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GRAY MARKETS IN CYBERSPACE

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I. INTRODUCTION

Cyberspace[1] is the Rorschach test for legal scholars. To those advocating greater contract and property rights on the Web, what one author refers to critically as Lochnerization,[2] Cyberspace is a frontier waiting to be foraged and settled as an extension of the marketplace in real space.[3] To those

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[1] In this Article, I use the term "Cyberspace" synonymously with "Internet," "Net" and "World Wide Web." Technically, "Internet" refers to the set of protocols that govern the connections among separate and distinct computer networks that has expanded from the Department of Defense's Arpanet. MICHAEL L. DERTOUZOS, WHAT WILL BE: HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES 39 (1997)("Arpanet would lead to the Internet and the Web."). "World Wide Web" refers to the particular means of communication among these networks; the Web rests on the technological platform provided by the Internet. ("The Internet did not become a widespread cultural phenomenon until the Web . . . hit the streets.") *Id.* at 40. Cyberspace is a much broader term than either the Internet or the World Wide Web; it refers to the set of legal, social, economic, and political relationships that govern and connect users of the Internet. Cyberspace would technically include individuals who have never logged onto the Internet but may be affected by its presence, because it serves as a conduit for personal information. The Rorschach test mentioned in the text refers to the visions an individual sees when examining the set of relationships that defines Cyberspace. By using the term Cyberspace synonymously with Internet and World Wide Web, I do not mean to ignore the important differences. Rather, my point is that whatever vision one has about Cyberspace will affect the structure of the Internet and the World Wide Web. The other reason that I use the term Cyberspace is to underscore the problem of making false analogies from real space and real property law to the arena of information. *Cf. Id.* at 20-21 ("The other name we often hear, Cyberspace, is also flawed, because it evokes a gleaming other-world . . . But the action of the Information Marketplace is a part of everyday life. . . ."). While certainly Cyberspace is part of everyday life, Cyberspace also offers a technological means to manage and distribute products for the information marketplace. The differences are important to recognize even though the underlying economic problems are the same. For a history of the Internet and World Wide Web, *see id.* at 25-55. *See also* Barry M. Leiner et al., *A Brief History of the Internet* (last modified Feb. 20, 1998) <http://www.isoc.org/internet/ history/brief.html> (recounting the conception and development of the Internet). I am indebted to M. Ethan Katsh for my use of the term Cyberspace. M. ETHAN KATSH, LAW IN A DIGITAL WORLD 28-33 (1995).

[2] Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV 462 (1998) (defining a group of cybereconomists whose legal conclusions are based in an ideology of freedom of contract and strong property rights, rather than in a scientific or analytical understanding of underlying economics or technology). The discussion in this article is intended as a response to Professor Cohen's cybereconomists as well as to her characterization of economic analysis, as applied to Cyberspace.

[3] The following are samples of such a perspective: Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217 (1996); Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, 1996 J. ONLINE L. 7 (Oct. 1996) <http://www.wm.edu/law/publications/jol/hardy.htm>; Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609 (1998); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997); PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOMS (1997). This perspective is distinct from the libertarian perspective that is discussed later in this paragraph. I believe that the authors I have cited here would advocate strong property rights in Cyberspace. However, there are some authors who start from

advocating sharing of information and ideas on the Web, Cyberspace is a communitarian haven, a locus for the development of individual autonomy against a background of mutual respect and tolerance made impossible in laissez-faire real space.[4] To others advocating unchecked and unregulated freedom on the Web, Cyberspace presents the opposite ideal, one of unfettered freedom made increasingly impossible in statist real space.[5]

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a position of strong property rights but would acknowledge that, because of external effects and exclusion problems, some regulation may be required. For a good example of such a perspective, see Dan Burk, *The Market for Digital Piracy, in* BORDERS IN CYBERSPACE 205 (Brian Kahin & Charles Nesson eds., 1997). Professor Burk argues that, from a perspective of regulation, private regulation of the Internet may very well lead to a race to the bottom because of the problems of externalities and exclusion. However, he advocates that deeper regulation of the Internet be stayed until the harmful effects of such a race to the bottom are actualized.

[4] *See, e.g.*, Margaret Jane Radin, *Property Evolving in Cyberspace,* 15 J.L. & COM. 509 (1996) (analyzing the effects of cultural, social, and economic influences on the development of property concepts with respect to Cyberspace). I am aware of the hyperbole in my characterization of all of the schools of thought that I am discussing in this paragraph. This hyperbole should not be taken as ridicule or as disagreement with any of these schools. All of these authors do have common ground; at the same time there are important differences. My goal, in part, is to develop an economic model in this article that will draw on the common ground. Professor Radin's vision is perhaps better characterized as a pragmatic one, rather than as a purely communitarian one. Her prescriptions draw more on economic theory than on a pure political theory of communitarianism. At the same time, and in light of her other work, her pragmatic analyses of Cyberspace do further communitarian ends. *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). For a critique, see Kenneth J. Arrow, *Invaluable Goods*, 35 J. ECON. LIT. 757 (1997). Other communitarian visions are represented in the essays in PUBLIC ACCESS TO THE INTERNET (Brian Kahin & James Keller eds., 1995), particularly the following: Beverly Hunter, *Learning and Teaching on the Internet: Contributing to Educational Reform*, at 85; Frank Odasz, *Issues in the Development of Community Cooperative Networks*, at 115; George Baldwin, *Public Access to the Internet: American Indian and Alaskan Native Issues*, at 137; Carol C. Henderson & Frederick D. King, *The Role of Public Libraries in Providing Public Access to the Internet*, at 154. These authors represent a vision quite distinct from the "cybereconomists" cited *supra* note 2, a vision grounded in shared property or, alternatively, in an ethic of altruism and sharing. A related but ultimately very different vision of communitarianism in Cyberspace is offered by Keith Aoki, who proposes the need for a new model that reconfigures our vision of the private-public distinction and provides a role for multiple sovereigns. Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443 (1998). *See also* Neil Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998) (emphasizing democratic goals of copyright in international enforcement with specific reference to the gray market).

[5] *See, e.g.*, John Perry Barlow, *The Economy of Ideas*, 2.03 WIRED 84 (1994)(arguing for more relaxed protection of intellectual property in Cyberspace and reliance on encryption and other technological means to protect information) and MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE (1998). Once again I acknowledge the hyperbole in the text. Mr. Godwin's vision, for example, is in many places communitarian as well as libertarian. But it is useful to distinguish his views from the strictly communitarian ones I described *supra* note 2. Mr. Godwin is grounded in notions of individual liberty as a primary value to protect in Cyberspace. Communitarianism is protected to the extent that freedom of association is one aspect of individual liberty. Mr. Godwin's views are also distinct

Whether seeking replication of markets, redemption from markets, or restitution from states, cyber thinkers seek to imprint their vision on the yet uncolonized arena of Cyberspace.

