questions, among them this intriguing legal issue: does the common law of trespass apply to "sites" in cyberspace?

{par. 4} At first blush, there would seem to be no need for a legal action to enforce one's "property" rights to a Web site. Technical means are available. The site owner can set a limit on the total number of such users, thereby enforcing a "first come, first served" priority scheme. The owner can also, with sufficient technical facility, limit accessing users to certain Internet addresses, or prevent access for certain addresses, or effect combinations of both approaches.

{par. 5} But perhaps the owner does not prefer such schemes. For one thing, they require technical intervention that may be beyond the capacity of the owner. A commercial Internet provider, for example, might provide a means for its customers to establish an individual home page, but might not choose to provide the technical assistance that would enable technical access restrictions. For that matter, not all classes of users can be unequivocally identified by their address. Nearly all university addresses end in ".edu," for example, whether they are publicly or privately funded. Suppose a site owner chose to limit access to public university students and faculty. A restriction based on Internet address would simply not suffice to effect this limitation, even if it were offered.

{par. 6} Why should the legal system not provide the owner a flexible choice of schemes in order to effectuate such a limitation if the owner desires it? The trespass action could be one means of providing that limitation; it could be tailored as flexibly as language allows, for the owner would simply describe the desired access restrictions on the site's home page. To be sure, identifying "trespassers" would often be difficult,

---

2 The implications of viewing "cyberspace" as a kind of "space" are many; they are well explored in M. Ethan Katsh, LAW IN A DIGITAL WORLD (1995).
if not as a practical matter impossible. But it will not always be impossible. Moreover, the knowledge that the legal system endorses a scheme of access restrictions analogous to those for real property, with an analogous action in trespass to enforce it, might be a sufficient deterrent for law-abiding citizens. That might be enough for an owner.

The shortcomings of copyright explained

{par. 7} Commonly today issues of information access are addressed, in the United States in any event, as questions of copyright law. Even momentary instances of information within a computer's memory have been found to be "copies" for purposes of that law. Current proposals such as that from the Commerce Department's Working Group on Intellectual Property regarding copyright in the age of the Internet do not suggest any other outcome. But the use of copyright for brief accesses to information strikes some commentators as either awkward or ill-advised. Indeed, it has recently been questioned by other courts and led to proposed legislation

---


6 See DSC Communications Corp. v. DGI Technologies, 95-10850, (5th Cir. 1996).

{par. 8} Moreover, even the Commerce Department Working Group, which has given the issue perhaps the most extensive and public scrutiny received to date, focused on defining the rights of copyright owners to "display" and (as proposed, to) "transmit" copyrighted works. The White Paper makes it quite clear, for example, that an unauthorized posting of copyrighted information on one's computer would infringe the owner's rights of public display, and possibly even the right of transmission. The proposal does not make clear, however, whether an authorized posting coupled with an \textit{unauthorized access} to that same information would infringe any of the owner's rights. In any event, the legislation introduced to enact the White Paper proposals\footnote{"The National Information Infrastructure Copyright Protection Act," S. 1284, 104th Cong., 1st Sess. (1995).} has, as of this writing, stalled and will apparently not be enacted in the 1996 calendar year.\footnote{See Mark Walsh, "Impasse Over Online Copyrights: Why a proposed bill is polarizing the Internet's two biggest industries," \textit{The Recorder}, May 9, 1996, at p.1.}
and the like, and those that offer court opinions and legislation.10

The issue of preemption of trespass by copyright disposed

[par. 10] One might think that a trespass action, however desirable or not in the abstract, would be a moot point in practice because it would be preempted by the copyright law's "preemption provision." That provision, section 301 of the Copyright Act, preempts any state law, including presumably an action for common law trespass, in certain instances: When a state law provides rights that are "equivalent" to those provided by the Copyright Act, and provides them for subject matter that is also the subject matter of the Copyright Act, then section 301 declares that the state law is preempted—leaving copyright to govern the issue.

