Copyright Defection

Margaret Jane Radin

Abstract

Copyright has traditionally and historically been viewed as a public domain containing discrete islands of propertization, but some today intuitively see it instead as a presumptive realm of propertization, in which there are some holes (non-propertization of ideas, facts, and functional modalities, and exceptions such as exhaustion and fair use). Taking this propertization perspective as its starting point, this essay presents a proposal about the holes. The proposal suggests that the holes in copyright can be viewed as the solution to a coordination problem: firms desire to lock up all of their own past information production but need access to information produced by others as inputs to their own future information production. Firms in this situation (hypothetically, and perhaps in actuality) coordinate to achieve legislation allowing all firms some access to information produced by others. The proposal has the corollary that firms' attempts to get around the holes in copyright can be seen as defection from the legislative solution.

Key words

Law, information, access, intellectual property, copyright, constitution, political economy, explanation, justification, public choice, public interest, propertization, public domain, defection, coordination, expression, fair use, exhaustion, first sale

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Copyright Defection[+]

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I

This essay presents a speculative idea about copyright law. It is a conceptual proposal in broad outlines, and therefore I offer it as a preliminary effort, a skeletal research agenda. Whether or not the proposal proves valuable will depend on further research. The usefulness of the proposal will also depend to some extent on which of two perspectives on copyright is accepted as a background principle. In the first perspective, the copyright system is understood as presumptively an information commons with delineated areas of propertization. In the second, copyright is understood as presumptively a system of information propertization with delineated areas of commons. Historically copyright has been viewed from the first perspective, in which the default

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condition of information production is a public domain.[1] The proposal here, however, is offered primarily to those whose intuition does not track this historical discourse but instead tends toward the second perspective, in which the default condition of information production is information ownership. In my opinion, many economists and practitioners of law and economics do tend, at least at the level of intuition, to start from a background perspective in which everything that is or may be scarce and valuable is appropriately propertizable.

For those whose basic perspective is a default condition of propertization or propertizability, copyright protection looks like a property scheme with holes in it. The holes are the areas of non-protection; i.e., the activities of copyists and re-users of information that are not subject to control of the copyright owner. For example, copyright covers "expression of ideas" but not "ideas" themselves. An owner seeking to protect an "idea" will find no legal recourse. (In practice, of course, that distinction

[1] Much of the discourse of copyright law pictures a sea of free information, in which discrete islands of propertization are allowable when certain conditions are met. See, e.g., Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. Law Review 354 (1999); Seana Shiffrin, Lockean Theories of Intellectual Property, in Stephen Munzer, ed., New Essays in the Political theory of Property (Cambridge U. Press 2001). Although this perspective is still the dominant legal discourse, recent scholarship has questioned the utility of thinking of "the" public domain, rather than many different kinds of public domains, see, e.g., Pamela Samuelson, Enriching Discourse on Public Domains, 55 Duke Law Journal (forthcoming 2006), available at SSRN: http://ssrn.com/abstract=925052.

is not very predictable and gives some areas of copyright law an ad hoc quality.) Another example of what I am calling a hole is the US doctrine of fair use, which immunizes copying that would otherwise be infringement. For example, some US courts show a tendency to immunize small amounts of copying by competitors of an owner when those competitors are engaging in reverse engineering for the purpose of interoperability.[2]

My conceptual proposal is that from the perspective of political theory, the holes in copyright law can be understood as a legislative solution to a coordination problem. If this proposal is accepted, then firms acting individually to plug the holes may be defecting from that legislative solution. Accepting this proposal may be significant in policy decision making. For example, courts may find it appropriate to take such apparent defection into account when deciding how to interpret and apply the Copyright Act in individual cases. Among other things, that may of course depend upon whether the legislative solution is seen as rent-seeking on behalf of the copyright inudstries or in the interest of the polity as a whole.

[2] See, e.g., Sega v. Accolade, 977 F.2d 1510 (1992).

In the next two sections, I outline some prefatory considerations before introducing my proposal in section IV.[3]

II

Here is a sketch of the factual context for my proposal.