Despite the differences in perspectives, libertarian, communitarian, and Lochnerian theories ironically converge into one arrangement for Cyberspace transactions: balkanization, or the dividing up of Cyberspace into private domains restricted through contract or property. The libertarian prescription of individual rights would lead to the development of technology to create proprietary rights in Cyberspace. Those citizens seeking open access would be able to maintain openness; those seeking privacy would have the technological means to do so. Communitarianism would also create incentives for those wishing to exit from a regime of shared property to expend resources on developing technological means to exclude. However, a communitarian vision would also be consistent with a rule of law in Cyberspace where legal mechanisms are used to protect individual rights within a domain of shared property. Finally, the Lochnerian position, as developed by Julie E. Cohen,[6] would also lead to balkanization as legal rules are developed through the mix of intellectual property, state common law, and sui generis rules. All three visions of Cyberspace would promote balkanization. For libertarians, balkanization occurs through technology; for communitarians, through a mix of technology and law; and for Lochnerians, through law. The fact that each vision would promote balkanization suggests that each is part of a more general theory of Cyberspace. In this article, I offer an understanding that has largely been ignored in the scholarly and practical literature on Cyberspace, one that I

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from those of the cybereconomists, described *supra* note 2. While the latter are grounded in principles of property, Mr. Godwin is grounded in individual freedom. An alternative libertarian view of Cyberspace is offered in CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (1998). Shapiro and Varian offer business advice for exploiting commercial value in the sale of information-based products. Although the authors offer an economic, rather than a political, analysis of Cyberspace transactions, their basis in economic liberty is within the libertarian vision and is distinct from the pure property rights notion of the Cybereconomists. The strategies that Shapiro and Varian propose are ones that maximize efficiency as opposed to ones that protect property or contract rights as natural rights.

[6] Cohen, *supra* note 2.

contend can bring together the various strands of thinking. Cyberspace is the locus of gray markets[7] in information.

A gray market is defined as an unauthorized distribution network for a lawful product. In a black market, it is the product itself that is illegal; in a gray market, it is the means of distributing the product that is the source of the problem. For example, the sale in the United States of perfume that is designated for sale only in the European market would be a gray market sale. From one perspective, the question of legality of the gray market seems trivial. If the perfume in my example is not meant for sale in the United States, then in a sense the sale must be illegal. But the legality or illegality of the sale hinges upon the source of the restriction. The sale of Cuban cigars in the United States would be a black market sale since federal law prohibits such sales. The sale of a Porsche that is distributed in the European market through European retailers would be a gray market sale if done by someone not authorized by the Porsche manufacturer to make such a sale in the United States. The gray marketer has not breached a contract with the European distributor or with the manufacturer of the automobile, since there is no privity of contract. The gray marketer also has not committed a tort, nor has he caused a breach of contract between the Porsche manufacturer and the distributor.

When I say that Cyberspace is the locus of gray markets in information, I mean that Cyberspace permits the creation of unauthorized distribution channels for information and information products. Cyberspace is a medium for the distribution of information. This medium is different from other technologies, such as the printing press, the telephone, or the photocopying machine, because it provides sizeable reductions in the costs of producing, distributing, and accessing information. Whenever transportation and other transaction costs are low, one would predict gray markets, or unauthorized distribution channels, to arise. In Cyberspace, the biggest example of unauthorized distribution channels is provided by hypertext linking, the creation of text which permits a user to directly access one website from another. The use of hypertext linking creates interesting conflicts between those who believe that all linking should be permitted and

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[7] For background on the law and economics of gray markets, see Shubha Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373 (1994); SETH E. LIPNER, THE LEGAL AND ECONOMIC ASPECTS OF GRAY MARKET GOODS (1990); Nancy T. Gallini & Aidan Hollis, *A Contractual Approach to the Gray Market*, 19 INT'L REV. L. & ECON. 1 (1999).

those who believe that linking should be allowed only when authorized by the party whose website is being linked. I contend that linking is a form of gray marketing. I also argue in this article that the distribution of free ware (computer applications distributed for free) is another example of gray marketing in Cyberspace.

Finally, this article delineates the law and economics of gray markets and applies the analysis to Cyberspace. Not only do I develop parallels between gray markets in real space and gray markets in Cyberspace, but I also conclude that the allocation of rights in Cyberspace hinges upon the distribution of rights in what Professor Carol Rose has recently dubbed "limited common property," which describes commons that are partially excludable.[8] Professor Rose's terminology of "limited common property" is akin to what economists call "club goods."[9] The economic theory of club goods provides a foundation for Professor Rose's model of Cyberspace as a regime of "limited common property." In a companion paper,[10] I draw on the economic theory of club goods as a description of Cyberspace transactions to show how a regime of "limited common property" implies the emergence of gray markets. In this paper, I develop a legal model for understanding Cyberspace transactions that centers on gray marketing.

Before defining what I mean by gray markets in Cyberspace, it is important to understand what gray markets are in real space. The broad definition of gray market is a market involving the unauthorized distribution of goods and services. Gray markets can be contrasted with white and black markets. The white market represents the distribution of goods through authorized agents, ones permitted by contract or regulation. However, the black market represents the distribution of a good or service that is unlawful to distribute. Thus, a black market itself is illegal, because the good or service distributed is itself illegal to use or to sell. In a gray market, the good

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[8] Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998). Professor Rose defines "limited common property," as "property held as a commons among the members of a group, but exclusively vis-à-vis the outside world." *Id.* at 132.

[9] RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996). *See* James Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965)(developing a general theory for club goods); Emilson C.D. Silva & Charles M. Kahn, *Exclusion and Moral Hazard*, 52 J. PUB. ECON. 217 (1993) (examining the effects of partial exclusion of individuals from a public good).

[10] Shubha Ghosh, Limited Common Property, Club Good Theory and the Law and Economics of Website Regulation (July 1999) (unpublished manuscript, on file with the author).

or service itself is not illegal, but the means by which it is distributed may be. I use "may," because it is difficult to determine whether gray markets entail illegal or improper means.

Figure 1: Gray Markets in Real Space

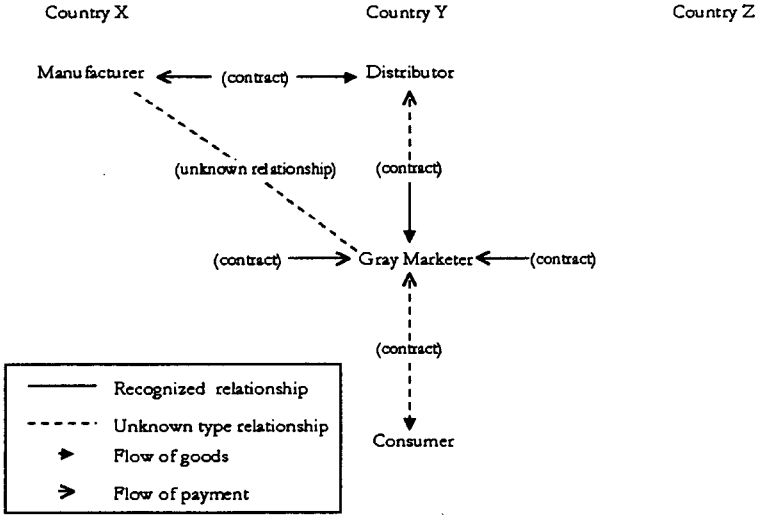

Figure One illustrates the problem. Suppose a manufacturer from country X contracts with a distributor from country Y to exclusively distribute a product in country Y. A gray marketer is an entrepreneur who buys the product in country Y and resells the product in another country or region, possibly but not necessarily the manufacturer's country, country X.[11] While the distributor-manufacturer relationship is regulated by contract, as is the gray marketer-distributor relationship, the question is the nature of the legal relationship between the manufacturer and the gray marketer.[12] If the manufacturer can enjoin the gray marketer, then the gray marketer needs to

[11] Ghosh, *supra* note 7, at 375-83; LIPNER, *supra* note 7, at 4-8.