[par. 11] At first glance, the state common law of trespass, if used to control access to information, would seem to be just the sort of law that section 301 would preempt. It would be no argument to the contrary, for instance, that the information at issue was in the public domain. The argument here would be that since such information is not copyrightable, the copyright act cannot preempt any attempt under state law to protect it. To the contrary, the copyright policies of furthering information access are at their maximum strength when otherwise copyrightable information has entered the public domain. A state law that directly precluded copying or

distributing such information would quickly be preempted on the grounds that the rights being sought were identical to those provided by copyright; and the subject matter at issue—public domain material—was indeed well within copyright's subject matter, but simply not currently protected by copyright.11

[par.12] But at least three other, more subtle arguments, suggest that preemption might not apply to a trespass action used to restrict access to a Web site. First, in a literal-minded way, when a trespass action is used, the right at issue would be the right to control the reading of information—not its reproduction, distribution, performance, etc. It is those latter rights, not that of "reading," that are the rights of an author established by the Copyright Act. If state law restricted reading, at least arguably such a right would not conflict with the copyright rights of reproduction, display, and so on, because the act's list of author's rights does not include the exclusive right to "read."

[par. 13] On the other hand, a closer look at what goes on when one "browses" a Web suggests that "reading" an electronic document does bring about the physical fact of "copying." A document on a Web site that is read by a remote user can only be read because the accessing software creates a "copy" of the document in the memory of the user's computer. As noted above, there is substantial authority that even temporary instances of copyrightable works in computer memory are "copies." If such temporary instances are conclusively "copies" for copyright purposes, then quite possible a trespass action would be preempted.

[par. 14] But the trespass issue is well worth considering, for the notion that temporary instantiation in RAM is a "copy" remains controversial. It may not be tightly adhered to by

11 See Paul Goldstein, Copyright at §15.2.3.
courts, and it may well be overturned legislatively. Should the Copyright Act be revised to make clear that such momentary fixations do not constitute “copying,” then the right to control such fixations would no longer be a copyright right. In that event, copyright’s preemption doctrine would be inapplicable if a common law trespass action were brought to control access to a Web site.

(par. 15) Consequently, the issue of preemption of a trespass action remains a significant, open question, and the arguments for such an ancient common law action remain of substantial—if not vital—importance in this high-technology world of networked Web sites.

An illustrative problem defined

(par. 16) To illustrate this issue, imagine the following scenario—based loosely on fact. Smith & Jones, a law firm in the United States, has put a document of information about law, including some government information that is in the public domain, on its Internet-connect computer. In other words, it has created its own home page on the Web.

(par. 17) This home page specifies that anyone on the Internet may browse through the document and look at any and all information—anyone, that is, except anyone who is using a commercial computer service that charges by the minute for access. Such people are advised that they may not read beyond the home page screen. No technical restrictions are put into place; users are simply told: “If you are paying a per minute charge for Internet access, you are not allowed to read any further.” Smith & Jones has its own reasons for doing this: they relate to the firm’s desire not to be a vehicle for someone else’s profit making.

(par. 18) Now suppose that a user named Carol has gained access to Smith & Jones’s home page and read but ignored the note there. As a matter of fact, Carol has continued to read the
Smith & Jones document well beyond what the notice allows her to do. If Smith & Jones learns of this access, can they successfully sue Carol for common law trespass?

**The basic law of trespass to land set out**

{par. 19} The Restatement of Torts defines the common law cause of action for "trespass" as follows:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.12

{par. 20} Obviously the first obstacle to adopting this principle to Web sites in cyberspace is precisely that such sites are not physical property. But the first two Restatement elements fit surprisingly well: it is not hard to imagine that an unwanted Web visitor "enters [a Web site] in the possession of the other," or that the unwanted visitor "remains on the [Web site]" without permission.

{par. 21} Of course, a simple semantic argument that one is able to interpret the Restatement's language in this way is not a powerful argument that it should be so interpreted. A deeper analysis of the policies and purposes of the trespass action is called for.

{par. 22} Broadly speaking, the tort of trespass to land exists to protect private property by vindicating the owner's

---

12 Restatement (Second) of Torts § 158 (1965).
interest in exclusive possession of the land. The need to vindicate that interest is what leads most courts to hold that actual damage in the legal sense of "harm" need not be proved in a trespass action. To look beyond the superficial similarities between real property and a Web site, we therefore need to look into the reasons that legal systems provide protection for private property, and that implies a need to look at the theories underlying the very institution of private property itself.