1. For all activities involving valuable information, copyright looms large. Copyright protection has steadily burgeoned, and never retrenched.[4] At its beginning the term of protection was 14 years. Now it is the life of the author plus 70 years; or 95 years for a "work made for hire" for a company. The scope of protection was originally narrow (clone copies only). Now it is very broad, encompassing a huge range of derivative works, and treating even transitory existence in computer memory as a copy. The categories of protection were originally few (books) and now are many (sound recordings, films, photos, sculptures, graphic works, computer programs, choreography, architecture). The remedies were originally much less draconian than they are today: copyright infringement now is a strict liability offense, not requiring that the defendant know that what it does is proscribed. In our era of myriad computerized

[3] For purposes of presenting the conceptual proposal, this essay refers to US copyright law. It remains to be seen whether the proposal will be of interest for other copyright regimes.

[4] See, e.g., R. Anthony Reese, The History of Innocent Infringement in U.S. Copyright Law (May 2005) (unpublished manuscript, on file with the author).

copies, large statutory damages, assessed for each and every copy, have bankrupted companies that guessed wrong about fair use. Moreover, the scope of liability has also expanded; today secondary liability is a huge risk factor.[5]

2. Despite the huge expansion of copyright coverage, the holes have pretty much remained.[6] Facts, ideas, and functional works (methods of operation) are not copyrightable. The first sale doctrine (exhaustion) limits owners' control of the aftermarket[7]; the doctrine of fair use immunizes certain infringements for certain purposes, such as criticism or interoperability. Doctrines such as

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[5] Those who facilitate copyright infringement by others are indirectly liable for infringement under certain conditions. The copyright industries are aggressive in pursuing secondary liability; for example, they have sued the venture capitalists who funded Napster. The US Supreme Court held in the Grokster case that providing technology that is used for infringement can render the provider liable, if the provider makes accompanying statements indicating that it condones infringement, or does anything else that can be construed as inducement to infringe. MGM v. Grokster, 545 US ____ , 125 S. Ct. 2764 (2005).

[6] This statement is controversial. The current situation is, I believe, that the holes have substantially contracted in practice, with narrow interpretations of fair use, with broad interpretations of what constitutes expression rather than basic idea, and so on. On the other side of this debate are those who believe that the holes remain or have enlarged; and need to be plugged. Meanwhile, the holes do exist, at least on the books, and attempts to explore their status or function are worth pursuing. If the holes are still there primarily in name only, that seems to make their continued existence more salient for ideal explanations that take public interest rhetoric seriously, and less salient for non-ideal explanations that do not. (Different types of explanations are discussed in Section III, infra.)

[7] As mentioned below, firms have undermined the first sale doctrine through the strategem of characterizing many transfers as "licenses" instead of "sales". But this is one area in which legislation has also narrowed a copyright hole: a provision prohibiting purchasers of software and sound recordings from renting them was added to the Copyright Act in 1990.

merger and scenes-a-faire police the boundary between unprotected ideas and protected expression of ideas.

3. Individual firms are using various strategies to plug the holes for themselves. One strategy is to promulgate mass-market adhesion contracts which purport to bind users to waiver of rights that users would otherwise possess under background copyright law; for example, provisions preventing resale, preventing copying of facts, or preventing reverse engineering.[8] Another strategy is to characterize most transfers as "licenses" instead of "sales" to avoid the first sale doctrine. Another strategy is to use novel legal doctrines, particularly the old common law doctrine of trespass to chattels, to protect factual data that would not be protected under copyright law.[9] Still another strategy is to use technological protection measures (TPM's) that automatically implement the firm's desired result; for example, software that will automatically self-destruct if the user attempts to copy it, even if some forms of copying would have been the user's right under copyright law.[10]

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[8] See Radin, Regulation by Contract, Regulation by Machine, 160 Journal of Institutional and Theoretical Economics 142 (2004).

[9] In cases where the doctrine of trespass to chattels is successfully invoked, removal of information from a host computer, as well as transmitting of messages to a host computer, is treated as a tort to the host computer. See Kevin Emerson Collins, Cybertrespass and Trespass to Documents, 54 Cleveland State Law Review 41 (2006).

[10] See Radin, Regulation by Contract, Regulation by Machine, supra note 8.

III

I do not mean to claim that the proposed coordination explanation of the holes in copyright law is the only explanation possible. Perhaps it is not even the most plausible one. My claim is only that it should be explicitly considered. Before outlining it, one more preface is needed.