[12] For a discussion of the role of contract in regulating the gray market, see Gallini & Hollis, *supra* note 7, at 18-19. A comparison of contractual and other means of regulating the gray market can be found in Ghosh, *supra* note 7, at 409-29.

contract with the manufacturer in order to distribute the product in other markets. However, if the gray marketer can distribute with impunity, then the manufacturer may need to seek out the gray marketer to foreclose the distribution through contract. Thus, the gray market describes the relationship between the manufacturer and the gray marketer, and determines whether the activity of the gray marketer should be regulated by contract or can occur freely.[13]

A parallel can be drawn between the activity of the gray marketer in real space and many activities in Cyberspace. For the purposes of this article, the principal activity that I will address is linking;[14] however, I will provide other

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[13] The United States case law on gray market goods demonstrates very divergent, often contradictory approaches based, at times, on the need to protect intellectual property, and, at other times, on the need to promote competition and free trade. For a discussion of the case law up to 1994, see Ghosh, *supra* note 7, at 378-86. Two recent opinions illustrate the disparities. In *Quality King Distributors, Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 45 U.S.P.Q.2d (BNA) 1961 (1998), the United States Supreme Court held that the first sale doctrine barred claims of copyright infringement against gray marketers. This decision severely limits the use of copyright law to enjoin the sale of gray market goods. (Copyright law, however, is still available to enjoin the performance of gray market goods; *see* Red Baron-Franklin Park Inc. v. Taito Corp., 883 F.2d 275, 11 U.S.P.Q.2d (BNA) 1548 (4th Cir. 1989) (holding that there is no first sale defense to the infringement of public performance right)). Courts do, however, tend to enjoin gray market goods under the Lanham Act. *See* Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA Co., 112 F.3d 1296, 42 U.S.P.Q.2d (BNA) 1801 (5th Cir. 1997) (holding that sale of gray market goods was trademark infringement because the goods were materially different from United States trademarked goods). The European Union has also moved towards regulating gray market goods through trademark law. *See* Case C-355/96, Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesllschaft mbH, 1998-7 E.C.R. I-4799 (holding that exhaustion of trademark rights doctrine did not apply to sale of trademarked goods outside the European Union).

[14] For a discussion of linking, *see* O'Rourke, *Fencing Cyberspace, supra* note 3, at 684-87 (advocating protection for linking on grounds of fair use); Dan L. Burk, *Proprietary Rights in Hypertext Linkages*, 2 J. INFO. L. & TECH. (1998) (visited Oct. 20, 1999) <http://elj.warwick.ac.uk/jilt/intprop/98_2burk/> (concluding that copyright, trademark, or other business reputational rights are not infringed by hypertext linking); Walter A. Effross, *Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking* (visited Oct. 20, 1999) <http://www.law.sc.edu/sclr/EFFROSS.htm> (advancing a solution to the problem of linking through the use of icons which would indicate limits on the use of linked material); Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames, and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA 243, 277 (1998) (advocating stronger intellectual property protection against linking and indicating that technological solutions exist to address problems created by confusion in the case law about the legality of linking); Edward A. Cavazos & Coe F. Miles, *Copyright on the WWW: Linking and Liability*, 4 RICH. J.L. & TECH. 2 (Winter 1997) (visited Oct. 20, 1999) <http://www.richmond.edu/jolt/v4j2/cavazos.html> (emphasizing the limits of current intellectual property law to regulate linking and warning against too great a reliance on technological solutions). These articles provide a discussion of the case law up to 1997. An important recent case is *Bernstein v. J.C. Penney, Inc.*, 50 U.S.P.Q.2d (BNA) 1063, 1063 (C.D. Cal. 1998), in which the district court dismissed a complaint brought by a photographer who claimed copyright infringement by J.C. Penney in establishing a series of links that indirectly connected to plaintiff's photograph, which had been displayed on the Web.

examples throughout the article.[15] I contend that linking is a gray market for information. Just as a gray marketer distributes goods from one region to consumers in another region, the linker brings information from one site to consumers in another site. Regardless of the technology used, a creator of a link provides an alternative distribution channel for the information contained on the linked site.

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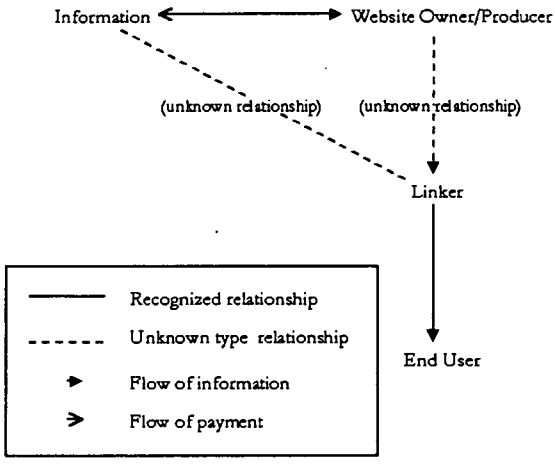
[15] Two other areas where my analysis would have applications are metatags and domain names, and First Amendment issues.

With regards to metatags and domain names, Network Solutions, Inc. (NSI), the private organization that administers domain names on the Web, has been held not liable for registering names that are likely to cause confusion among consumers or infringe upon registered trademarks. Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 949, 44 U.S.P.Q.2d (BNA) 1865, 1865 (C.D. Cal. 1997). Cases against the infringer have been more successful under either trademark infringement or trademark dilution theories. *See* Playboy Enters., Inc. v. Calvin Designer Label, 985 F. Supp. 1220, 44 U.S.P.Q.2d (BNA) 1156 (N.D. Cal. 1997) (finding trademark infringement in use of Playboy as keyword or metatag to mark website); Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296, 40 U.S.P.Q.2d (BNA) 1908 (C.D. Cal. 1996) (famous domain name squatter held liable for trademark dilution); Planned Parenthood v. Bucci, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997) (holding that use of "Planned Parenthood" as part of domain name for pro-life website was trademark dilution). The domain name and metatag cases illustrate the principles of gray marketing discussed in the text. The issue raised by each of these cases is whether unauthorized use of a trademarked name is illegal. The courts focus on confusion issues, much as they do in gray market good cases. Courts, however, also overlook consumer benefits from access to certain marks, especially as captured through exceptions for non-commercial marks under the federal dilution statute. *See* 15 U.S.C. § 1125(c) (Supp. III 1997) (creating a federal cause of action for dilution of famous names with exceptions for non-commercial use). In *Bucci*, for example, the court considered the use of the name "Planned Parenthood" to be a commercial use because the pro-life website was soliciting donations. The free speech limitations on the federal dilution cause of action have yet to be clarified. A gray market analysis would very likely excuse the use in *Bucci* and in similar cases in which the use of a name is for a political purpose.

As suggested in the last paragraph, a gray market analysis would support First Amendment exceptions for much activity on the Web that would be potentially infringing. The First Amendment has been used to strike down state laws that would criminalize Internet transmissions falsely identifying the sender, such as linking. *See* ACLU v. Miller, 977 F. Supp. 1228, 43 U.S.P.Q.2d (BNA) 1356 (N.D. Ga. 1997) (striking down Georgia's statute). The First Amendment, however, has been found not to be violated in cases involving e-mail dumping and a defamation claim brought against the manager of a website for transmitting a communication that was defamatory. *See*, respectively, Compuserve, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997) (holding that spamming and other forms of e-mail dumping were trespass to chattels); Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 175 (S.D.N.Y. 1991) (holding website owner not liable for defamation in unknowingly transmitting defamatory communication because the website owner is entitled to the same protection as a distributor of publications). The gray market analysis in this article would support broader First Amendment protection than either of these cases. For further discussion of issues, other than linking, to which my gray market analysis would apply, see Dan L. Burk, *Trademark Doctrines for Global Electronic Commerce*, 49 S.C. L. REV. 695 (1998); Ira S. Nathenson, *Spamdex, Heavy Meta, and Invisible Ink: Navigating the Internet Infoglut* (1998) (on file with journal).