**Four property theories sketched and applied to Web sites**

(par. 23) A thorough investigation of the theory of property would take us far into a fascinating literature—much farther than is possible in a short essay like this one. Fortunately, no more than a summary of some key theories will suffice for our purposes.

**Locke—Labor-desert**

(par. 24) John Locke justified the institution of property in a few simple logical steps: First, everyone has a property right in their own bodies and in their own labor. Second, all the resources of the world are given by God to humanity in common. Third, when anyone mixes his labor with resources held in common, the mixture of his own labor is the reason for the rise of a property right in the resources that were mixed with the labor. Finally, this right must be limited: one has a right to the resources with which one has mixed one's labor,

---

13 Restatement (Second) of Torts § 163, Comment d (1965) ("The wrong for which a [trespass] remedy is given ... consists of an interference with the possessor's interest in excluding others from the land. Consequently, even a harmless entry or remaining, if intentional, is a trespass. This is true even though the possessor benefits from the trespass, ...").
but only to the extent that carving out an individual property right leaves enough resources, of as good a quality, for others.\textsuperscript{14}

\{par. 25\} Many of Locke’s examples were of the addition of labor to the cultivation or production of goods directly from natural resources: bread, wine, and cloth were examples of labor-produced goods that he contrasted with the naturally-occurring acorns, water, and leaves. But he espoused the notion that when labor created property in resources, those resources (their property right) could then be transferred to another for further processing, transferred again, and again, yielding a property right in goods that may have passed through many hands and steps in the fabrication process.

\{par. 26\} Locke’s formulation has been immensely influential in the thinking of later philosophers of property. But we need not linger on its contribution or correctness more than to note that the essential “labor-desert” component of his theory easily justifies the institution of property rights in Web sites. Notice that with such sites, their value and even their existence derive entirely from someone’s labor in setting up the site. Locke assumed that uncultivated land had some value (though a tenth or hundredth of its value when cultivated), but the addition of labor was itself enough to create a property interest. Far more with Web sites, for without the labor and skill to create such a site, there is no “Web site” at all. Someone had to process the natural resources of copper, petroleum, silicon, and so on to produce wires, plastics, and computer chips; others labored to create software; others combined these to create a Web site.

\{par. 27\} Moreover, one of the harder aspects to justify of Locke’s theory is the requirement that when one “incloses”

common property and with labor, makes it one's own, one must leave "enough, and as good" of the resources for others. Locke himself had no difficulty with this limitation because he conceived of a world of enormous surplus: huge tracts of land, endless rivers. "No Body could think himself injur'd by the drinking of another Man, though he took a good Draught," he explained, "who had a whole River of the same Water left him to quench his thirst." 15

{par. 28} One can quarrel with this expansive view as applied to many forms of property, but it works as Locke imagined for Web sites. Indeed, the marvelous thing about the WWW is that there is no technical reason that every human being could not have his or her own Web site—a home page for Everyman. Perhaps one day this "expansive" view will seem as naive (or not) as Locke's view, but for the present it appears perfectly true.

{par. 29} In any event, the Lockean "labor" theory of property and its "enough, and as good" restriction, readily justify the treatment of Web sites as a form of property.

Bentham—utilitarianism

{par. 30} Philosopher Jeremy Bentham justified the institution of private property on utilitarian grounds. He did not agree that anyone had any Lockean natural right to the ownership of property, but he concluded that the state should create such a right because it was advantageous to society to do so. When the state does not create and protect private property, this lack leads to four evils: first, that people are deprived of the pleasure of ownership; second, that one experiences pain on losing something that is otherwise a part of one's hopes and expectations; third, that fear of losing what one currently owns causes insecurity and inability to "relax

15 Locke, para. 33 quoted in MacPherson at 20.
and enjoy" what one currently owns; and fourth, that the knowledge of the possibility of future ownership provides an incentive to labor.\footnote{Jeremy Bentham, The Theory of Legislation 70-71 (Oceana Pubs. 1975).}

\{par. 31\} Some of these rationales seem a bit circular: how can one suffer the pain of loss of ownership or a sense of insecurity about impending loss of ownership if one has no expectation of a right of ownership in the first place? But Bentham was concerned that absent a law of property, individuals would try to use technological means (locks, guns, fences, etc.) to protect what they had amassed. It would be this sense of technological ownership that would be subject to a sense of insecurity because superior technological force could always overcome it. Legal protection would provide the security and sense of ownership that these technological means could not provide.