In comparing my proposal with other views of the holes in copyright, both explanation and justification come into play. Explanation focuses on why or how it came about that there are holes in copyright and justification focuses on whether or how holes in copyright are part of an underlying rationale or ideological commitment that validates or legitimates them. The philosophical contests about explanation and its relationship to justification will not be explored here, but a few words on this topic are necessary in order to situate the proposal offered here within the framework of things that might count as explanations (or justifications).

Some philosophical positions make a sharp distinction between explanation and justification. In those positions, what renders a situation legitimate or good is separate from the forces or acts that have brought it about. Many

economists, for example, maintain, at least in theory, a sharp distinction between positive and normative: to explain a situation in terms of the operation of market forces is not to justify it.

On the other hand, many economists and practitioners of law and economics, like philosophical pragmatists, tend in practice to blur explanation and justification together. For this type of position, efficiency may serve both to explain and justify a certain state of affairs. Practitioners of law and economics, for example, often elide explanation and justification by arguing or implying that an efficient result is a good result, while also arguing or implying that if market forces over time brought about the result, it is efficient.

Related to the distinction (and the overlap) of explanation and justification is the distinction (and the overlap) of ideal and non-ideal explanations. An ideal explanation characterizes a state of affairs in a way that would render it justified (under whatever basic normative commitments are assumed by the analyst). In ordinary life we do this frequently when we assume, for example, that if our friend breaks a promise it is for good and justifiable reasons. In the sphere of political theory, public interest explanations of political acts tend to characterize them in terms of what an ideal democratic body would have been

attempting to accomplish. Good motives are imputed to the legislature, or the rhetoric of good motives is taken at face value.[11] Legislators deliberate with each other, representing their constituents, until they reach consensus on what benefits the polity.

On the other hand, a non-ideal explanation characterizes a state of affairs without regard to justification but rather in terms of what is thought to be closer to the venal, self-serving, accidental, unpredictable realities of social life. Public choice explanations of political acts tend to characterize them in terms of self-serving motives of politicians and interest groups.[12] Good motives are not imputed, and the rhetoric of good motives is not taken at face value. No matter what they say they are doing, legislators are in fact maneuvering to maximize their power, their time in office, and the wealth of their own group.

Explanations also vary along the dimension of whether they emphasize history or function. Historical explanations tend to focus on the effect of events, intentions and actions in the past in determining the present situation.

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[11] See, e.g., Margaret Jane Radin, Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory, chapter 6 in Reinterpreting Property (University of Chicago Press 1993).

[12] Frank Michelman, Political Markets and Community Self-Determination: Competing Models of Local Government Legitimacy, 53 Indiana Law Journal 145 (1977) (elaborating the terms “public interest” and “public choice”).

Historical explanations can be either ideal (attributing idealized motives to influential political actors or social movements) or non-ideal (paying more attention to what are considered underlying economic forces and discounting the rhetoric).[13] Functional explanations, on the other hand, focus on how the system works, today, regardless of its history.

The proposal offered here about the holes in copyright can best be taken as primarily a functional explanation. As such, it does not (at least not entirely) stand or fall depending on what historical actors stated or did or had in their minds. Although the history remains relevant, a functional explanation (or justification) is best tested by considering the role of its features in how the system works today.

Functional explanations too can vary between ideal and non-ideal. For example, we can talk about bicameral representative institutions in a world of ideal democracy or in a public choice world; these two conversations about the same "thing" would be very different. In the world of ideal democracy, representative institutions facilitate continuous deliberation and therefore democratic self-rule. In the world of public choice, representative institutions

[13] This is related to the distinction between idealist and materialist history; or, perhaps, is another way of putting that distinction.

facilitate continuous jockeying for power and rents. Considering the holes in copyright as the legislated solution to a coordination problem is an interesting cross between ideal and non-ideal explanation. It is non-ideal because the premise of the coordination problem is self-interestedness that precludes cooperation even where cooperation would be jointly maximizing; but ideal because it may be an appropriate functional explanation and possible general welfare-enhancing explanation even if that was not the actual intent of the actors.[14]

The proposal here diverges from the traditional explanations (sometimes blurring into justifications) of the holes in copyright in two ways: first, because it starts from the perspective of prima facie propertizabilty rather than from the perspective of prima facie public domain; and second, because it emphasizes the functional rather than the historical. In the remainder of this section I will review other prevalent explanations before coming to my proposal.