Figure 2: Gray Markets in Cyberspace



The parallel between gray markets in real space and gray markets in Cyberspace is drawn in Figure Two. In real space, the problem created by gray marketing is one of specifying a legal regime to govern the relationship between the gray marketer and the manufacturer. In Cyberspace, the analogous problem is two-fold: first, the relationship between the linker and the owner of the website must be determined; second, the website owner's right to control the flow of information from the linker to the end user must be determined. As I discuss extensively in Part III of this article, the legal regime governing gray marketing in real space offers important lessons for gray marketing in Cyberspace.

Even if one accepts the analogy between gray markets in real space and gray markets in Cyberspace, the natural question is what is its value. At one level, the answer to this question is that gray marketing offers an alternative to the property-based metaphors that many scholars have adopted to understand Cyberspace. Some scholars have espoused notions of "fencing Cyberspace" or "drawing borders" or "mapping," by assuming that a real

property model is the one appropriate for Cyberspace. The natural corollary is that legal infringement of rights in Cyberspace should be called "trespass" or perhaps "nuisance."[16] But the imprinting of a real property model onto the new set of technological, social, and economic relations created by Cyberspace imports property rights based on rigid, individualistic rights.[17] However, use of this metaphor swallows up the interesting questions. Even those who advocate a shared regime are forced to argue in real property terms, talking about easements or public use or joint property regimes.[18] The gray market analogy, on the other hand, starts from the assumption that there are certain undefined rights governing particular relationships in Cyberspace. The analogy provides a framework to resolve the legal problems in a way that takes account of the economic relationships in many Cyberspace interactions.

The gray market analogy also resolves the problem of interdisciplinary approaches in the law, a problem sometimes referred to as the "law of the horse."[19] Is Cyberspace law governed by unique principles of law, never

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[16] *See, e.g.*, the discussion in O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 640 (identifying arguments for strong property rights regime in Cyberspace). The courts on occasion also adopt an analogy with real or personal property regimes. *See, e.g.*, *Cyber Promotions, Inc.*, 962 F. Supp. at 1024 (holding that spamming was trespass to chattels).

[17] This argument is elaborated in a communitarian framework by RADIN, CONTESTED COMMODITIES, *supra* note 4 and Aoki, *supra* note 4. This argument has also been made in opposition to a top-down model of rule making in Cyberspace by Johnson and Post, who demonstrate that the rules of real space almost certainly do not apply to Cyberspace. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). Lawrence Lessig is skeptical of this separation between real space and Cyberspace, characterizing Johnson and Post's position as one of deference to institutions and rules that emerge in Cyberspace. Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996). The gray market analogy is intended to bridge the gap in this debate. By thinking in terms of transactions in Cyberspace as gray market ones, we can bridge the chasm between real space and Cyberspace and resolve the problems seen by Professor Lessig. Gray markets also offer an alternative to the real property models that underlie and distort many analyses of Cyberspace, and, as a result, also address Johnson and Post's concerns.

[18] *See, e.g.*, Radin, *Property*, *supra* note 4, at 511-14 (describing property regime of shared rights based on economic analysis). The real property metaphor is of course implicit in the "information superhighway" metaphor which suggests that the Internet will provide ready access and connectivity in ways similar to the great highway projects of the 1950s and 1960s. *See* KAHIN & KELLER, *supra* note 4, at 3-4 (discussing the highway metaphor).

[19] The reference is to Judge Frank Easterbrook's description of much interdisciplinary scholarship that ignores basics and substitutes a deep and established understanding of a problem with dilettantish appeal to irrelevant disciplines. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. Whether my endeavors are dilettantish, I will leave readers to decide. Economics, however, does provide established tools to study much of the problem posed by the definition of rights and duties in Cyberspace. My work in many ways does not invite the creation of "Cyberspace Law" or the creation of a new interdisciplinary field. However, it is also not old wine in new bottles, for I am

before seen, yet to be discovered, or is Cyberspace law governed by old and well-established legal principles? The resolution is that Cyberspace law is a little bit of the old and a little bit of the new. A real property model for Cyberspace, not so subtly but often unconsciously, masks this debate by purporting to demonstrate that Cyberspace must inevitably be colonized and "lochnerized." For example, Professor O'Rourke in her article on linking leaves the reader with the sense that linking, and perhaps many other Cyberspace interactions, should be left to property law to regulate.[20] Professor Merges, similarly, in his articles on private licensing agencies suggests that Cyberspace may ultimately be a regime of private, individualized, maybe largely autochthonous units that are self-regulating.[21] Each author relies heavily on a real property foundation for understanding Cyberspace. Although each author carefully analyzes the economic and social relationships implicated by Cyberspace, the presumption of a real property model assumes away the answer: Cyberspace will be like other regimes, divided up into a set of rights resembling what we have in real space.

The gray market analogy allows us to be more careful in projecting real space onto Cyberspace because the legal regime governing gray markets in real space is equally uncertain. A mix of traditional doctrines and sui generis rules better suggests what the legal regime governing Cyberspace will look like. More importantly, gray marketing, once understood in Cyberspace, will have implications and feedback for how we understand gray markets in real space. The enthusiasts for a real property analogy, interestingly enough, miss this secondary question: What can Cyberspace tell us about how real space should be regulated?

The gray market analogy is proffered here as an alternative to the real property metaphor that has been consciously and unconsciously applied to Cyberspace. But an alternative is not necessarily an improvement, especially if the suggested alternative is really just a clone. If the real property metaphor inevitably leads to lochnerization of Cyberspace, a gray market

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using economic theories that have been largely ignored in the area of Cyberspace transactions.

[20] O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 640-704; *see also* Cohen, *supra* note 2, at 481-85 (criticizing strong property rights protection in Cyberspace based on the principle of freedom of contract).

[21] Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996); Robert P. Merges, *The End Of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997).

metaphor must do so double fold.[22] After all, at least a real property metaphor allows for the possibility of envisioning Cyberspace as shared property, a "virtual tenancy in common" among millions, if not a million fee simple absolutes. However, this argument overlooks the advantages of thinking of Cyberspace as an arena for gray markets. The key word in the phrase "gray market" is "gray"; in some ways, it is unfortunate that the word "market" is used at all because gray markets do not entail commodification. Instead most gray market regimes describe regimes of imperfect- or even non-commodification, in which politics and policy have their sway in conjunction with, or often counter to, market transactions.[23] The reaction to the gray market analogy should logically come from the strong Cyber-Lochnerians. But this wing may be solaced by the presence of the term "market" in "gray market"; for this phrase allows us to use a wider set of tools from law and economics to understand Cyberspace. The problem for the Cyber-Lochnerian wing is applying these tools to the production and

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[22] For example, John Perry Barlow is very much opposed to thinking of information in terms similar to economic analysis of personal property. As he states, it is meaningless to speak of distribution of information since information cannot be distributed like goods. Instead he speaks of the dissemination of information. *See* Barlow, *supra* note 5, at 87. I think that this point is largely semantic. Perhaps information is really "disseminated" and not "distributed," but the underlying economic relationships are the same regardless of the verb used. Barlow suggests that information is different from goods because of the lack of non-rivalry. As he states, when a good is distributed, the distributor loses possession and use; when information is disseminated, the disseminator loses neither possession nor use. But, of course, goods are not completely rival. For example, under a chattel mortgage, I can sell a good to someone and retain the right to reclaim the good if the buyer fails to make payment. Rights in goods (and in real property) can be carved up in a number of ways that permit joint ownership and sharing; many of these divisions of rights implicate issues similar to the dissemination of information. What is relevant for much legal and economic analysis is the allocation of rights rather than whether something has been distributed or disseminated.

