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Note

Crossing Virtual Lines: Trespass on the Internet

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Crossing Virtual Lines: Trespass on the Internet*

Daniel J. Caffarelli†

I. INTRODUCTION

1. "People who own intellectual property tend to be terrified of the Internet."¹ This statement captures the confusion and uncertainty Internet users and intellectual property owners experience when sorting out the nature of their rights in cyberspace.² Cyberspace is an evolving, non-physical place, uneasily governed by a mix of legal regimes, including the common law, statutory regulation, and custom.³ In the 1990s, the Internet expanded from a purely government-funded, experimental computer network to an international web of commercial, educational, and private computer sites.⁴ Statements like that quoted above demonstrate that as the Internet becomes even more commercial, the need for formalistic, predictable legal standards will increase. In the context of the Internet, however, the application of accepted traditional legal doctrines often becomes uncertain and ambiguous.⁵ Although no one will deny a landowner's right to exclude others from her land, should the law grant similar rights to a World Wide Web ("Web") site creator? Can one possess common law property rights in a Web site, which protect the site's virtual boundaries and all the

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¹ Thomas Petzinger, Jr., *Copyright Imbroglia Entangles a Work That Web Gave Away*, WALL ST. J., Oct. 10, 1997, at B1.

² See *id.* (recounting one individual's effort to post an out-of-print book on the Internet and his resulting liability despite having received the publisher's permission).

³ See *ACLU v. Reno*, 929 F. Supp. 824, 830, 832 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) (stating that "[t]he Internet is not a physical or tangible entity" and that "it would not be technically feasible for a single entity to control all of the information conveyed on the Internet"); see also David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that "Cyberspace challenges the law's traditional reliance on territorial borders" because it does not have "physical markers," but is bound by "screens and passwords").

⁴ See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 535-536 (1996) (providing a brief history of interactive computing and its development).

⁵ See Johnson & Post, *supra* note 3, at 1367 (stating that cyberspace requires a "system of rules quite distinct from" those that govern traditional physical worlds and "can create its own law and legal institutions").

business that the site's creator conducts within it?

2. Expert Pages, a California company, raised these issues in three 1997 law suits.⁶ Expert Pages maintains a Web site that contains a database of consultants who are experts in various fields and available for consultation.⁷ The site is open to the public, and the homepage contains a notice stating that “[b]y accessing Expert Pages for Free [sic], visitor confirms that his/her use is for purposes of retaining an expert or evaluating this site and agrees that s/he will not use any information on this site for marketing or solicitation.”⁸ Additionally, visitors can read the site's conditions of use through a link located below the notice.⁹ The terms on this page state that “[u]se of the Expert Pages, or any information on this site, for purposes of solicitation, or for any other purpose other than to retain an expert or consultant, is strictly prohibited.”¹⁰ Ignoring these terms, three separate parties downloaded the database for use in their own expert sites.¹¹ The parties also contacted individuals listed in Expert Pages' database to solicit them to buy listings in the new databases.¹²

3. Expert Pages filed complaints against the three parties, alleging copyright infringement, state and federal unfair trade practices, common law breach of contract, and common law misappropriation.¹³ In addition to these claims, Expert Pages also

⁶ See Plaintiff's Verified Complaint for Injunctive Relief and Damages, *Expert Pages v. Buckalew*, No. 97-2109 VRW (N.D. Cal. filed June 5, 1997); Plaintiff's Amended Verified Complaint for Injunctive Relief and Damages, *Expert Pages v. Universal Networks, Inc.*, No. 97-1542 SI ENE (N.D. Cal. filed May 2, 1997); Plaintiff's Verified Complaint for Injunctive Relief and Damages, *Expert Pages v. LawInfo.com*, No. 97-1302 SI (N.D. Cal. filed Apr. 11, 1997).

⁷ See *Expert Pages* (last modified Apr. 16, 1999) <<http://www.expertpages.com/>>.

⁸ *Id.*

⁹ See *id.*

¹⁰ Expert Pages, *Conditions of Use* (last modified Apr. 15, 1999) <<http://www.expertpages.com/conditions.htm>>.

¹¹ See Plaintiff's Complaint, *Buckalew*, ¶ 14 (No. 97-2109 VRW); Plaintiff's Amended Complaint, *Universal Networks, Inc.*, ¶ 16 (No. 97-1542 SI ENE); Plaintiff's Complaint, *LawInfo.com*, ¶ 15 (No. 97-1302 SI) (alleging in each complaint that the respective defendant “made at least one unauthorized copy of the ‘automated database titled Expert Pages’ by copying the database” onto a magnetic storage medium).

¹² See Plaintiff's Complaint, *Buckalew*, ¶ 15 (No. 97-2109 VRW); Plaintiff's Amended Complaint, *Universal Networks, Inc.*, ¶ 18 (No. 97-1542 SI ENE); Plaintiff's Complaint, *LawInfo.com*, ¶¶ 18-19 (No. 97-1302 SI) (alleging in each complaint that the defendants sent e-mail messages to experts listed on the database, soliciting them for defendants' new database sites).

¹³ See Plaintiff's Complaint, *Buckalew*, ¶ 1 (No. 97-2109 VRW); Plaintiff's Amended Complaint, *Universal Networks, Inc.*, ¶ 1 (No. 97-1542 SI ENE); Plaintiff's Complaint, *LawInfo.com*, ¶ 1. (No. 97-1302 SI)

alleged common law trespass.¹⁴ The United States District Court for the Northern District of California issued a temporary restraining order against one defendant, which immediately removed its site from the Web.¹⁵ The other two defendants also agreed to remove their Web sites and settled with Expert Pages.¹⁶ Although Expert Pages did not have the opportunity to argue its trespass claims in court, the claims raise many interesting questions: Are Web sites virtual real property? Do Web site creators have exclusive property rights in their sites? Does interfering with the maintenance of a Web site constitute trespass or conversion of personal property?

4. The Expert Pages litigation involved an electronic database posted within a Web site. It provides an excellent case study for observing how intellectual property law applies to this common modern technology. This Note will examine how businesses or individuals who create electronic databases and make them available on the Internet can secure greater protection over the databases, despite the thin copyright currently granted,¹⁷ by enforcing property-like rights through trespass. Additionally, this Note will discuss how Web site creators can obtain greater protection than a thin copyright in those sites containing interactive features, like electronic databases. The Expert Pages litigation will serve as an example for this analysis.

5. To win a claim of trespass to its Web site, Expert Pages would have needed to prove that Web sites are property in which site creators have exclusive interests,¹⁸ and that federal copyright law does not preempt a trespass claim as a form of common law copyright protection.¹⁹ Because federal copyright law preempts all legal or

¹⁴ See Plaintiff's Complaint, *Buckalew*, ¶ 1 (No. 97-2109 VRW); Plaintiff's Amended Complaint, *Universal Networks, Inc.*, ¶ 1 (No. 97-1542 SI ENE); Plaintiff's Complaint, *LawInfo.com*, ¶ 1. (No. 97-1302 SI)

¹⁵ See *Expert Pages v. Universal Networks, Inc.*, No. 97-1542 IS ENE (N.D. Cal. May 2, 1997) (temporarily enjoining defendant from using or reproducing plaintiff's database, maintaining a competing database, or soliciting experts from plaintiff's database).

¹⁶ See Expert Pages, *Web Piracy Update Pages* (visited Oct. 29, 1998) <<http://www.expertpages.com/anti-webpiracy/>> (reporting that LawInfo.com agreed to settle on Apr. 16, 1997, and that Universal Networks agreed to a permanent injunction and damages on Apr. 30, 1997).