[14] My proposal is offered primarily in the spirit of the species of political theory that proceeds conceptually from hypothetical bargains. This philosophical procedure goes back to Hobbes. See, e.g., Don Herzog, Without Foundations: Justification in Political Theory (Cornell University Press 1985). This species of theory tends to blur explanation and justification. It does not preclude further exploration of the extent to which the facts on the ground, whether of economic forces or individual intentions, do or do not accord with the concept. But it is philosophically unclear (at least to me) to what extent definitive ascertainment of those facts on the ground would tend to prove or disprove the conceptual theory; partly, of course, because what we take to be "facts" are also dependent on the theories we hold. In other words, it is unclear (at least to me) to what extent this species of theory can be considered empirical.

The most prevalent ideal explanations of the holes in copyright are an ideal historical explanation and an ideal functional explanation. The ideal historical explanation is that copyright was intended to be--and still is or ought to be— a system of discrete, carefully circumscribed islands of information propertizability scattered in a public domain sea of free information.[15] This ideal historical explanation is the best known and the most adhered to, at least in rhetoric (in practice it may be honored in the breach). It blurs into justification for those who hold that the intent of the constitutional framers or legislators is justificatory. But an ideal functional explanation, holding that the function of the holes is to prevent over-propertization, is also important.

The ideal historical explanation has long been prevalent in the legal community. From this perspective, the holes in copyright are part of the original constitutional design of intellectual property, and/or part of the design as it has been elaborated by Congress and by precedent over time. The US Constitution gives Congress the power to enact copyright for limited terms "to promote the progress of science and the useful arts."[16] In theory, failing to promote progress could render a law unconstitutional. This argument was unsuccessful in the case challenging the recent

[15] See note 1, supra.
[16] U.S. Const. Art. I, sec. 8, cl. 8.

Copyright Term Extension Act.[17] Nevertheless, it is a significant legal argument in the US, because copyright exists only by positive law, and federal positive law is legitimate only if within the powers granted to Congress by the Constitution.

Also in the category of legal explanations relating to constitutional and precedential history and design is the notion that the principle of fair use—as indeed the broader notion of a public domain of ideas-- is required by the first amendment to the US Constitution or by background legal rights and principles of freedom of expression. This is an ideal explanation that has been an important strain in US copyright history. Before the US Copyright Act of 1976 legislated a provision providing for fair use, judges had read a fair use exception into copyright by referring to the first amendment.[18]

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[17] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[18] A nonideal twist related to this perspective would suggest that if pro-propertization actors had control of the legislative process of enactment that resulted in the 1976 Act they could not simply omit provision for fair use, because they would understand that judges would then just continue to read it in; so they instead would write as minimalist a fair use provision as they could, in order to cut back on what the judges had previously done. I think this non-ideal explanation, specifically with respect to fair use, is quite plausible. There is substantial evidence that pro-propertization actors had control of the enactment process. See Jessical Litman, Digital Copyright (Prometheus Books 2001). Fair use does afford very minimalist exemption, even when core free speech concerns seem to be at issue. It is applied case by case as an affirmative defense to infringement, and it is very unpredictable, meaning that the defendant must infringe and take its chances with the judge's discretion. This causes a chilling effect, and would likely not be the solution favored by judges concerned with freedom of expression if they had broad discretion.

In contrast to the ideal historical explanation that I have been discussing, there is also an ideal functional explanation in terms of overpropertization, which in my opinion has so far received less attention than it should have. What is overpropertization? A property scheme is worthwhile only if its benefits outweigh its costs. Over-propertization refers to a situation in which increasing costs of increased IP protection reach the point of overwhelming its benefits. The benefit of increasing information propertization is (at least from a traditional ideal perspective) increased innovation. But the costs include: increased administrative costs in policing the system; increased costs of acquiring inputs to innovation when those inputs are propertized and must be acquired through negotiation with owners; and the costs ex post to society of the economic rents allocated to the owner ex ante as the incentive to innovate.