Professor Cohen would perhaps also disagree with my attempt to develop an economic theory of Cyberspace transactions that is admittedly grounded in neoclassical economics. I agree with much of what Professor Cohen says about neoclassical economics as applied to intellectual property transactions and especially the reification of "property" and "contract" among cybereconomists. *See* Cohen, *supra* note 2, at 515. I am also sympathetic to her power and public choice alternatives to the neoclassical model. My work in this article overlaps with and builds upon her ideas of externalities, especially the positive externalities associated with information and information networks. As I show in this article, externalities properly recognized in an economic model of Cyberspace result in conclusions quite different from the cybereconomists that Professor Cohen criticizes. If bargaining power and public choice elements were added to my model, Professor Cohen's criticisms would be given greater support. My conclusions, however, indicate that there are more fundamental things that cybereconomists have missed: the nature of information, the externalities that are generated from information, and the institutional structure of information dissemination.

[23] *See, e.g.*, Netanel, *supra* note 4, at 278-82 (pointing to the limits on territoriality and sovereignty introduced by gray marketing).

distribution of information in Cyberspace because this application does not justify a regime of strongly protected property.

As this brief introduction suggests, the gray market analogy deepens and expands our analysis of interactions in Cyberspace. In this article, I develop the gray market analogy first by applying the legal regime regulating gray markets in real space to gray markets in Cyberspace. I focus my attention on the issue of linking, currently the principal and most controversial gray market in Cyberspace. In Cyberspace, as in real space, the gray market is an important counterweight to the white market. But to develop and support this ultimate point, I should first elaborate on the meaning of gray markets in real space and the strength of the analogy for Cyberspace, the topic of Part II.

II. THE GRAY MARKET ANALOGY

Before dissecting and applying the gray market analogy in the context of Cyberspace, it is necessary to flesh out what I find useful and powerful about this analogy. In real space, gray markets can be viewed as a geographic phenomenon. In an idealized world, if it is possible for one manufacturer to supply the entire global market with his goods, the gray market would not occur. This single manufacturer, like the single firm described in Coase's *The Nature of the Firm*,[24] is a convenient fiction for highlighting the problem of transaction costs. Even if a manufacturer could produce enough to satisfy global demand for his product, the product would have to be delivered to the customer, the end user. The delivery, of course, occurs through distribution channels regulated by contract law and possibly other legal rules. The extent of delivery is limited by the ability of the manufacturer to contract, which in turn is affected by geographic limitations. For example, the extent of contracting required to deliver the product to meet demand in Region A will depend upon the topography, demography, and boundaries in Region A. If the population is dispersed, many distributors will be needed; if it is concentrated, relatively few will be needed. Because of these limitations, a manufacturer may fail to meet the total global demand. These limitations

[24] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

may further affect the marketing of the product, such as through advertising and information networks, and its price.[25]

Against this background, gray markets arise. Gray markets provide alternative distribution channels where it is costly for the manufacturer to contract for distribution.[26] Typically, the geographic limitations described in the previous paragraph lead the manufacturer to cater to the high end market.[27] The gray market satisfies demand in the low end market.[28] Furthermore, the gray market can serve to prevent the counterfeit market.[29] The gray marketed product is the authentic product, not a knock-off. In contrast with counterfeit goods, which are produced by an entity disguised as the actual manufacturer, the actual manufacturer produced the gray marketed product. Typically, counterfeit goods are purchased by those who cannot afford the authentic items in the regional market. Gray market goods also fulfill this demand. Gray marketers typically buy products overseas and distribute them below the price of authorized dealers. Since the gray market goods, in contrast to the counterfeit goods, are authentic, gray markets serve the beneficial purpose of satisfying the low end of the regional market and pre-empting the market for counterfeit goods.

Transportation and transaction costs also set important preconditions for the emergence of the gray market. If transportation costs are high, gray marketing will be difficult to achieve.[30] However, if transaction costs are an impediment to the manufacturer, then they should equally be an impediment to the gray marketer. The relevant transaction costs for the two agents are, of course, different. The manufacturer must find the correct number of distribution outlets that will allow distribution of his product in order to maximize his returns. Given the costs of contracting described above, the optimal number of distribution outlets may not necessarily result

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[25] JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 279-87 (1989); *see* Gallini & Hollis, *supra* note 7, at 3-5 (defining gray market); DAVID SPULBER, REGULATION AND MARKETS 200-29 (1989) (describing price discrimination).

[26] Gallini & Hollis, *supra* note 7, at 5; Ghosh, *supra* note 7, at 411-14.

[27] The high end of the market is measured by the willingness of the consumers to pay. Willingness to pay is determined by factors such as income, preferences, and wealth.

[28] The low end of the market is measured by the consumers' lack of willingness to pay. Those consumers who are not willing to pay above a certain price for a given product will be serviced by typical retail outlets, such as K-Mart or Sam's Club. These outlets are designed for mass consumption and sacrifice quality for a lower price.

[29] A counterfeit product is a knock-off of a genuine product.

[30] *See* Ghosh, *supra* note 7, at 411-13 (explaining the problems solved by gray marketing).

in an outlet in every region. Demand factors and marketing strategies also affect the manufacturer's decision. In contrast, the gray marketer has a much simpler decision; she must identify a distribution outlet in Region A, purchase the product, and find a distribution outlet in Region B in which to sell the product. The relevant factors affecting this decision are the prices in Regions A and B and the costs of moving the goods from Region A to Region B. If the cost of moving is low relative to the price differential, then gray marketing will be profitable and will occur. Further, one would expect that as the transportation costs fell, gray marketing would increase.[31]

One of the key characteristics of Cyberspace is that through the technology of the Web, the cost of transporting information is negligible.[32] Search costs are further reduced through more powerful search engines and hardware. The costs of access also fall drastically as the power of the machine and interconnectedness increase. The problem from the perspective of the manufacturer of information, however, is one of congestion.

Suppose an entrepreneur has created a compilation of data that she wants to share with the public. There are several methods for distribution and dissemination of the new compilation. The first, of course, is passive dissemination: create a website with the compilation containing key search terms and hope that enough people hit upon it in their searches. Clearly, this would not be the most efficient means of distribution. Alternatively, the entrepreneur could contract: sell advertising that would lead to the site in both real and cyber media. Thus, the technology of the Web does not necessarily lower the costs of distribution for the manufacturer of the information. This combination of the lower costs of moving information in Cyberspace, as opposed to in real space, and the potential increase in the cost of contracting in Cyberspace (because of the large number of contracting parties) provides a precondition for gray marketing. The gray market analogy is one worth pursuing to understand the economic and social relations implicated in Cyberspace.

Although I believe that the gray marketing phenomenon is quite common in Cyberspace, for the purposes of this article, I will illustrate this phenomenon with the best example of what I mean by gray markets in Cyberspace: linking. The technology of linking is relatively easy to

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[31] *See* TIROLE, *supra* note 25, at 140-41 (discussing transportation costs).

[32] *See* Merges, *End of Friction*, *supra* note 21, at 116-18 (discussing reduction of transaction costs in Cyberspace).

understand and is so common that many readers may take it for granted. Hypertext linking, the most common form, allows the user of one website to jump to another site that may have related information.[33] The hypertext link is created by the owner of a site as a means of facilitating use. The link essentially combines the functions that we associate with a library staff at a closed stacks library. The hypertext[34] in the website is code for the URL[35] of the site to be linked; it is like a user telling a member of the library staff that he wants a certain book by a certain author. The information can be conveyed to the librarian in many ways: through a call number, through a last name and title, or sometimes simply through the title. Once the user clicks on the hypertext, the URL of the linked site is called up, just like the librarian going to the shelf to retrieve the requested book. Finally, if the URL is valid and the site is active, the linked site is displayed on the screen, just like a book waiting for the user at the Circulation desk. Hypertext linking is the modern version of the closed stacks library in Cyberspace. And just as the closed stacks library is a substitute for open stacks, where the user can browse and retrieve the book personally, hypertext linking is the equivalent of the user finding the URL and retrieving the site himself.