\{par. 32\} These four rationales offer limited, but certainly not trivial, support for treating Web sites as property. Anyone who labors over the creation of such a site would have an expectation of ownership. If it were important to such a person that others access parts of the site and not others, the law's protection of that expectation would preserve the creator's "pleasure" of ownership and exclusive control. In the same way, presumably a Web site creator might be said to experience some form of emotional pain if others could defeat the owner's desires to control access.

\{par. 33\} Perhaps this seems silly, but let's put it in context: most Web site owners do not want to restrict access to their sites. To the contrary, they prefer to encourage others to visit. For these people, the law's recognition of a private property right in the form of a trespass action would simply be irrelevant: they would not seek to invoke it. But as we noted in the opening hypothetical about the law firm and its public
domain material, others might seek to restrict access for their own good—or for silly or pointless—reasons. These are the people who will feel the pain—however great or small—of loss of the ability to control access to their site. Similarly, these are the people who will feel whatever insecurity attaches to the lack of any legal enforcement mechanism for controlling access and who, correspondingly, will be benefited by a private property right in their Web sites.

{par. 34} To be sure, these various rationales, all centering on emotional pain and insecurity, seem attenuated when plucked from their tangible property origins and applied to more intangible "properties" like Web sites. But we ought not be too quick to conclude that Bentham's concerns are irrelevant or trivialized when applied in the latter context. Indeed, it would be patronizing to assume that no reasonable person could experience pain in the face of an unauthorized access to a "home page." Perhaps it is no accident that people are so fond of the term "home page:" it invokes strong emotional feelings. For that matter, anyone who has experienced a physical break-in of their home understands in a way that others cannot just how strong is the emotional sense of insecurity and helplessness that results. We should hesitate, then, before dismissing Bentham’s first three, “pain” rationales, as they apply in cyberspace.

{par. 35} Moreover, Bentham’s fourth rationale, that knowledge of the possibility of future ownership of property provides of the necessary incentive to labor to create or improve that property. Far more straightforwardly than the others, this rationale directly applies to the creation and improvement of intangible property. Indeed, the rationale underlies the notion of copyright and patent laws. Those laws exist to provide an incentive for the creation of works of authorship and technology, exactly as Bentham described for tangible property.
Would a recognition of private property rights in Web sites provide an incentive to the creation of such sites? We may debate the degree and frequency with which individuals would experience this incentive, but there is no question that property ownership would indeed provide some incentive. Again, it is essential that we keep our focus on the individuals who are within the scope of our concern. For those, perhaps many, individuals who want as much access to their sites as possible and who have no desire to bring a trespass action, the knowledge of a possible property right to exclude others does not provide an incentive. Neither is it an impediment, of course: it is simply irrelevant.

But we are not here concerned with those individuals; rather we are concerned with those who do have some desire to exclude. For these latter individuals, the knowledge of property rights would certainly serve as an incentive. They would be freer to create a site with limited access, such as the law firm site.

Hardin—tragedy of the commons

One of the most common justifications for private property is its alternative: the "tragedy of the commons." This utilitarian theory explains property by noting that when all members of a society have equal rights to all property, they will tend to overuse it. Imagine that every individual owns a cow and wants to graze that cow on the group-held property, the "commons." No individual has any incentive to limit the grazing of his own animals, for each is in a "prisoner's dilemma" vis-a-vis the other members of society. Let's take individual "Alice" who owns cattle. Alice has to decide

whether to restrain her cattle so as not to eat all the grass or to let them graze "full speed ahead," and perhaps thereby injure other members of the society whose cattle may not find enough to survive.