The holes in copyright—the non-propertizability of facts, ideas, and methods of operation, the limited term, and so forth—could be seen as balancing levers to weigh in against over-propertization. This type of explanation is at its most ideal when deployed to argue that copyright represents (or at some previous point in time represented) a delicate balance with just the right level of propertization to maximize the difference between the benefits and the

costs of the system. No one knows at what point this is (or was) true. Commitment to this type of explanation could be deployed more non-ideally as a possible brake on continual expansion of the scope of copyright by seeking to have some kind of empirical demonstration of positive benefits from a copyright system; but this seems not to be a feasible research agenda.[19]

My proposal, then, is not the only explanation for the holes in copyright, nor even the only one that I consider plausible. Nevertheless, an explanation is not ipso facto invalid if other explanations are also plausible; and the explanation offered here may be useful for those whose intuitive underlying perspective involves propertization as a default condition rather than as an exception to a default condition of commons.

IV

[19] One reason it is not a feasible research agenda is that copyright is a multi-faceted whole; the result of evaluating any one of the sub-systems would need to be traded off against the status of all the others. This recapitulates the problem of when partial equilibrium analysis is appropriate and when it is not. And another reason it is not a feasible research agenda is that the problem is dynamic; the copyright system changes, frequently, and probably does not stay put long enough even to see what a partial equilibrium analysis might yield.

Various factors suggest that copyright law is particularly amenable to a political economy perspective.[20] Copyright law is federal law; in order to enact its agenda, an interest group must control Congress, not all 50 states. Copyright industries—film, recording, publishing-- are concentrated, facilitating interest group solidarity. On the other hand, those who would mitigate strong copyright protection, such as readers, listeners, and libraries, have been diffuse and weak. The major copyright industries have substantial common interests, even though their agendas may differ in detail. Each of these industries has an interest in maximalist protection (length of term, strength of remedies, etc). Important work by Jessica Litman, detailing the legislative history of copyright for the past century, reveals that copyright legislation has been essentially written cooperatively by industry players, geared to existing technologies and economic structures.[21]

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[20] In keeping with the limited ambition of this essay, this paragraph reflects only the broad principles of factors affecting political outcomes. See, e.g., Dennis C. Mueller ,Public Choice III (Cambridge University Press 2003), William Eskridge, Phillip Frickey & Elizabeth Garrett, Cases and Materials on Legislation (West Publishing Co., 3d ed 2001). Other important areas of inquiry I am not addressing here are: (1) The temporal dimension in legislative bargains; when and how does a bargain once struck get revised or reinterpreted? (2) The jurisprudential dimension of implementation; when and how should judges honor, reinterpret, re-evaluate, or disallow previous legislative bargains? (Does it depend on theories of legislative supremacy? On whether or not the judge thinks the bargain was—or is now?--in the public interest?) Each of these topics deserves in-depth exploration.

[21] Jessica Litman, Digital Copyright (Prometheus Books 2001). Litman's work shows that the industry was able to cooperate in enacting broad protection and took care of more specific interests of the coalition members by trading specific exception provisions representing "deals" for one member or another.

That is what we know about the actual bargaining. What did the bargainers actually "have in mind" about the holes? Perhaps to keep them as narrow as possible.[22] But now switch to the procedure of hypothetical bargaining. Suppose a situation in which each firm would prefer to keep all of the information it discloses from being used by others, but at the same time it would prefer to have access to information disclosed by others. This situation would occur where firms need access to others' information as inputs to further innovation and information asset creation, but at the same time wish to lock up the information assets they already have.

It is frequently noted that information asset creation requires access to already existing knowledge; most innovations are not created out of whole cloth. This is just as true with respect to works of authorship as with respect to works of engineering. Poems, novels, music, and films depend upon their predecessors just as much as washing machines and petroleum refining systems.[23]

At least in the world of hypothetical bargaining, firms face incentives in which they want to get the most value out of propertization of the assets already under their control

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[22] See note 18, supra.

[23] See, e.g., Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 North Carolina Law Review 101 (2006)

but also wish to be able to create new assets in the future at the least cost to themselves. The future viability of a firm depends upon this ability, and therefore so does a substantial component of its present value. Old assets decline in value and new assets must replace them if a firm is to remain viable. (In real life, firms may indeed recognize and respond to these incentives; but they may also fail to respond to them, being more short-sighted because of the pressure of needing to demonstrate results quarter-by-quarter; or because of the heuristic bias that makes assets in hand seem more valuable than those not yet in possession.)