Hypertext linking is the most familiar form of linking; framing[36] and IMG[37] are two other common forms.[38] Both framing and IMG incorporate elements of the linked website into the linking site. Although these two forms of linking implicate different issues from hypertext linking, issues I address more closely below, all three forms of linking constitute a gray

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[33] *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 631-34 (explaining how hypertext linking works); *see also* KATSH, *supra* note 1, at 195-211 (explaining how hypertext linking creates a "seamless web").

[34] Hypertext has been described as something that is "easier to demonstrate than to describe." KATSH, *supra* note 1, at 199 (footnote omitted). If linear writing flowing from a beginning to an end is "text," then hypertext is a collection of texts connected with a particular path of navigating from one text to another. *Id.* at 201-02. From a mathematical perspective, "text" is a scalar quantity having only magnitude, while hypertext is a vector, having both magnitude and direction.

[35] "URL" stands for Universal Resource Locator, the technical term for a website address (such as http://law.gsu.edu/sghosh).

[36] Framing is a form of hypertext where the text is surrounded by borders that remain fixed as the reader moves through the Web pages while the text content changes. *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 637-39 (discussing linking by framing).

[37] An IMG, or image link, creates a link with graphical or pictorial material. While an ordinary link connects the user with a different Web page, an IMG link transports a copy of graphical or pictorial material from the linked page and reproduces it on the linking page. *Id.* at 655-56 (discussing linking by IMG).

[38] *Id.* at 631-34 (describing each of the three types of linking).

market in information. Just as the gray marketer distributes goods from one region in real space to another, the linker conveys information from one part of Cyberspace to another. The relationships between manufacturer, gray marketer, and customer are analogous to the relationships between the owner of the linked site, the linker, and the end user.[39]

This homology has two important implications. First, the relationship arises even if Cyberspace is in fact Lochnerized. The existence of linking, according to some scholars, will invariably result in the balkanization of Cyberspace. If linking is legally permitted, website owners will convert their sites to subscription sites requiring a password and possibly fees to access; end users will have to pay for access.[40] Technological solutions will substitute for legal restrictions. If linking is held to be enjoinable, less linking will naturally occur, and once again the result will be balkanization; linkers would have to buy the right to link and the cost of information access would be borne by the linker, as opposed to the end user. But even in a perfectly balkanized regime of Cyberspace, where sites are protected from access through contract or technology, gray markets can still arise, although in a different form. Fences in Cyberspace, like border protectionist policies in real space, cannot keep the gray marketer from operating. Furthermore, protectionism would be even less effective in Cyberspace, because of the relationship between the costs of transportation and the costs of contract.[41]

Second, the homology focuses the attention on the background economic and social transactions that determine what the relevant transaction costs are, which should be relevant in analyzing linking specifically and other interactions in Cyberspace more generally. There is a presumption in the literature that real property models apply to Cyberspace, whether the model is one of shared or private property.[42] But this presumption ignores the varied sets of relationships that exist in Cyberspace. More importantly, the presumption imposes the model of real property interactions onto Cyberspace. To say that linking is like trespass, for example, assumes that

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[39] *See* Figures 1 and 2, *supra* Part I (graphically depicting these relationships).

[40] *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 625-26 (discussing Web business models).

[41] *See supra* notes 31-30 and accompanying text (discussing the relationship between costs of transportation and contract in Cyberspace).

[42] *See, e.g.*, Hardy, *Ancient Doctrine*, *supra* note 3, at 9 (arguing that trespass law applies directly to Cyberspace); Radin, *Property*, *supra* note 4, at 514 (arguing that property in Cyberspace evolves from property in real space).

relationships between websites are like the relationships between adjoining parcels or their respective owners. Such a presumption ignores that information differs from land, both in use and in value. A gray market model invites more caution, partially because the law governing gray markets is less settled, and partially because the model forces an inquiry into the underlying structure of production and distribution of information.

But, of course, all analogies are imperfect, and the gray market analogy can be subjected to several criticisms. I suggested in the previous part that the critique from anti-commodificationism may be unsatisfactory. There are still several powerful criticisms of my analogy that need to be addressed. I focus here on the three principal ones that I have identified: (a) gray markets in real space arise from price arbitrage, which has no clear analogue in Cyberspace; (b) gray markets in real space arise from schemes of price discrimination by the manufacturer and distributor that have no clear analogue in Cyberspace; and (c) the contracting issues in real space implicated by gray marketing are distinct from the contract issues implicated in Cyberspace.

A. THE GRAY MARKET AS ARBITRAGE

The gray marketer in real space buys low and sells high.[43] Though the pricing mechanism has not been fully implemented in Cyberspace, the gray market analogy applies, because the heart of gray marketing is not price arbitrage but *unauthorized distribution*. Since the price system is the most extensive mechanism for allocating goods and services in real space, gray marketing in real space naturally would entail questions of price. But gray marketing can occur in subtle ways that may not involve price arbitrage.

The classic case of *International News Service v. Associated Press*[44] provides such an example. International News Service (INS) took Associated Press' (AP's) stories as AP distributed them through authorized agents and redistributed them in "new packaging" to the West Coast. Although INS was not taking advantage of a price differential, it was taking advantage of a time differential and in effect distributing to an unauthorized market, one not fully tapped by AP. What is important in the INS case is the unauthorized distribution of the news, characterized by the Court as

[43] Gallini & Hollis, *supra* note 7, at 1-2; Ghosh, *supra* note 7, at 411-13.
[44] 248 U.S. 215 (1918).

misappropriation; INS was a gray marketer of news under the facts of that case. Similar unauthorized distribution characterizes *International News Services*' progeny, such as *Motorola, Inc.*,[45] in which the defendant was providing sports scores through a different distribution mechanism. Thus, a critique of the gray market analogy from the perspective of price arbitrage is ineffective, for the issue in gray marketing is whether the unauthorized distribution violates the law.

Furthermore, even if gray marketing in Cyberspace does not entail price arbitrage, it may involve arbitrage of a different sort. INS' conduct exemplifies non-price arbitrage. Because of the time difference between the East and West coasts, INS was able to obtain the relatively old news on the East Coast and redistribute it as fresh news on the West Coast. In this case, INS was exploiting the differential in the value of the information created by the difference in time between the two coasts. Similarly, gray marketers can take advantage of differentials in the value of information created by other means. In the linking cases, linkers provide value by compiling various sorts of information in one source; thus the arbitrage is based on the freshness and packaging of the information. For example, in *Washington Post Co. v. Total News, Inc.*,[46] the company Total News created a website funded by advertising that allowed the user to link to websites of major newspapers that would appear on the Total News website in frames. The function Total News provided was one of repackaging the information and thereby allowing the user to scan newspapers and compare each paper's coverage of an issue with that of other papers. By compiling the news, Total News created a new product: a bundle of news gathered from a scattered set of newspapers. Through compilation, Total News provided an arbitrage function between low value scattered news and high value compiled news, which it then distributed to users who could not afford to acquire subscriptions to multiple newspapers.

In many ways the arbitrage implicated by gray marketing in information is much like the arbitrage that occurs across fields of expertise among academics. A person trained, for example, in economics may take ideas that are well-established, possibly even trivial, in the field of market theory and

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[45] NBA v. Motorola, Inc., 105 F.3d 841, 843, 41 U.S.P.Q.2d (BNA) 1585, 1587 (2d Cir. 1997) (holding that *International News Service* is still good law, but that broadcasting of sports scores by Motorola was not misappropriation).