¹⁷ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that "copyright in a factual compilation is thin"). A thin copyright refers to the legal rule that a copyright in a factual compilation only covers the selection and arrangement of facts in the work and not the facts themselves. See *id.* The Copyright Act expressly denies copyright protection for facts. See 17 U.S.C. § 102(b) (1994) (stating that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery").

¹⁸ See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 13, at 77 (5th ed. 1984) (noting that an action for trespass protects an individual's "interest in exclusive possession" of property).

¹⁹ See 17 U.S.C. § 301(a) (1996) (providing that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by this title").

equitable interests that provide rights equivalent to copyright, courts may not enforce private agreements, like shrink-wrap licenses, though the agreements may be valid contracts.²⁰ Depending on the nature of their intellectual property, parties may find that ordinary copyrights and contracts insufficiently safeguard their interests. In light of these limits, Expert Pages' trespass claims could potentially fill a gap in the protection of intangible property that is not currently covered by property, tort, contract, or intellectual property law.

6. This Note suggests that by recognizing property rights in Web sites, Web site creators will be able to rely on the doctrine of trespass to protect both their Web sites and the data within the sites. Part II of this Note reviews four arguments for recognizing property rights in real and personal property and applies them to Web sites. Part II.A discusses the underlying rationales of these four perspectives and concludes that the arguments traditionally cited in support of property rights in real and personal property also support the recognition of property rights in Web sites. The law recognizes real and personal property rights because of the labor an owner invests in her property, as a natural condition of human expectations, for reasons of social utility, and as a way to allocate scarce resources. These same factors can justify the creation of property rights in Web sites.

7. Part II.B examines the doctrine of conversion of intellectual property, a body of law that extends property rights to non-traditional, non-physical property. This evolution in the common law's treatment of intangible property has important implications for Web sites and electronic databases. Part II.B concludes that Web sites have characteristics similar to other forms of intangible property for which courts have found conversion liability. Although claims of conversion are probably not applicable to Web sites, the common law doctrine of trespass should apply to Web sites. That the common law has evolved to provide actions involving intellectual property in addition to federal patent, copyright, and trademark law provides additional support for the recognition of property rights in Web sites.

8. Part III addresses specific gaps in the protection that intellectual property law secures over electronic databases and Web sites. Part III.A discusses the limited scope of protection that copyright provides the owners of electronic databases like Expert Pages. Because databases are subject to thin copyrights overall,²¹ federal copyright protection provides incomplete coverage. Part III.B reviews shrink-wrap licenses and suggests that the notices Expert Pages posted on its Web site provide limited protection against visitors' improper acts. Part III.C examines the elements of trespass to chattels and argues that this body of law should apply to Web sites. The law should treat Web site visitors as having conditional consent to visit and interact with a Web site. A visitor's violation of a site's posted terms, however, revokes the conditional consent, making the visitor a trespasser.

²⁰ See *infra* notes 129-32 and accompanying text.

²¹ See sources cited *supra* note 17.

II. THE INTERNET AND PROPERTY LAW

A. Theoretical Foundations of Private Property and Their Application to Web Sites

9. While the underlying doctrines of property law have ancient roots, the World Wide Web (“Web”) is less than a decade old.²² It is not surprising, then, that applying the doctrine of common law trespass, with its long legal tradition, to modern computer technology might seem inappropriate. Fundamentally, Web sites are computer programs that programmers create using special code.²³ Although the sites are not physical places, there are many parallels between real property and cyberspace.²⁴ The Internet’s jargon reflects this reality: one *navigates* the Web, has a *homepage*, and visits individual *sites* that have specific *addresses*.²⁵ Additionally, many of the interests associated with real property are also attributable to the Internet.²⁶ Indeed, Professor I. Trotter Hardy observes that philosophical arguments and rationales for the creation and recognition of property rights similarly justify the creation and recognition of property rights in the Internet.²⁷

1. John Locke

10. According to John Locke’s labor theory, an individual’s property rights in a “thing” arise from the investment of labor in developing the property’s resources.²⁸ All

²² See Bryan Pfaffenberger, *World Wide Web Bible* 57 (2d ed. 1996).

²³ See *id.* The code, called hypertext markup language (HTML), allows a programmer to translate a standard document into a graphical format which an Internet browser can read and display. See *id.* at 63.

²⁴ See I. Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, 1996 J. Online L. 7, ¶ 1 (Nov. 1, 1998) <<http://www.warthog.cc.wm.edu/law/publications/jol/hardy.html>>.

²⁵ See *id.* ¶ 1 (discussing analogies which can be drawn between the Internet and real property).

²⁶ See *id.* ¶ 20 (discussing how the elements of trespass apply to Web sites).

²⁷ See *id.* ¶ 57. Professor Hardy reviews four different works that discuss the nature and origin of property rights. He first discusses John Locke’s labor theory of property, explaining the importance of invested human labor in property rights. See *id.* ¶¶ 24-29. Hardy next reviews Jeremy Bentham’s classic work, *The Theory of Legislation*, explaining the social utility of property rights. See *id.* ¶¶ 30-37. Hardy also examines Garrett Hardin’s analysis of public goods, or the commons, as a basis for expanding property rights to Web sites, see *id.* ¶¶ 38-48, and concludes with a discussion of Margaret Jane Radin’s personhood perspective of property rights, as applied to Web sites, see *id.* ¶¶ 49-52. Part I of this Note reviews Professor Hardy’s analysis of these arguments.

²⁸ See John Locke, *Two Treatises of Government* ¶ 27 (Peter Laslett ed., Cambridge Univ. Press rev. ed. 1964) (1689) *reprinted in* *Property, Mainstream and Critical Positions* 17-27 (C.B. Macpherson ed., 1978).

individuals own their bodies and the labor they are capable of performing.²⁹ Conversely, all unclaimed resources belong to society in common.³⁰ When an individual improves a resource by investing her labor in it, she gains property interests in the improved item, as long as sufficient resources are left for others to enjoy.³¹

11. Locke's theory supports the recognition of property rights in Web sites.³² Using computer resources, a Web site creator invests her energy and time to build a site. In the same way that a landowner's improvements increase the value of real property, a programmer's development of a site increases the value of the Internet, or the specific address of a newly created Web site.³³ Furthermore, the ease with which people can publish on the Internet makes it virtually infinitely expandable.³⁴ Creating a new Web site does not infringe upon anyone else's rights in existing or proposed Web sites because there will always be room for additional sites.³⁵ Web site creators can enjoy exclusive property-like rights in their sites without exhausting common computing resources.³⁶

2. Jeremy Bentham

12. Jeremy Bentham believed that utilitarian reasons justified the legal recognition and enforcement of property rights.³⁷ Bentham argued that the law's failure to protect property rights would challenge various social norms and upset basic

²⁹ *See id.*

³⁰ *See id.* ¶ 26.

³¹ *See id.* ¶ 27. Locke reasoned that labor is the basic foundation of property rights because it adds the greatest value to the property. *See id.* ¶ 43.

³² *See Hardy, supra* note 24, ¶¶ 26, 28-29.

³³ *See id.* ¶ 26.

³⁴ *See* *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996) *aff'd* 117 S. Ct. 2329 (1997) (stating that an individual can become a publisher on the Web simply by connecting to the Internet through a small personal computer running the appropriate software).

³⁵ Further, one could argue that new Web sites are limited because sites cannot use domain names that infringe someone else's trademark. *See Panavision Int'l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1306 (1996). This limitation, however, does not reflect a technical limitation of the Web, but merely a constraint on domain name choices.