In most cases it would be difficult or impossible for all firms to implement a first-best solution to this problem. That is, it is implausible to expect that all firms can both keep their existing knowledge assets firmly locked up and at the same time have low-cost access to knowledge assets in the possession of other firms.

In this situation we can suppose further that the second preferred option for firms is that everyone be allowed access to a certain portion of information disclosed by others. Here we suppose that as a fall-back option, a firm would be willing to allow other firms access to some portion of its information in return for free access to some portion of the information of all other firms. This second preferred

solution can be achieved through coordination. It is the proverbial box 2 on the prisoner's dilemma matrix. Spontaneous coordination is unlikely, and also unstable if it does occur, since each individual firm is tempted to defect by trying to lock up its own information while still having access to the information of others.

The classic prescription for securing the second preferred solution is to take the problem to Leviathan: obtain pre-commitment through legislation. Firms can agree in advance to have the state require them to cooperate in this rational manner, and the state's threat of enforcement deters defection after the deal is imposed.

In this hypothesis, parts of the copyright regime, including the exclusion of ideas and facts from ownership, as well as the notion of fair use, can be interpreted as a solution to the coordination problem. To the extent that is true, the regime should be seen as setting out some rules for when information developed by one firm is available for use by others, rules that all firms have an interest in supporting. That is, firms would have a rational incentive to organize and get copyright legislation enacted that does allow each firm to have access to some portions of information held by others, on a reciprocal basis.

Instead of leaving large holes like factual and functional works, why wouldn't firms coordinate to keep prima facie general protection at a lower level?-- make the term shorter or narrow the scope (such as covering clone copies only)? This solution might be better for the general welfare in the long run, and therefore might be the output of a thoroughgoing hypothetical bargaining procedure in political theory. To the extent such theory must track reality,[24] however, it would note that such a system might be less advantageous for firms wanting to get the most protection except when individually needing material belonging to someone else, and therefore harder to secure agreement to.[25]

Of course, individual firms still have an incentive to defect from the legislative solution. Each firm would prefer to protect its own ideas, functional works, and factual works fully, and to exclude everyone else from fair use, etc., even while maintaining its own access to those kinds of information assets held by others.

Under this hypothesis, we would expect to observe individual firms attempting to defect. One way to defect is to use other means to protect information assets or uses

[24] The question of to what extent hypothetical coordination reasoning procedure must track "reality" remains puzzling to me. See note 14, supra.
[25] Also, perhaps this solution might be more difficult to coordinate; this matter needs more investigation.

that the copyright regime leaves unprotected. We do in fact observe such alternative attempts at protection, especially by means of mass market promulgated adhesion contracts that purport to waive or supersede the rights reserved to recipients and third parties; and also by the increasing use of TPM's. As I mentioned earlier, we are also seeing creative use of legal doctrine such as trespass to chattels to protect information assets that would otherwise be available to competitors, customers and other users under copyright law.

If the holes in copyright represent a legislative solution to a coordination problem, we might also expect the legislation to have some mechanism rendering defection difficult or punishing defection. Ideally, and therefore in a hypothetical bargaining procedure, legislative solutions would be designed with this problem in mind. In reality, however, the Copyright Act does not make explicit provision for punishing defectors. The absence of specific punishment for defectors may make it seem less likely that those who wrote the Act had the solution to a coordination problem explicitly in their minds.

Treating the coordination explanation as a functional explanation means that, qua explanation, it does not require conscious intention. But in practice coordination is incomplete without some method of making defection

sufficiently costly. Perhaps defection by means of mass-market adhesion contracts and TPM's is costly for consumers and users but not (or at any rate not directly) for the firms that coordinated the legislation. In that case, coordinating firms would not have a strong interest in preventing this particular type of defection.[26]

One method of raising the cost of defection would have been to make it legally more difficult to evade the holes. The widespread use of promulgated adhesion contracts to supersede the holes in copyright law raises the question of whether the provisions of copyright law should be treated entirely as default rules. (Default rules are subject to waiver by individual agreement.) With a few exceptions not germane to this discussion, the Copyright Act is silent on the question of the extent to which its provisions are merely default rules. If the coordination explanation is accepted, it suggests the policy consequence that other legal actors (judges) might play the role of making defection legally more difficult, by interpreting the Copyright Act as implying some deterrence of defection. Even if real bargaining firms did not implement such