{par. 39} What makes the situation a prisoner's dilemma is that Alice's best strategy is invariant under any assumptions about what those other members of the society may do. If they hold back their cattle, Alice stands to gain by letting hers run free. On the other hand, if they let their cattle run free, Alice will only be hurting herself if she does not do the same. Each member of the society would view matters the same way and face identical incentives: to let their cattle run free and graze as much as possible. There will be no incentive to hold back and conserve grass for the future needs of the society. Consequently, without other limitations, the society will tend to overuse the commons and take little heed for conservation for the future.

{par. 40} Converting the commons from group ownership to private ownership converts the externalities of each individual's behavior—the overgrazing—into an internal cost: one the owner will feel. A private property owner will therefore have greater incentives to manage grazing wisely with an eye toward maximizing long-term gains through conservation.

{par. 41} Does this same rationale apply to Web sites? To answer that question we need to understand the technical nature of a Web site. Such a site is "usable" by more than one individual at a time. This result flows from the nature of the Internet as a packet switched network. Some networks, like the telephone network, operate on the basis of a dedicated channel of communication that is established at the outset of a call and preserved until the call is finished. For dedicated channel communications, once a channel is in operation, no other users can communicate over it. That is why the telephone network features the "busy" signal: a signal that a
channel over which one wishes to communicate has already been dedicated to another's use and is therefore unavailable.

{par. 42} Packet-switched networks, in contrast, have no dedicated channel. Rather, communications are broken up into small parcels called "packets." These packets are routed over different physical channels on an ad hoc basis. One packet may take an entirely different path from start point to end point than another packet that is part of the same communications session.

{par. 43} A consequence of packet switching, as this process is called, is that the receiving computer receives a communications session in discrete pieces, a packet at a time. In turn, that means that as long as each packet is properly identified, the receiving computer can receive packets from different sources, each part of a different communications session, without the different sessions conflicting. And that means that a given Web site can serve as a host for more than one user at a time.

{par. 44} In a sense, that makes a Web site something like a "public good," as is "information" generally. Public goods are goods that exhibit "non-rivalrous consumption." That is, one consumer can make use of the good without preventing or impeding another user from doing the same thing at the same time. In practical terms, this means that one person's reading a book does not stop anybody else from reading another copy of the same book.

{par. 45} The idea of resources being wasted through the tragedy of the commons is based on the commons being a private good: something the use of which by one individual does prevent another individual from the same simultaneous use. If the use of a Web site by one person does not impede others' simultaneous use, then the argument for granting such sites the status of private property is weakened.
In fact, Web sites are not completely public goods. The use by one person consumes some of the host computer’s resources, resulting in ever so slightly less of those resources available at that instant for other users. For small numbers of users on common Web host computer systems, each user will experience no noticeable delay from the presence of the other users. But as more and more users attempt to access the same site, eventually delays will become noticeable. For some smaller machines this might happen at about 25 users; larger machines might not experience any significant delays until 50 or more simultaneous users. But it is obvious that each user does indeed consume some of the host computer’s computational resources. A Web site is, therefore, not a perfectly public good; rather it is a kind of semi-public or semi-private good—one that exhibits no noticeable rivalry in consumption over some low level of use, but that becomes noticeably rivalrous as use passes some threshold point.

Because consumption is rivalrous at some point, a Web site owner might well desire some priority scheme to prevent overloading. The default scheme of service does not accomplish the control necessary to prevent a slow down. For once the number of simultaneous users reaches the point that the computer cannot effortlessly keep up with their demands, service begins to slow for all users, no matter when they first connected to the site.

To the extent, then, that sites evidence at least a low level of rivalrous consumption, it makes sense to allow the site owner a means of limiting access to what is, in effect, a limited resource. Trespass, as the legal enforcement mechanism that undergirds the establishment of private property in land, is therefore a suitable action.
Radin—personality

{par. 49} Professor Margaret Jane Radin has offered an intriguing view of property theory by suggesting that property rights in some item "X" might vary in proportion to the strength of one's personal attachment to or investment in "X." The notion is that an individual's ability to achieve a sense of "personhood" is often bound up with things over which the individual asserts or would choose to assert some sort of ownership interest. Objects such as wedding rings, houses, family pictures, and the like are not simply fungible commodities but things that make human beings what they are. Under Radin's view, things with a stronger attachment to one's person might command a higher degree of property-like protection than purely fungible items like dollar bills.