³⁶ *See Hardy, supra* note 24, ¶¶ 27-28.

³⁷ *See* JEREMY BENTHAM, *THE THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE*, pt. 1, ch. 8, 111-13 (C. K. Ogden ed. & Richard Hildreth trans., Routledge & Kegan Paul Ltd. 1950) (1802). Bentham rejected any notion that "natural property" existed; property, he reasoned, was a creation of law. *See id.*

social values.³⁸ The absence of property rights would destroy the security inherent in ownership and eliminate incentives for future ownership.³⁹ Without property rights, a property owner must defend her possessions by force or forgo the expectation and enjoyment of exclusive ownership.⁴⁰

13. These utilitarian rationales for property rights also reinforce the argument for treating Web sites as property.⁴¹ If a person interferes with a Web site's maintenance, the site's creator will experience the same breach of security that a real property owner would experience from trespass.⁴² Although a typical Web site creator does not want to exclude visitors from her site, she does want to maintain control over the site's access; private property rights would provide her with this control.⁴³ The law's failure to enforce property-like rights in Web sites could destroy much of the incentives for computer programmers and businesses to invest money or labor in the continued development of the Internet.⁴⁴ Although copyright, trademark, and misappropriation laws protect Web sites from specific acts, such as misrepresenting a site's source,⁴⁵ common law property rights would give Web site creators better control over visitors' access to the site. Also, site creators lacking the hardware or resources to restrict access to a site technically would benefit from increased control.⁴⁶ Recognizing private property rights in Web sites would give site creators the incentive to create and maintain their sites, encouraging the development and expansion of the Internet.

³⁸ *See id.* at 113.

³⁹ *See id.* pt. 2, ch. 1, at 159.

⁴⁰ *See id.* pt. 1, ch. 8, at 113 (stating that “[a] feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law”).

⁴¹ *See Hardy, supra* note 24, ¶¶ 32-37.

⁴² *See id.* ¶ 33.

⁴³ *See id.*

⁴⁴ *See id.* ¶¶ 35-37. *See also* 143 CONG. REC. E2000 (daily ed. Oct. 9, 1997) (extension of remarks of Rep. Coble) (reporting on a study of the “economic reasons for providing adequate statutory protection for the data base industry” and pointing out that “failure to act may result in adverse effects on technological progress, on economic growth, and possibly on the research, education, and scientific communities”).

⁴⁵ *See Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 309 (D.N.J. 1998) (granting plaintiffs a preliminary injunction enjoining the defendant from maintaining an Internet site “designed to be a false designation of origin,” because the site falsely inferred plaintiffs’ organization as the site’s origin).

⁴⁶ *See Hardy, supra* note 24, ¶¶ 4-6 (listing various ways in which a site creator could restrict access to a site, all requiring advanced technical facilities that may not be available to the creator).

3. Margaret Jane Radin

14. Margaret Jane Radin provides another justification for private property rights: personhood.⁴⁷ According to her theory, an individual must have control over the resources in her environment to develop completely as a person.⁴⁸ This theory reflects the human tendency to define or conceptualize an individual partly from the objects or “things” that she possesses.⁴⁹ If the physical property that a person possesses, in part, defines that person, the law should recognize broad private property rights in the control of that property. Unless the law sufficiently recognizes an individual’s right to control the pieces of property that partly define one’s personhood, the resulting restraint on rights will “hinder” individual autonomy or liberty.⁵⁰ The amount of pain that a person experiences from the loss of an object provides a measure of the strength of the connection between the individual and the property.⁵¹ If a married person’s wedding ring is stolen, the pain felt will be much greater than that felt by a jeweler who loses the same ring from his display case, though the monetary loss is equivalent.⁵² Because a person’s identity is “bound up” in the property she owns, to guarantee personal liberty, the law should allow her to exercise control over that property.⁵³

15. As with their personal property, Web site creators can also develop strong connections to their sites, providing a basis under Radin’s theory for the recognition of private property rights in the sites.⁵⁴ Many Web site creators use their sites as tools for expressing personal information about themselves and issues important to them.⁵⁵

⁴⁷ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

⁴⁸ See *id.*

⁴⁹ See *id.* at 959. Radin says that a wedding ring, a portrait, an heirloom, and a house are examples of the types of possessions that are “bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.” *Id.* These objects are “almost part” of ourselves. *Id.*

⁵⁰ *Id.* at 960. Radin further states that “[o]nce we admit that a person can be bound up with an external ‘thing’ in some constitutive sense, we can argue that by virtue of this connection the person should be accorded *broad liberty with respect to control over that ‘thing.’*” *Id.* (emphasis added).

⁵¹ See *id.* at 959.

⁵² See *id.*

⁵³ *Id.* at 960. Radin stresses that the fundamental element of this theory is personhood, not liberty. See *id.* Liberty arises from an individual’s ability to control the property that defines her person. See *id.*

⁵⁴ See Hardy, *supra* note 24, ¶ 50.

⁵⁵ See *id.* (stating that “[h]ome pages have personality” because “they reflect the idiosyncrasies of their owners” and that many Web site owners “use the pages to make a statement about themselves”).

Depending on the information an individual has chosen to post on her Web site, a site can be an extremely useful tool for discovering the individual's personality and beliefs. Following Radin's theory, Web site creators should have strong property interests in their sites stemming from the strong connection between the creator's personality and the site.⁵⁶ Likewise, a business may expend considerable energy and resources in creating a site that reflects the firm's character or product. Just as personal Web sites can convey details about their creators, commercial sites can perform the same function.⁵⁷ A corporate entity should possess property rights in its Web site under the personhood theory in the same way that it owns the trademarks and goodwill of its products.⁵⁸

4. Garrett Hardin

16. Garrett Hardin's paper on the "tragedy of the commons" discusses how the recognition of private property rights can cause individuals to change harmful behavior and eliminate the negative externalities of common ownership.⁵⁹ A rational actor seeks to maximize her wealth.⁶⁰ Accordingly, the actor will maximize her consumption of common resources because she gains the complete benefit of the additional use of the resources, but spreads the costs of use among the common owners.⁶¹ Likewise, other actors will also maximize their use because the cost of additional use is minimal.⁶² The aggregate consumption, though, is considerable, causing the common property to be quickly consumed.⁶³ If society recognizes private property rights over common property, however, individuals will better police consumption of the property because

⁵⁶ *See id.*

⁵⁷ *See id.* ¶ 51. Hardy proposes that corporate Web pages do reflect a business' "self-expression" through graphics, presentation, and trademarks. *Id.*

⁵⁸ *See id.* See DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 5A (1992), for an introductory description of trademarks. Trademarks identify the producer of a good and enable a consumer to distinguish between different producers and goods. *See id.* Trademarks, because of their identifying function, seem analogous to Radin's argument that property is capable of defining its owner. In this regard, the similarity between trademarks and Web sites is strong.

⁵⁹ *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

⁶⁰ *See id.*

⁶¹ *See id.* Hardin explains his theory by using the examples of an open pasture for the commons and individual herdsmen as the rational actors. *See id.*

⁶² *See id.*

⁶³ *See id.* at 1245. Hardin describes common situations where this problem has developed: over grazing in the western United States, over fishing on the open ocean, and over crowding at national parks. *See id.*

each owner will bear the costs of unlimited consumption, which the public would otherwise bear.⁶⁴ Private property rights, thus, internalize the costs of each individual's additional use, restraining each person's ability to consume additional resources cheaply.