[26] Perhaps this type of defection should not be called defection at all, but rather should be characterized as a method by which firms inflict costs on other segments of society rather than on each other. The extent to which strategies such as mass-market adhesion contracts and TPM's do inflict costs on firms as well as their customers should be investigated. The question is whether information assets held by firms deploying adhesion contracts or TPM's are rendered less available to competing firms wanting to access them under the terms of the hypothesized legislative compromise.

deterrence, in other words, treating the coordination as a hypothetical bargain may include attention to deterrence.

Of course, the idea of private ordering through contract presupposes that most entitlements should be treated as default rules subject to exchange between willing parties where gains from trade are available. Nevertheless, if copyright rules establishing that some kinds of information are open to access by others are merely default rules, such that individual firms can easily contract around them, this capability may destroy, or at least destabilize, the commitment enacted in legislation that was meant to secure a solution to the original problem.

V

In this paper, I have presented an idea about regarding the holes in copyright as the solution to a coordination problem. I have also mentioned the species of ideal functional explanation that postulates that the holes in copyright prevent over-propertization, but I have not met head-on the most straightforward question of social welfare maximization: whether the scope of copyright, even with its holes, has reached a point where the costs of copyright outweigh its benefits.[27] But putting this straightforward but unanswerable question together with the coordination

[27] As I noted earlier, see note 19, supra, although the question is straightforward, the investigation by which it might be answered is not.

hypothesis I am suggesting here seems to counsel caution in further erosion of the holes.

Moreover, disallowing defection may be part of the legislative intent in its ideal sense, though not the actual conscious thoughts of the participants. Whether or not courts should enforce legislative “deals” is a complicated question, having to do not only with the substance of the “deal” but also with jurisprudential questions such as commitment to formal legislative supremacy versus commitment to judicial discretion under a less formalistic structural interpretation. Formal legislative supremacy would tend to dictate that courts should enforce legislative deals come what may. Less formalistic structural positions would give judges more leeway to reinterpret as circumstances change; for example, granting judges discretion to ignore or revamp bargains that were not or are no longer in the public interest. These jurisprudential commitments are deeply contested. They are complicated by the fact that, even if we are inclined to yield more discretion to judges in reinterpreting legislation when it is rent-seeking on behalf of a powerful interest group than when it is in the interest of the whole polity, we do not have a good way of deciding which “deals” are rapacious rent-seeking and which are in the public interest.

It is at minimum problematic to assume that any specific

legislative "deal" is in the public interest. In fact public choice theory often tells us to assume the opposite. There have been significant instances in American history of industries—for example, the transportation industries--obtaining government regulation which they otherwise could not cooperate to create. In many cases it is thought that this was a strategy that eliminated competition and facilitated rent-seeking. In this paper I have certainly not sought to suggest that cooperation of the copyright industries to obtain regulation has been ipso facto in the public interest. I do think, however, that it is possible that a hypothetical bargaining procedure that would be in the public interest could have some results that overlap with the result of the actual bargaining, and that the holes may represent such overlap. In that case, it would be appropriate to enforce adherence to the holes, and prevent defection, either under a theory that actual bargains should be enforced or under a theory that permits judicial scrutiny regarding past or current justification.[28]

Although firms themselves have an interest in disallowing defection, at least in the hypothetical bargain,

[28] In my opinion, widespread promulgated mass-market contracts attempting to obviate legislated pockets of non-propertization should at least be scrutinized carefully rather than assumed to be efficient. These are not merely garden-variety contracts evidencing gains from trade. Nor are TPM's merely protection of an owner's existing legislated rights; instead, they add to them. In my opinion, TPM's should have a mechanism of review for over-reaching. See Radin, Regulation by Contract, Regulation by Machine, supra note 8.

this interest is not going to be represented by a firm before the court as a defendant, because, according to my hypothesis, that firm is defecting. At minimum, courts may want to take this incentive into account, and not assume that a firm before the court necessarily represents the interests of other firms similarly situated but not before the court.