{par. 50} Radin's theory is intriguing; more to the point, it offers strong support for the notion that a Web site should be considered property, at least those sites that are set up by individuals primarily for the sake of their expressive qualities. Many Web home pages today are indeed the product of individual, not corporate and not commercial, effort. Home pages have personality; they reflect the idiosyncrasies of their owners. They are the '90's equivalent the expressive tee shirt, only if anything more expressive because far more customized for each owner. One certainly senses from viewing many of these "home grown" home pages that their owners take great pride in their pages, that they use the pages to make a statement about themselves. To use Radin's phrase, such home pages "are closely bound up with personhood because they are part of the way we constitute ourselves as continuing

personal entities in the world." 19 Certainly in the "world" of cyberspace, home pages are often the principal if not the only way that many people "constitute themselves as continuing entities."

{par. 51} Not all such pages will experience the same degree of personal self-expression, of course. Presumably corporate Web pages will have fewer—perhaps no—personal attributes. 20 But even here, a corporate "personality" of a sort is often expressed by a Web page. Such things as trademarks, familiar and colorful graphics, a style of presentation, and the like can often be seen on corporate, commercial Web pages. It takes no great stretch of the imagination to conceive these pages as reflecting a corporate self-expression.

{par. 52} One does not have to agree with the latter observation, however, to find in the notion of "property for personhood" at least a strong strand of support for viewing Web pages as a kind of property. If Web pages are only bound up with individual personhood for many individuals, then at least for those individuals the legal system would be justified under Radin's view in recognizing a property interest in such pages. That such property recognition might be better grounded for individuals than corporate entities does not argue against the fundamental proposition: that a Web page is worthy of recognition by the legal rule against trespasses.

19 Radin, note 18, at 959.

20 See MARGARET JANE RADIN, REINTERPRETING PROPERTY 12 (1993) ("Corporations are normally not conceptualized as having collective identities in any cultural sense. It follows that business entities, as long as we conceive of them as rational economic actors, can only hold fungible property.")
Conclusion

{par. 53} The notion that a cause of action for “trespass to Web sites” should exist as a means of enforcing control over access to Web sites may seem strange. But many things about the Web are strange, at least compared to pre-Web technology; it should not surprise us if legal developments might seem comparably strange at first.

{par. 54} Copyright law might seem the more obvious way to establish “rights” over one’s own Web site, since copyrightable information is often at issue. But copyright law suffers from several disadvantages. First, it seems a stretch of reasoning to make copyright apply to a “visit” to a Web site. Copyright, after all, is most at home with multiple reproductions or performances of individual works of authorship—not with Web reading and browsing. Viewed afresh, without knowledge of current case law, a trespass action is actually a more straightforward and intuitively sensible means of controlling access to “sites” than is a copyright one.

{par. 55} Second, there is mixed authority on the copyright point: though some courts have held or implied that a Web “visit” might result in an infringing “copy” of a work of authorship, other cases have implied the contrary. Consequently, it may turn out that copyright simply does not work in the site visit situation, so that a consideration of trespass as an alternative is much to the point.

{par. 56} Third, there is some sense in the copyright community that copyright ought not to apply to Web site visits. If this sense is translated into legislation, Congress will itself rule out copyright as a means of controlling site access, and again, consideration of a trespass action is in order.

{par. 57} Trespass actions are grounded in the idea of protecting an owner’s control over real property. But real
property is just a particular species of "property." There is no inherent reason that a Web site could not be considered a species of "property." The institution of property can itself be justified by several different jurisprudential theories, including those of Locke, Bentham, Hardin, and Radin. Each of these theories offers surprisingly strong support for treating a Web site as "property," and accordingly, for allowing a common law cause of action for "trespass to Web sites."