17. As a common resource, the Internet is susceptible to the tragedy of the commons.⁶⁵ The Internet is a packet-switched network that does not use dedicated channels of communication between points, allowing more than one user to request data from a single site at any one time.⁶⁶ Although the Internet is virtually infinitely expandable in size, individual sites have finite processing capabilities dependent on the site's hardware.⁶⁷ As a Web site receives more visitors, its computational power per visitor decreases and the site distributes data more slowly.⁶⁸ At some point, after a site receives too many requests, it becomes so slow that it is no longer usable, regardless of when a visitor first accessed the site.⁶⁹ Web site creators, therefore, have a strong interest in controlling access to their sites. The extension of traditional private property rights to Web sites would provide the needed recognition and power to restrict access and avoid the tragedy of the commons.⁷⁰

18. The underlying reasoning of the policies and rationales discussed above, which have been found to justify common law property rights in real or personal property, also justify the extension of property rights to Web sites. Whether based on invested labor, social norms, personal fulfillment, or resource allocation, Web sites exhibit characteristics of personal property despite their intangible nature. Based on theories that justify common law property rights, some forms of intangible and intellectual property appear to be an appropriate subject matter for misappropriation or conversion actions. Plaintiffs and courts have used these areas of the law, although

⁶⁴See Hardy, *supra* note 24, ¶ 40.

⁶⁵ See *id.* ¶¶ 44-47.

⁶⁶ Packet-switching technology allows many users to transmit and receive information over single lines of communication at once. See *id.* ¶ 43. Unlike a telephone circuit-switching network, which requires a direct electrical connection between both parties, packet-switched networks allow computers to divide messages into small packets and send them over random, varying routes to the same destination. See PFAFFENBERGER, *supra* note 22, at 34-35. The receiving computer reassembles the packets into their original format. See *id.* at 35.

⁶⁷See Hardy, *supra* note 24, ¶ 46. Visitors using small machines may begin to experience delays in accessing Web sites when 25 or more users try to access the same site; for larger machines, delays will occur at a higher user level. See *id.*

⁶⁸ See *id.* ¶¶ 46-47 (explaining that the use of a Web server by a user "consumes" some of that computer's computational resources, creating "rivalrous" consumption past a certain threshold).

⁶⁹ See *id.* ¶ 47.

⁷⁰ See *id.* ¶ 48.

relatively new, to enforce property rights in “intangible trade values” and intellectual property falling outside of the subject matter of copyright and patent law.⁷¹

B. Conversion and Misappropriation of Intangible Property

19. Traditional property law is “anchored” in the physical property which it governs.⁷² Although intellectual property law concerns intangible inexhaustible subject matter, the subject matter must still fall into certain categories, such as fixed works of authorship⁷³ or useful, novel, non-obvious inventions.⁷⁴ These categories are substitutes for the concreteness of tangible property and provide an analytical anchor that intellectual property law would otherwise lack.⁷⁵ In recent years, courts have allowed claims for misappropriation or conversion of intangible property, expanding the scope of protection for information falling outside the traditional bounds of intellectual property law.⁷⁶ For example, New York courts allow plaintiffs to recover for the misappropriation of an idea that is novel, in concrete form, and that a defendant uses.⁷⁷

⁷¹ KEETON, *supra* note 18, § 130, at 1020 (describing various successful claims regarding rights in news broadcasts, public performances, personal likenesses, and trade secrets).

⁷² Jeff C. Dodd, *Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases*, 32 HOUS. L. REV. 459, 460 (1995).

⁷³ See 17 U.S.C. § 102(a) (1994) (providing that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”).

⁷⁴ See 35 U.S.C. § 101 (1994) (providing that a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof,” is patentable); 35 U.S.C. § 102 (requiring that patentable subject matter be novel); 35 U.S.C. § 103 (Supp. II 1996) (requiring that patentable subject matter be non-obvious “to a person having ordinary skill in the art to which said subject matter pertains”).

⁷⁵ See Dodd, *supra* note 72, at 460-61. This anchor is important because it provides “the functional equivalent of tangibility,” providing intellectual property with greater stability. *Id.* at 461. By fitting the subject matter into these categories, intellectual property is given tangible property-like characteristics or qualities. See *id.* at 460-61.

⁷⁶ See *id.* at 462 & n.14 (explaining that the application of these doctrines to new forms of intellectual and intangible property has “enlarged the domain of information property” and created uncertainty over “just how far [these doctrines will] extend the realm of property”).

⁷⁷ See *Galanis v. Procter & Gamble Corp.*, 153 F. Supp 34, 38 (S.D.N.Y. 1957) (holding that the plaintiff’s claim that defendant unlawfully appropriated her laundry detergent idea presented a triable issue of material fact). In *Galanis*, the plaintiff sent an unsolicited letter to the defendant explaining her idea and plan for a new laundry soap, including a possible name. See *id.* at 35. The plaintiff had also used the idea in her home. See *id.* at 36. Though the court doubted that plaintiff would succeed at trial, plaintiff had presented a question of fact on which the court could not grant summary judgment. See *id.* at 38. But see *National Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847-55 (2d Cir. 1997), where

21. A claim of conversion of property has three elements: (i) the plaintiff must prove she owned the property at the time of the conversion; (ii) the defendant must wrongfully dispossess the plaintiff of her property; and (iii) the plaintiff must suffer damages.⁷⁸ A problem with alleging misappropriation of intangible property is determining what intangibles “will be treated as property.”⁷⁹ The court in *G.S. Rasmussen & Associates v. Kalitta Flying Service, Inc.*,⁸⁰ listed three elements that must be met before the law recognizes a property right: “First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.”⁸¹

22. Applying the *Rasmussen* elements to Web sites demonstrates that the site creators have property rights in their sites. In satisfaction of the first *Rasmussen* element, Web site creators have definable, specific interests in their sites, such as control of the sites’ appearance, profits from business conducted over the sites, and maintenance of the site without outside interference. A Web site is essentially computer code stored in a retrievable form in a piece of computer hardware connected to the Internet.⁸² Although intangible, third parties can read the code, as embodied in the storage medium, and the code is sufficiently similar to other forms of protected intangible property to constitute a recognizable property interest.⁸³ A Web site creator, therefore, can base her interests in the site on the site’s programming, a precise “limited thing.”⁸⁴

the Second Circuit held that the defendant’s reporting of basketball statistics and scores was not a misappropriation of intangible property.

⁷⁸ See 18 AM. JUR. 2D *Conversion* § 2 (1985).

⁷⁹ Dodd, *supra* note 72, at 463-64.

⁸⁰ 958 F.2d 896 (9th Cir. 1992) (upholding plaintiff’s property right in a FAA air-worthiness certificate issued to plaintiff for his modified design of DC-8 airplanes). In *Rasmussen*, the defendant copied the plaintiff’s STC certificate and included the copy in its application to the FAA for obtaining its own certificate. See *id.* at 900. The court held that the plaintiff possessed a property interest in the STC certificate, which required many hours of engineering and testing to receive. See *id.* at 903.

⁸¹ *Id.* at 903.

⁸² See PFAFFENBERGER, *supra* note 22, at 63.

⁸³ See Dodd, *supra* note 72, at 479. When adjudicating claims for conversion or misappropriation of intangible property falling outside the normal bounds of intellectual property law, courts “look to some form of the traditional elements of a personal property conversion action.” *Id.* Because a Web site creator can demonstrate this link between her site and personal property, the creator can provide a court with a legitimate property basis for protecting the site.

⁸⁴ *Rasmussen*, 958 F.2d at 903 (explaining how a FAA certificate precisely defines and limits the plaintiff’s interests in the intangible property subject to the conversion claim).

