WRAPS AND COPYRIGHTS

Deborah Tussey*

Copyright law has been entangled with the proliferation of wrap contracts from the beginning. The first wrap contracts were specifically designed to circumvent, in digital media, copyright doctrines that protect the public domain in analog media. The subsequent evolution of wrap doctrine has immersed all Internet users in a complex web of legal entanglements that substantially impact copyright law specifically and

nuanced approach to such contracts in the digital environment. She proposes a dynamic, practical approach that, if implemented, could help to rectify not only the imbalance of power between wrap drafters and their customers, but also the related imbalance between copyright owners and the users of informational works.

In the first part of this essay, I briefly outline the impact that contemporaneous developments in wrap doctrine, copyright law, and electronic technologies have had on information access. Wrap doctrine has damaged not only basic precepts of contract law, but also the balance of

their control over the creative content and personal data they generate. I ls, drawing parallels to related issues in copyright law, particularly with respect to the demise of the first sale doctrine. My comments suggest a few specific adjustments to the proposals, but primarily concern one overarching issue: once the courts

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became the preferred means by which private content owners asserted control over access to both copyrighted works and public domain information, particularly in highly concentrated markets where the wraps essentially imposed private legisla

down access to vast informational resources walking away not only from the marketplace, but also from much of contemporary culture.

II. CAN WE GET BACK AGAIN?

contracts run amuck indicates how closely wrap doctrine and copyright are now entangled with resulting drastic impact on information access. Her book offers a number of well-considered, pragmatic proposals to rectify the situation. I address them in two rough categories: (1) the reworking of formation rules to include the duty to draft reasonably, including an enhanced assent requirement for terms affecting non-

unconscionability.

The suggested abandonment of the blanket assent rule is essential. Such a binary, all-or-nothing, rule is far too inflexible in the complex,

wrap terms into shield, sword, and crook provisions requiring different levels of assent offers a more nuanced approach: shield terms handily survive; the more objectionable sword and crook provisions by which the

or entitlements require a clearer manifestation of volition in the form of multiple clicks, separate emails, or the like. A duty is imposed on drafters to draft reasonably using all the capabilities of online formats, from graphics to placement on the page to noninterference with transactional

consider onerous terms that the drafter seeks to impose.[18]

Online mass consumer transactions are not feasible without the use of standard form contracts.

shows was comparable to cable television, while the dissent argued vigorously that Aereo was more like a copy shop that provides its patrons with a library card.[30] Not helpful.

Courts in such cases seemingly pick their desired result, and then pick the analogy that gets them to that result, providing little or no doctrinal framework for future cases. They may be protecting new business models against free riders, but are equally likely in the copyright cases to protect established industries against new competitors. Until judges eschew the battle of analogies and more directly engage with the digital universe, as

dent now

established for wraps does not bode well for judicial adoption of such

a basic unfamiliarity with the digital environment. An obvious case in point is Judge Easterbroo

the terms contained in a shrinkwrap software license could simply return the opened box to the store. While younger, more tech-savvy judges will eventually take office, judicial unfamiliarity with the digital universe presents an issue for the immediate future. Some means of better educating judges on digital issues seems desirable perhaps a reading of Professor [31] should be required in all wrap enforcement cases.

The failure of courts explicitly to consider consumer interests is, to some extent, an unavoidable structural problem. Lawsuits that implicate basic precepts of wrap doctrine, or copyright law, are less likely to be brought against average consumers than against business competitors, free riders like Zeidenberg, or particularly unlikeable defendants like Lori Drew whose misuse of a Myspace account arguably caused a teen suicide. In the nature of the judicial process, no one directly represents the interests of consumers in general, though courts sometimes take note of them. Perhaps consumer interest groups might generate appropriate test cases that more directly present consumer concerns, though the courts have proven notably unfriendly to fabricated copyright test cases.[32] These barriers to judicial resolution argue for legislative treatment.

most from wrap contracts. The Uniform Computer Information Transactions Act (UCITA) offers an example. The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted a uniform law to govern online information transactions originally as a new Article 2B for the Uniform Commercial Code, then as UCITA after the American Law Institute disavowed it. The draft was so unbalanced in favor of software providers that only two states passed it, and several others adopted anti-UCITA legislation before NCCUSL moved the act to the back burner.[33] The demise of UCITA offers a negative sort of hope in that an act demonstrably favoring software providers over consumers ran into a brick wall in state legislatures. The fact that reasonable legislatures may reject an overreaching act, does not, alas, guarantee that they can draft a fair one. The failed legislative efforts to recreate the first sale doctrine online may foretell a similar failure at legislative reworking of wrap doctrine.

It is possible, of course, that some public-spirited online business might

proposals, as a way to position itself as a consumer-friendly venue willing to adapt its wrap contracts to protect its customers as well as its own interests. However, given the advantages that wrap doctrine confers on online businesses, there is limited incentive for such actions. They may also run into judicial resistance based on existing wrap doctrine, much as gital secondary market ran into RAM copy doctrine.

The preceding comments raise a few concerns about proposals that are, by and large, quite sound and long overdue. I would add the following suggestion: the dynamic theory of contract that Professor Kim promotes as essential for online commerce must also reference policy goals beyond those of traditional contract law. Wrap doctrine is a facilitator for and a portal into other legal regimes. Reformers should consider not only wrap eat traditional goals of contract law, but also to thwart the policies behind other legal regimes, including but not limited to copyright.[34] In the digital universe, the legal treatment of wrap contracts initiates feedback loops affecting a multiplicity of other laws. Professor

33. *A Commercial Code for the Information Age?*, UCITA ONLINE, http://

not threaten to unleash chaos in the digital marketplace. However, they will have impacts beyond the arena of contract doctrine and reformers should, to the extent possible, try to anticipate those consequences. Such an approach may well require more cross-regime collaboration than is typical, but will certainly produce better results in the long run.

CONCLUSION

I have suggested that contract and copyright law have been particularly closely associated in the judicial development of wrap doctrine, so much so that current wrap doctrine threatens the balance of both regimes. Professor