[46] Washington Post Co. v. Total News, Inc., No. 97 Civ. 1190 (S.D.N.Y. June 6, 1997).

apply them in the area in a novel, potentially high value way with payoffs in terms of publication and scholarly notoriety. Although this example is not intended as judgment upon the research in this paper, the example demonstrates that arbitrage has a broad meaning beyond the exploitation of price differentials, especially when information is involved. The gray market analogy does not fail for lack of an analogue for price arbitrage in Cyberspace.

B. GRAY MARKETS, DISTRIBUTION, AND PRODUCTION

Gray markets in real space result from price differentials that are a result of price discrimination by the manufacturer and distributor of the product.[47] Price discrimination is the marketing of the same product at different prices within the same temporal market. The classic example is differential ticket pricing based upon the age of the customer. Other examples of price discrimination are peak load pricing[48] and volume discounts by retailers. In the global market, setting different prices in different regions is a form of price discrimination where the manufacturer charges different prices for the same product based upon regional differences in consumption and tastes. The gray marketer, by providing an alternative channel for distribution of the product in one of the regional markets, undercuts the ability of the manufacturer to price discriminate. Because price discrimination is not an issue in Cyberspace, where many transactions are not metered by the price mechanism, a criticism could be that my analogy of gray markets in Cyberspace is not appropriate.

Once again this criticism hinges upon the fact that the price mechanism is not fully operating in Cyberspace, while it fully operates in real space. But, as with the arbitrage argument, the price discrimination argument ignores both the ways in which information is marketed and the practices in real space that facilitate price discrimination. By differentiating products, manufacturers and distributors can facilitate discriminatory practices by

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[47] I focus here on the economics of price discrimination, rather than on the legality of price discrimination under the Robinson-Patman Act. *See* TIROLE, *supra* note 25, at 133-62 (illustrating the various aspects and applications of price and quality discrimination); *see also* ROBERT P. WILSON, NONLINEAR PRICING 5-17 (1993) (explaining the motivations and practical uses of price discrimination via non-linear pricing); SPULBER, *supra* note 25, at 200-29 (providing a mathematical analysis of price discrimination schemes); SHAPIRO & VARIAN, *supra* note 5, at 19-53.

[48] Peak load pricing is the setting of a higher price at peak usage times. WILSON, *supra* note 47, at 262.

segmenting the market into high end users, those willing to pay a high price, and low end users, those willing to pay a slightly lower price. By segmenting the market in this way, the manufacturer and distributor can charge two different prices and capture a larger portion of the market. If the manufacturer was forced to charge only one price for a non-differentiated product, not only would she lose some sales to the low end of the market, but she would also lose some of the surplus that would go to the high end users. By segmenting the market, a manufacturer can increase her returns by capturing a larger share of the market.

An example of segmentation is provided by pricing schemes for movie tickets. Suppose elderly patrons would be willing to pay at most $4 each to see a movie, while younger patrons would be willing to pay at most $7 each to see a movie. If the movie theater charged $6, it would capture the younger audience, but lose the older audience. By segmenting the market by age (such as by giving a senior citizen discount reducing the price to $4 for elderly patrons), the movie theater can expand its uses and its returns.

Information markets can be segmented in a similar way, through packaging and metering of use, which may facilitate price differentials but which also facilitates dissemination of information. Even if the price mechanism is not directly functioning in Cyberspace, a website owner may engage in segmenting the domain of end users for the purposes of further disseminating information. For example, a website owner can create two or more packages of information based upon characteristics of the end user or intensity of use by the end user. Each of these mechanisms for segmenting the domain of end users is like product differentiation in market settings.[49] The only difference is that in real space, price is the form of discrimination; in Cyberspace, quality is the relevant variable.

Product differentiation (and the resulting price discrimination) can occur in both real space and Cyberspace, but the role of gray marketing may be different in the two settings. In real space, gray marketing serves to distribute goods to the low end of the market, expanding the amount consumed in the marketplace with accompanying gains to consumers. In this respect, gray marketing may subvert attempts to price discriminate in real space by providing a competitive source of goods in one of the

[49] *See* SHAPIRO & VARIAN, *supra* note 5, at 80-81 (offering an economic analysis of Cyberspace transactions).

manufacturer's markets.[50] On the other hand, if the gray marketed goods are different from the products sold in the country in which the gray marketer distributes, gray marketing may support price discrimination by further differentiating the products of the manufacturer.[51] In the first case, gray marketing is a positive phenomenon from the perspective of consumers and a negative one from the perspective of manufacturers. In the second case, gray marketing benefits consumers and may even help the manufacturer. The role of gray marketing in Cyberspace is more complex. While the gray marketer can repackage or provide low cost links to information and thereby aid the end users, the gray marketer in Cyberspace, like his analogue in real space, may take a free ride by using the efforts of the original creator of the information. However, the gray marketer may also provide a benefit to the original creator by further disseminating the information produced.[52] The gray marketing analogy is not inappropriate in Cyberspace simply because price discrimination is localized to real space. On the contrary, differentiated products and quality discrimination play a key role in Cyberspace interactions, and gray marketing through linking fills in the resulting gaps.

C. GRAY MARKETS AS IMPERFECT CONTRACTING

The gray market problem in real space is, from one perspective, a trivial problem. According to one view of the gray market, if the gray marketer wants to distribute in Region B, he should be required to buy that right from the manufacturer. Region B may be a market yet to be tapped by the manufacturer, but currently unexploited because of transaction costs. The gray marketer can lower transaction costs for the manufacturer, and then share his rewards from exploiting a previously untapped market with the manufacturer who initially produced the good. In accordance with this view, a court, in deciding a gray market case, should provide the missing

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[50] *See* Gallini & Hollis, *supra* note 7, at 7-11 (exploring the social impact and policy implications of gray market goods, and recommending their exclusion except under special circumstances); Robert J. Staaf, *The Law and Economics of the International Gray Market: Quality Assurance, Free-Riding, and Passing Off*, 4 INTELL. PROP. L. 193, 233-35 (1988) (providing empirical and theoretical support for the role of gray markets in promoting competition and undercutting market division).

[51] *See* Ghosh, *supra* note 7, at 392-97 (explaining the implications of §§ 42-43 of the Lanham Act on gray market goods, with examples).

[52] *See* Ghosh, *supra* note 7, at 383-409 for a discussion of the various costs and benefits of gray marketing with examples.

contract between the gray marketer and the manufacturer through a compulsory license requiring the gray marketer to compensate the manufacturer for the license that was neither obtained nor sought. Under this view of the gray market, my analogy is not helpful to the Cyberspace debate: contracting is the solution.[53]

Before attacking the implications of this argument for Cyberspace, I should point out that this argument overlooks some important aspects of gray marketing in real space. First of all, if the manufacturer is involved in market segmentation and price discrimination, compulsory licensing for gray marketing would have an adverse effect on consumers. Gray marketing when price discrimination exists may benefit the market at the expense of the manufacturer.[54] Second, the contracting argument assumes that the manufacturer has the property right to sell his product in Region B. Although on the surface this seems like a plausible assignment of rights, closer scrutiny suggests its basic fallacy.

The manufacturer has the right to be free from unfair competition in the sale of his product, but this does not mean that he has an unfettered right to sell the product. For example, under copyright law, the first sale doctrine limits the copyright owner's distribution right to the first sale; thus the owner should extract as much of the rents from selling the protected work in the first contract through which the work is sold.[55] The copyright owner does not have the right to control resale or redistribution of the work except through narrow means.[56] In the gray market context, it is not clear that the manufacturer has an absolute right to control the resale of his product after

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[53] *See* Gallini & Hollis, *supra* note 7, at 22-24 (offering a contractual solution to the problem of gray markets).