23. Web site creators can also easily prove that their sites are capable of being exclusively possessed or controlled, the second *Rasmussen* element. A Web site creator, like a land owner, can “fence off” a site, giving the creator the exclusive ability to program the site and determine its content.⁸⁵ Although a Web site creator invites others to visit the site, only the creator has the ability to shape and alter the site. The Web site creator can require passwords to access the site or prohibit users from linking to an internal page in the site without navigating through the homepage.⁸⁶ Through measures like these, Web site creators can restrict access to their sites to those who have a specific interest in the site. Even if a site creator allows unrestricted access to his site, he still retains the ability to restrict access. Thus, a Web site creator is capable of exclusive possession over his site.

24. Web site creators’ claims to exclusivity are legitimate, satisfying the third *Rasmussen* element. A Web site programmer has invested time and resources in the site. Without this investment, the Web site would not exist. Regardless of whether the creator is a corporate entity or a natural individual, the site creator’s investment in the site gives the creator the “type of reasonable investment-backed expectations that give rise to a legitimate claim of exclusive control over” the site.⁸⁷

25. As discussed in Part II.A, many of the rationales often cited to justify property rights in real or personal property also justify the extension of property-like rights to Web sites. Even if critics fail to see this similarity, Web sites appear to have property-like characteristics similar to those minimally required to bring a claim for conversion of intangible property. Based on these reasons, Web site creators should receive the same protections which common law property rights grant.

III. FILLING THE GAP — ACTIONS IN TRESPASS WHEN INTELLECTUAL PROPERTY LAW FAILS

26. Although Web sites exhibit the property-like characteristics required for a claim of conversion, such a claim is probably inappropriate. Conversion actions redress tortious interference with chattel that are “so serious, and so important, as to justify the forced judicial sale” of the chattel to the defendant.⁸⁸ In the Expert Pages litigation, the defendants’ conduct did not interfere so seriously with Expert Pages’ interests in its Web site and database that Expert Pages could not continue to use and

⁸⁵ See Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 645-47 (1998) (describing technical means for Web site creators to prevent unwanted linking to their sites).

⁸⁶ See *id.* at 645-46 (stating that password authentication is the easiest technique for restricting access to a Web site and that technology exists for prohibiting linkers from linking to interior pages of a site).

⁸⁷ *Rasmussen*, 958 F.2d at 903.

⁸⁸ KEETON, *supra* note 18, § 15, at 90.

enjoy them. Though the defendants' actions violated Expert Pages' terms of use for the site and database, other visitors could still interact with the site and search the database. The defendants' actions did not sufficiently challenge Expert Pages' interests to such an extent that they amounted to conversion of the Web site and database. Their conduct, however, did provide a sufficient basis for an action in trespass, which remedies "minor interference, resulting in some damage, but not . . . sufficiently important to amount to the greater tort" of conversion.⁸⁹

27. Additionally, a Web site visitor can undertake conduct that does not amount to a violation of traditional intellectual property rights, but does contravene a site creator's property rights. For example, consider a Web site creator like Expert Pages. The federal copyright statute would deem many of the most valuable portions of the database, such as the factual listings, uncopyrightable.⁹⁰ If a visitor were to download and use the information to compete against the original site's creator, the creator could not assert any copyright claims over the information. If the Web site creator was capable of enforcing property rights in the Web site, however, she could allege that the visitor trespassed against the site when she visited it and copied the information. All that the site creator would need to do to build a successful claim is post a notice prohibiting visitors from taking the database information for commercially competitive purposes. This type of notice would constitute the creator's limited consent to navigate the Web site, subject to the limitations contained in the notice. A visitor who took information in violation of a Web site creator's limited consent would be a trespasser because the conditional consent terminated once the visitor acted contrary to the posted notice.

A. Database Compilations and Copyright

28. The Internet's most powerful feature is its ability to connect individuals to a myriad of sources containing thousands of pages of information.⁹¹ Much of this information is organized in the form of databases, increasing the need for secure means of protecting intellectual property in cyberspace.⁹² Before addressing the specific manner in which a visitor's actions could constitute a trespass against a Web site, it is necessary to summarize current copyright law governing databases. Review of this topic will demonstrate why copyright does not sufficiently protect Internet databases.

29. Facts alone are not copyrightable, but compilations of facts are within the

⁸⁹ *Id.*

⁹⁰ *See infra* notes 93-97 and accompanying text.

⁹¹ *See* DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 17 (1994) (describing the Internet as offering "access to information and resources beyond measure, limited only by your ability to find them").

⁹² *See id.* at 451 (reporting "that as of mid-1992 there were 2000+ database producers and 700+ on-line services").

subject matter of copyright protection if the compilations “constitute[] an original work of authorship.”⁹³ A fact cannot be copyrighted because it is discovered, not invented.⁹⁴

Courts base this principle on the fundamental tenet that copyright subsists because of “originality, not effort.”⁹⁵ Even though an author’s labor is not copyrightable subject matter, copyright can subsist in a factual database if the database embodies a unique arrangement, selection, or design of facts.⁹⁶ The copyright, however, is limited to the arrangement, design, and selection of the facts, and does not extend to the underlying facts themselves.⁹⁷

30. In its discussion of the Copyright Act, the Supreme Court, in *Feist Publications, Inc. v Rural Telephone Service Co.*, emphasized the three elements that form the basis of a factual compilation’s copyright when the work contains preexisting facts: the compilation (i) consists of pre-existing facts or data; (ii) is selected, coordinated, or arranged by the author; and (iii) is an original work of authorship “by virtue of the particular selection, coordination, or arrangement” of the data.⁹⁸ The second element is the most important because it requires a court to evaluate a compilation’s originality by examining the author’s selection and arrangement of the data.⁹⁹ “Originality” requires only a “minimal level of creativity” and that the author worked independently of any preexisting materials in selecting and arranging the new compilation.¹⁰⁰ Originality, however, does not equal novelty.¹⁰¹

31. To prove that a factual compilation or database infringes a preexisting collection’s copyright, a plaintiff must possess a valid copyright and demonstrate that

⁹³ 17 U.S.C. § 101 (1994). *See also* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (discussing the nature of factual compilations and the requirements that the Constitution and copyright statute impose on database authors to receive copyright protection).

⁹⁴ *See Feist*, 499 U.S. at 347.

⁹⁵ *Id.* at 364.

⁹⁶ *See* 17 U.S.C. § 101 (1994) (defining a compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”); *Feist*, 499 U.S. at 350 (stating that copyright subsists in a compilation if the compilation is “an original selection or arrangement of facts”).

⁹⁷ *See* 17 U.S.C. § 103(b) (1994) (stating that “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, . . . and does not imply any exclusive right in the preexisting material”).

⁹⁸ 499 U.S. at 357 (discussing 17 U.S.C. § 101 (1976)).

⁹⁹ *See id.* at 358.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

the junior compilation impermissibly copies the original elements of the senior compilation.¹⁰² These two elements focus on the creative elements of a compilation.

That a subsequent database contains copied facts or data from a prior copyrighted collection is irrelevant. As Justice O'Connor wrote in *Feist Publications, Inc. v. Rural Telephone Service Co.*, "100 uncopyrightable facts do not magically change their status when gathered together in one place."¹⁰³

32. If the Expert Pages litigation went to trial, Expert Pages would have needed to prove that its database is an original work of authorship so that it could assert a copyright in the work.¹⁰⁴ To demonstrate that the database is an original work of authorship, Expert Pages would have had to show that the layout, selection, and creative aspects of the database are sufficiently original to warrant copyright protection.¹⁰⁵ Although *Feist* imposes a relatively low threshold for originality,¹⁰⁶ Expert Pages possesses a thin copyright at best.¹⁰⁷ With this level of protection, Expert Pages will not be able to prevent the copying of its database contents, preventing it from adequately protecting its intellectual property investment. To encourage the continued development of the Internet's resources, Web site creators should be able to rely on stronger methods of protection.¹⁰⁸

33. The policy objectives underlying the Copyright Act's treatment of databases is to preserve the public's access to factual information, balanced against the need to provide incentives for the creation of databases.¹⁰⁹ The public's interest, however, does

¹⁰² See *id.* at 361 (listing the two elements for an infringement action as "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original").

¹⁰³ *Id.* at 345.

¹⁰⁴ See 17 U.S.C. § 101 (1994).

¹⁰⁵ See *id.*

¹⁰⁶ See *Feist*, 499 U.S. at 358 (stating that the "originality requirement is not particularly stringent" and involves only a "minimal level of creativity").

¹⁰⁷ See sources cited *supra* note 17.

¹⁰⁸ One author argues that the strongest reason companies learn to use and continue to explore opportunities on the Internet is the "growing number of information services available on a pay-for-use or other basis." DERN, *supra* note 91, at 449.

¹⁰⁹ See generally *Feist*, 499 U.S. at 349-50 ("[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); see also *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (stating in a case regarding the news that, "[i]t is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const., Art. I, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it").

not always trump the other factors that determine whether copyright subsists in a work.¹¹⁰ Accordingly, although limited copyrights clearly serve the public's interest in most instances, greater copyright protection for electronic, on-line, factual databases may serve the public's welfare more efficiently. Factual databases provide a wealth of information.¹¹¹ Instead of protecting social welfare by securing absolute access to the factual information contained within databases, the public may benefit more from the increased creation and maintenance of these resources. Although the public could enjoy free access to facts, the public derives even greater benefit from heightened restrictions on copying facts, which would create incentives to develop more free on-line databases from which to search. If online database creators are unable to prevent unauthorized uses of their databases, they may not receive a return on their investments in their databases. Creation of these databases could decrease, and the public, though free to copy factual information, would suffer from the lack of on-line information.

B. Shrink-wrap Licenses and Expert Pages' Notice

34. In light of the limited copyright protection available for factual databases, Expert Pages and other Web site creators can attempt to use private contracts to secure greater protection for their sites. Software writers commonly rely on contracts to avoid a variety of traps.¹¹² Like software writers, Web site creators can also use these agreements, called shrink-wrap contracts or licenses, to attempt to gain additional security over their sites.¹¹³ On the Internet, the shrink-wrap takes on an electronic form that provides terms and conditions which a site creator posts within her site.¹¹⁴ Web site creators can enter into these agreements with their sites' visitors, specifying the rights that each party will enjoy.

35. A shrink-wrap refers to a non-negotiated agreement placed on or inside software packaging and written such that the act of opening the package, breaking the cellophane shrink-wrap, or using the enclosed product binds the mass-market

¹¹⁰ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (holding that an author enjoys absolute control over an unpublished work, including works of historical value and significant newsworthiness).

¹¹¹ See *DERN*, *supra* note 91, at 449, 451 (reporting on the increase in information available on the Internet and through electronic databases).

¹¹² See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 96 n.7 (3d Cir. 1991) (explaining that sellers first used contractual licenses in software transactions to avoid the first sale doctrine of 17 U.S.C.A. § 109(a)).

¹¹³ See *O'Rourke*, *supra* note 85, at 689 (describing how Web site creators can request that site visitors assent to specific terms governing their visit).

¹¹⁴ See *id.*

purchaser to the agreement's terms.¹¹⁵ The contracts typically state the following:

[Vendor] is providing the enclosed materials to you on the express condition that you assent to this software license. By using any of the enclosed diskette(s), you agree to the following provisions. If you do not agree with these license provisions, return these materials to your dealer, in original packaging within three days from receipt, for a refund.¹¹⁶

Generally, shrink-wraps contain terms relating to three interests: (i) the agreements address a seller or software creator's proprietary rights in the program;¹¹⁷ (ii) the agreements often have some form of warranty limitation;¹¹⁸ and (iii) the agreements restrict a user's rights, usually according to those rights granted by intellectual property law.¹¹⁹ An electronic shrink-wrap appears on a user's computer screen and requires that the user scroll through the agreement's text and accept its terms by "clicking" on an "accept" button.¹²⁰ The Expert Pages Web site, however, did not require visitors to take any affirmative actions or acknowledge the posted conditions of use.¹²¹

36. Shrink-wraps have created a fair amount of controversy because they touch upon the boundaries of tort, intellectual property, and contract law.¹²² The primary reason for the uncertainty over shrink-wraps is that many courts may refuse to enforce them for three reasons: (i) the shrink-wrap is not a valid contract; (ii) the terms of the shrink-wrap are not enforceable, even though the agreement is a valid contract; and (iii) federal copyright law preempts the shrink-wrap, even though state law considers it a valid and enforceable agreement.¹²³ In general, there is little case law on shrink-

¹¹⁵ See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241-42 (1995).

¹¹⁶ *Id.* at 1241 (quoting language from the license agreement at issue in *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 257 n.2 (5th Cir. 1988)).

¹¹⁷ See *id.* at 1244.

¹¹⁸ See *id.* at 1245.

¹¹⁹ See *id.* at 1245-46.

¹²⁰ See O'Rourke, *supra* note 85, at 689 (describing online shrink-wraps and the significance of user assent to an agreement's terms).

¹²¹ See *Expert Pages* (last modified Apr. 16, 1999) <<http://www.expertpages.com/>>.

¹²² See Lemley, *supra* note 115, at 1248.

¹²³ See *id.*

wraps and, until recently, there was no direct judicial treatment of the type of shrink-wrap licenses discussed in this Note.¹²⁴

37. In the cases that do involve shrink-wraps, the courts have refused to enforce such agreements under contract law.¹²⁵ In *Step-Saver Data Systems, Inc. v. Wyse Technology*, the Third Circuit agreed with the plaintiff's breach of warranty claim, though the defendant disclaimed all warranties in the shrink-wrap license that covered the software.¹²⁶ The court reasoned that the basic terms the parties had previously discussed constituted the entire agreement and the subsequent shrink-wrap was an attempt to modify those terms.¹²⁷ Similarly, in *Arizona Retail Systems, Inc. v. Software Link, Inc.*, a U.S. district court held that except for an initial software sample package, the defendant's shrink-wrap agreement, which accompanied all of the plaintiff's software purchases, was an unenforceable attempt to modify the agreements that the parties formed when the plaintiff ordered software over the phone.¹²⁸ The facts in these cases, however, are different from the on-line Web site or end-user software examples discussed in this Note because the *Step-Saver* and *Arizona Retail* cases involve "face to face" transactions between merchant parties. In the normal context of on-line shrink-wraps, a Web site visitor or software user has only one choice: Agree to the terms or refrain from either visiting the site or using the software. There is no negotiation, the main reason for the courts' refusal to enforce the shrink-wraps in the above mentioned cases.

38. Courts may also hold that federal copyright law preempts private shrink-wraps if the agreement's terms provide rights equivalent to those exclusive rights and privileges that federal copyright or patent law grants.¹²⁹ In *Vault Corp. v. Quaid*

¹²⁴ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452, 1455 (7th Cir. 1996) (describing the lack of applicable case law and holding that end-user shrink-wrap agreements are enforceable and not preempted). In *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993), the court held that a software buyer entered into an agreement prior to receiving and opening the software's shrink-wrapped package, classifying the shrink-wrap license as a proposal to modify the original agreement governing the transaction. In *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 99-100 (3d Cir. 1991), the dispute concerned a classic battle of the forms and did not involve any consumer transactions. *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670, 675 (3d Cir. 1991), held that computer software qualifies as a "good" under Pennsylvania's Uniform Commercial Code ("Code") and evaluated the parties' license agreement according to the Code's provisions. Finally, in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988), the court held that federal copyright law preempted a software maker's state law based license.

¹²⁵ See Lemley, *supra* note 115, at 1249-52 (discussing the *Step-Saver* and *Arizona Retail Systems* cases).

¹²⁶ See 939 F.2d 91, 105-06 (3d Cir. 1991).

¹²⁷ See *id.*

¹²⁸ See 831 F. Supp. 759, 764, 766 (D. Ariz. 1993).

¹²⁹ The Supreme Court generally affirmed federal preemption power and delineated the permissible

Software Ltd., the Fifth Circuit found that federal copyright law preempted a Louisiana statute that granted software creators the right to use shrink-wrap licenses to impose a variety of prohibitions on software purchasers.¹³⁰ Because the plaintiff's shrink-wrap agreement prohibited certain actions that federal copyright law grants to computer program owners, the court concluded that the state law and the shrink-wrap "clearly touche[d] upon an area' of federal copyright law."¹³¹ Specifically, § 301(a) of the Copyright Act states that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by [the Copyright Act]."¹³²

39. In June, 1996, however, in a decision that generated much commentary,¹³³ the Seventh Circuit held that shrink-wrap licenses are enforceable.¹³⁴ The opinion, *ProCD, Inc. v. Zeidenberg*, is particularly relevant to the Expert Pages litigation because *ProCD* involved an electronic database of telephone directories.¹³⁵ According to the court, shrink-wrap agreements are enforceable contracts and federal law does

bounds of state law in three well-known patent and unfair competition cases. *See* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 141 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232-233 (1964); and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964). *But see* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (holding that federal copyright law does not preempt shrink-wrap licenses because contractual rights exist only between the parties to an agreement and are, therefore, not equivalent to copyrights, which are exclusive against the world). It should be noted, however, that copyright law has express preemption provisions provided by § 301 of the Copyright Act. *See* 17 U.S.C. § 301(a) (1994).

¹³⁰ *See* 847 F.2d 255, 270 (5th Cir. 1988).

¹³¹ *Id.*

¹³² 17 U.S.C. § 301(a) (1994). Section 301(a) further states that "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." *Id.*

¹³³ *Compare* Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 56 (1997) (arguing that the *ProCD* decision "reflects a flexible freedom of contract approach to preemption which is fully appropriate"), *with* Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 113 (1997) (arguing that "[t]he need to secure general access to information will require maintaining copyright schemes in contractual regimes").

¹³⁴ *See* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) ("But whether a particular license is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced").

¹³⁵ In *ProCD*, the plaintiff *ProCD* published a national telephone directory on CD-ROM. *See id.* at 1449. *ProCD* released two versions, one for commercial use and one for general consumer use. *See id.* *ProCD* sold the consumer version at a lower price, but used an accompanying shrink-wrap agreement to restrict it to non-commercial, private uses. *See id.* at 1450. The defendant uploaded his copy of the consumer version to a Web site and charged the site's visitors a fee for access to the database. *See id.*

not preempt them.¹³⁶ The court cited sections 2-204(1) and 2-606(1)(b) of the Uniform Commercial Code (“U.C.C.”) in upholding ProCD’s shrink-wrap license.¹³⁷ Section 2-204(1) provides that parties may form a contract for the sale of goods by mere conduct, as long as the conduct sufficiently demonstrates agreement.¹³⁸ A software vendor is master of the offer in a software sale and can dictate how the buyer must accept the offer.¹³⁹ A buyer, in turn, can accept a sales agreement by performing the seller’s requested conduct.¹⁴⁰ By incorporating section 2-204(1) into its reasoning, the court found that shrink-wraps do not lack the necessary assent.¹⁴¹

40. Section 2-606(1)(b) states that when a buyer fails to reject goods received in a transaction, she accepts them provided she has a “reasonable opportunity” to inspect the goods before her failure to reject them constitutes acceptance.¹⁴² Section 2-606 reinforces the *ProCD* court’s finding that a software buyer who objects to the terms of a shrink-wrap “can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price.”¹⁴³ According to the court, software creators can structure the sale of their software with a shrink-wrap so that a buyer can review the software and the terms of the deal after purchasing the software and then make a final decision to accept or reject both.¹⁴⁴

41. The Seventh Circuit also held that federal copyright law did not preempt ProCD’s shrink-wrap because the rights that the agreement created were not

¹³⁶ *See id.* at 1449, 1455.

¹³⁷ *See id.* at 1452.

¹³⁸ Section 2-204(1) states: “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” U.C.C. § 2-204(1) (1987).

¹³⁹ *See ProCD*, 86 F.3d at 1452.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² U.C.C. § 2-606(1)(b) (1987) (“(1) Acceptance of goods occurs when the buyer . . . (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them.”) *See also id.* at 1452-53. Section 2-606(1)(b) states: “Acceptance of goods occurs when the buyer fails to make an effective rejection . . . , but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them.” U.C.C. § 2-606(1)(b) (1987).

¹⁴³ *ProCD*, 86 F.3d at 1452.

¹⁴⁴ *See id.* at 1453.

equivalent to rights exclusively within the scope of federal copyright law.¹⁴⁵ The crux of the court's preemption holding was that the rights which the contract created are not equivalent to copyrights because contractual rights apply only to those entities which are parties to an agreement while copyrights, by operation of law, are exclusive rights granted to the holder against the entire world.¹⁴⁶ The court found that ProCD's shrink-wrap did not create *exclusive* rights exercisable against the world for ProCD and, therefore, did not create an impermissible form of private copyright.¹⁴⁷

42. The *ProCD* decision plays a significant role in the Expert Pages analysis because it potentially legitimizes Expert Pages' notice as an electronic shrink-wrap for its Web site. After reading the notice, visitors to the site can either comply with the stated conditions or leave the site. The *ProCD* opinion, however, is controversial, and not all courts are likely to accept the Seventh Circuit's reasoning. Furthermore, Congress is also considering amending the Copyright Act's preemption provisions to limit the power of shrink-wrap agreements.¹⁴⁸ At best, electronic online shrink-wraps may provide enhanced security to Web sites, but it is not certain that online shrink-wraps would be enforceable. Therefore, to secure the maximum amount of protection, Web site creators should rely on trespass.

C. Trespass on the Internet

43. Web site and online database creators face various challenges to securing their intellectual property investments. As discussed above, both copyright and contract laws offer limited or uncertain security. Legal recognition of a Web site's property interests would allow Web site creators to sue for trespass, augmenting the protection available to their intangible works. If accepted as a legal tool available to those individuals and organizations that maintain sites on the Internet, trespass would close a gap in the current law.

¹⁴⁵ See *id.* at 1454.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 1455.

¹⁴⁸ On November 13, 1997, the House of Representatives sent Bill 3048, called the Digital Era Copyright Enhancement Act, to the Committee on the Judiciary. See H.R. 3048, 105th Cong. (1997). Section 7 of the bill proposes to amend the current Copyright Act's preemption provisions by adding the following at the end of § 301(a): "When a work is distributed to the public subject to non-negotiable license terms, such terms shall not be enforceable under the common law or statutes of any state to the extent that they (1) limit the reproduction, adaptation, distribution, performance, or display, by means of transmission or otherwise, of material that is uncopyrightable under section 102(b) or otherwise; or (2) abrogate or restrict the limitations on exclusive rights specified in sections 107 through 114 and sections 117 and 118 of this title." *Id.* § 7. If enacted, this amendment would clearly curtail software writers' ability to create contractual safeguards for their programs.

44. A Web site trespass claim would be similar to a chattel trespass claim.¹⁴⁹ According to the Restatement of Torts, a person is in possession of a chattel when she has physical control of the chattel with the intent to exercise control.¹⁵⁰ Trespass to a chattel occurs when an actor “intentionally us[es] or intermeddl[es] with a chattel in the possession of another.”¹⁵¹ To intermeddle with a chattel is to come into physical contact with it.¹⁵² Finally, for trespass liability to arise, the alleged trespasser’s conduct must harm the chattel’s “condition, quality, or value.”¹⁵³ In a typical trespass case, the harm done to the chattel’s physical condition impairs its value.¹⁵⁴ The Restatement, however, explains that there may be situations where intentional interference with a chattel destroys its value *without* harming the chattel’s physical condition.¹⁵⁵ In these instances, the interference is actionable though the chattel has not been physically harmed.¹⁵⁶

45. When Web site visitors intentionally violate the posted conditions of use at a site, their conduct satisfies all of the elements of a trespass to chattels claim. Because Web site creators program and maintain their Web sites, there should be little doubt that they enjoy possession over the sites. The act of visiting or interacting with the site is the electronic equivalent of physically touching the chattel, the intermeddling part of the trespass claim. For Expert Pages, a business entity, the defendants’ intentional violation of Expert Pages’ prohibition against the commercial use of its database potentially deprived Expert Pages of revenue.¹⁵⁷ Therefore,

¹⁴⁹ According to KEETON, *supra* note 18, § 14, at 85, trespass to chattels is best described as an interference with the possession of personal property that is “not sufficiently important to be classed as conversion.” Moreover, trespass to chattels is “a little brother of conversion” and “exclusively a wrong of intentional interference.” *Id.* at 86.

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 216 (1965) (“[A] person who is in ‘possession of a chattel’ is one who has physical control of the chattel with the intent to exercise such control on his own behalf”).

¹⁵¹ *Id.* § 217(b).

¹⁵² See *id.* § 217 cmt. e (“‘Intermeddling’ means intentionally bringing about a physical contact with the chattel.”).

¹⁵³ *Id.* § 218(b).

¹⁵⁴ See *id.* cmt. h.

¹⁵⁵ See *id.* The Restatement uses a toothbrush as an example: If someone uses another person’s toothbrush, the user has not impaired the toothbrush’s physical condition, but a “person of ordinary sensibilities” may “regard the article as utterly incapable of further use.” See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See, e.g., Plaintiff’s Verified Complaint for Injunctive Relief and Damages, *Expert Pages v. Buckalew*, No. 97-2109 VRW ¶ 35 (N.D. Cal. filed June 5, 1997) (alleging that defendant’s actions were intended to “solicit business from clients of Expert Pages”).

although Expert Pages' Web site and database were not *physically* harmed, a reasonable business person could conclude that the defendants' actions destroyed some of the Web site's commercial, competitive value. This consequence is similar to the harm in value described in the Restatement, thereby fulfilling the damage element of a trespass claim. The defendants' actions did not physically impair the condition of Expert Pages' database, but their intermeddling should be actionable nonetheless.

46. Additionally, according to section 252 of the Restatement of Torts, one who possesses a chattel can give consent to a second party to deal or interact with the chattel in specific, limited ways.¹⁵⁸ If the second party undertakes any conduct outside of the scope of the owner's consent or permission, then that party is liable for trespass against the chattel.¹⁵⁹

47. If Web site creators enjoyed property rights in their sites, they could allege trespass against those individuals that interfered with the creators' interests. It follows that the creators would gain a greater ability to control the manner in which visitors used their sites. With recognized rights of possession and the power to subject visitors to trespass liability, Web site creators could establish rules and conditions governing visitors' behavior. Like Expert Pages' conditions of use, every site creator could post rules with which she expected visitors to comply. Once a creator established a set of guidelines, the consent or permission granted by the rules would limit a visitor's freedom to interact or "intermeddle" with the site. Any visitor that failed to comply would be subject to trespass liability similar to the liability that sections 218 and 252 of the Restatement of Torts provide. Essentially, this application of trespass to Web sites would treat visitors as conditionally licensed to undertake only that conduct described by the site's creator.

48. In light of the Seventh Circuit's *ProCD* decision holding that federal law does not preempt the enforcement of shrink-wrap software licenses, trespass claims should also escape preemption. The Seventh Circuit concluded in *ProCD* that federal copyright law does not preempt contractual copying prohibitions or private copyright.¹⁶⁰ Actions in trespass, however, reinforce rights that are different than the exclusive rights detailed in § 106 of the Copyright Act.¹⁶¹ Trespass to chattels protects rights of possession and control. These rights are not equivalent to the § 106 rights, which include the rights of reproduction, distribution, display, performance, and the

¹⁵⁸ See RESTATEMENT (SECOND) OF TORTS § 252 cmt. c (1965) ("A consent to dealing with a chattel which is restricted to a specified time or place, or otherwise limits the extent or manner in which the chattel may be dealt with, creates a privilege only in so far as the chattel is dealt with in accordance with the limitation. The actor remains liable for any unauthorized or excessive interference.").

¹⁵⁹ See *id.*

¹⁶⁰ See *supra* notes 145-47 and accompanying text.

¹⁶¹ See 17 U.S.C. § 106 (1994).

right to prepare derivative works.¹⁶² Because actions in trespass reinforce fundamentally different interests than federal copyrights, there is little or no ground for federal law to preempt trespass claims.

IV. CONCLUSIONS

49. The fundamental purpose of intellectual property law is to balance the inherent tension between guaranteeing public access to ideas and securing private incentives for authors and inventors to create.¹⁶³ Intellectual property protection gives authors an incentive to create by allowing them to reap the financial rewards of their work. The public also benefits from the development of new ideas and information. The incentives must be limited, however, to safeguard the public's interest in having access to the new information and inventions. By recognizing property rights in Web sites and allowing claims for trespass against Web sites, courts or legislatures would satisfy both of the intellectual property objectives. Congressional bills have proposed greater statutory protection for databases, reinforcing the argument for greater security for Web sites and on-line databases discussed in this Note.¹⁶⁴ Trespass to Web sites, if limited to the violation of a conditional license defined by the terms posted on an individual Web site, would give creators the opportunity to bring a tort action against those individuals who ignore a site's rules. By acknowledging property interests in Web sites, creators and owners would be better able to protect their investments in their sites and more fully safeguard their commercial and personal interests on the Internet.

¹⁶² See § 106.

¹⁶³ See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

¹⁶⁴ See, e.g., the Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1997). The bill, based on the Lanham Act, proposed to “prohibit the misappropriation of valuable commercial collections of information by unscrupulous competitors who grab data collected by others, repackage it, and market a product that threatens competitive injury to the original collection.” 143 CONG. REC. E2000 (daily ed. Oct. 9, 1997) (extension of remarks of Rep. Coble). The bill was intended to replace H.R. 3531, 104th Cong. (1996), by taking a “minimalist approach grounded in unfair competition principles as a complement to copyright, and the damage that can be done from substantial copying of collections of information.” 143 CONG. REC. E2000.