[54] *See* Ghosh, *supra* note 7, at 409-14 (discussing the trade-off between market effects and loss to the manufacturer).

[55] *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (arguing that the fair use doctrine cures a market failure when there are large transaction costs to licensing); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications* of Sony, Galoob, *and* Sega, 1 J. INTELL. PROP. L. 49 (1993) (discussing the implications of fair use for technological innovation and standard setting); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J.L. & ECON. 325 (1989) (supporting fair use doctrine as a way of maximizing the value of the copyright owner's work); Stanley M. Besen & Sheila Nataraj Kirby, *Private Copying, Appropriability, and Optimal Copying Royalties*, 32 J. LEGAL STUD. 255 (1989) (demonstrating that permitting some amount of copying and sharing of intellectual property can increase value to the property owner).

[56] 17 U.S.C. § 106 (1998).

he has contracted with the initial distributor.[57] Whether the right to control resale should exist, in other words whether that right should be assigned to the manufacturer, is a question of transaction costs. The answer to this question depends upon the underlying economic and social relations implicated by gray marketing. The United States Supreme Court's recent decision[58] to permit gray marketing through the application of the first sale doctrine demonstrates that the manufacturer's right to control resale is far from clear.

Extending the contracting solution to Cyberspace is equally suspect. As with the property metaphor discussed above, the contracting solution assumes a particular set of entitlements. The real question is *what types of entitlements are consistent with the types of interactions that occur in Cyberspace.* This question rests intimately on our conception of what these interactions are and what they should be. Gray marketing is a powerful model for understanding these interactions. Even though many scholars have turned to contracting as the basic legal model on which Cyberspace should rest, contracting does not resolve many of the more vexing problems.[59] In fact, contracting may exacerbate the underlying problems that lead to the unauthorized flow of information through mechanisms such as linking. The basic problem is that in Cyberspace the costs of disseminating information are very close to zero, even though the costs of manufacturing the information are not. It is in this environment that gray marketing arises in real space and in Cyberspace; and it is for this reason that gray marketing is difficult to contain.[60]

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[57] *See* the discussion in Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911) in the context of resale price maintenance; *see also* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 339 (1908) (discussing the limitation placed on copyrights under the first sale doctrine).

[58] Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 45 U.S.P.Q.2d (BNA) 1961 (1998); *see infra* note 78 and accompanying text.

[59] *See* Cohen, *supra* note 2, at 481-95 (scrutinizing Cybereconomists' claims regarding the efficiency of contracting for allocating rights in digital works).

[60] Bakos, Brynjolfsson & Lichtman discuss the pricing problems for information goods and suggest that permitting sharing can actually increase the contract price for information goods under some circumstances. They analogize sharing of information goods to commodity bundling of goods and services. Yannis Bakos et al., *Shared Information Goods*, 42 J.L. & ECON. 117, 120-29 (1999).

D. SUMMARY

In this part, I have elaborated on the gray market analogy and addressed several potential criticisms. The gray market analogy works in many dimensions: first to capture the problem of unauthorized distribution, second to capture the differential costs of contracting and accessing information, and third to capture the ways in which the domain of end users can be segmented and differentiated. Taking these elements of the gray market analogy, I now address two questions: what can we learn from the law of gray markets, and what can we learn from the economics of gray markets? I address each question in turn.

III. COMPARATIVE LEGAL REGIMES IN REAL SPACE AND CYBERSPACE

A. THE LEGAL ISSUES RAISED BY GRAY MARKETS IN REAL SPACE AND CYBERSPACE

In the previous part, I laid out an argument for the gray market analogy as applied to Cyberspace transactions. Although I spoke of Cyberspace generally, the specific transaction I provided as an example was linking. In this part, I turn to the legal implications of the gray market analogy. Once again, I will draw the implications for the activity of linking. As background for the legal analysis, consider the following scenarios:

(1) I write an article on the law of Cyberspace. I present my own ideas developed and expressed originally. But I also wish to incorporate the work of others in my writing, and I do so through standard operating procedures for researchers: I quote directly and attribute the quotes appropriately, or I cite my fellow scholar's work directly, urging you to read it as a follow up. Such use does not constitute a violation of copyright law or trademark law.[61]

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[61] Such a use would constitute fair use under copyright law. *See* 17 U.S.C. § 106 (1999) (laying out standards for determining whether a particular infringement would constitute fair use and hence would be protected); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 225 U.S.P.Q. (BNA) 1073 (1985) (citing Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) and stating that "[a] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism"). Such a use also would not constitute trademark infringement, which governs use of names or symbols in a way that causes confusion as to source. 15 U.S.C. § 1114

(2) Suppose that I place my completed article on my website. In order to facilitate your reading the articles that I cite, I link the titles and citations of the articles from which I quote using hypertext, so that with a simple click you can have my fellow scholar's work before you. Should the hypertext linking make a difference in determining whether I violated any intellectual property law? By using hypertext linking, have I taken something of value from my fellow scholar, or have I simply provided the reader with a service: easy access to more valuable information?[62]

(3) Consider the same problem in a commercial context. The mention of a competitor's protected trademark for comparison purposes would merely constitute fair use under trademark law ("trademark fair use") as long as the advertiser does not create false association or disparagement.[63] Use of a competitor's trademark on a website for comparison purposes would also likely constitute trademark fair use. Now suppose that the trademark—whether word or icon—is transformed into hypertext so that the

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(1991). Even if I incorporate names and symbols into my research, this use would be protected as fair use, because my purpose is non-commercial and the use is nominative. New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 23 U.S.P.Q.2d (BNA) 1534 (9th Cir. 1992).

[62] Academic literature has consistently held that such a use should constitute fair use under copyright and trademark law. *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3 (arguing that hypertext linking should be fair use under both copyright law and trademark law and urging limits in the application of contract law and the doctrine of misappropriation); Edward A. Cavazos & Coe F. Miles, *Copyright on the WWW: Linking and Liability*, 4 RICH. J.L. & TECH. 3 (Winter 1997) (detailing potential bases for liability under state and federal law for linking and possible defenses); Walter A. Effross, *Withdrawal of the Reference*, *supra* note 14 (proposing technological solutions to limiting linking); Burk, *supra* note 14 (suggesting that linking is no different from standard reference tools in research); Kuester & Nieves, *supra* note 14 (suggesting strategies and guidelines for website owners to escape liability under the intellectual property laws).

The limited case law has not been as clear as the academic commentary. *See* Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 DDP (C.D. Cal. filed April 28, 1997) (still in pre-trial stage, but it forwards allegations that hypertext linking constitutes trademark infringement and federal dilution); Washington Post Co. v. Total News, Inc., No. 97 Civ. 1190 (S.D.N.Y. June 6, 1997) (settlement in the context of allegations that framing constituted trademark infringement); Expert Pages v. Buckalew, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997). For a discussion of *Ticketmaster Corp.* and *Total News, Inc.*, see O'Rourke, *Fencing Cyberspace*, *supra* note 3.

[63] Conopco, Inc. v. May Dep't Stores, 46 F.3d 1556, 32 U.S.P.Q.2d (BNA) 1225 (Fed. Cir. 1994) (holding that the use of a trademark in comparative advertising where there was no likelihood of confusion was not infringement); *New Kids on the Block*, 971 F.2d at 302 (use of music group's trademarked name in newspaper story is not infringement); *see supra* note 62 (discussing fair use within Trademark law); *but see* Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996) (rejecting a trademark fair use defense when there was a possibility of consumer confusion as to celebrity endorsement).

consumer can click and "cyberleap" to another owner's Web page. Has fair use become theft, trespass, or some other form of infringement?[64]

Commentators on this issue have focused on real property analogies to the use of hypertext to link different websites.[65] One such analogy requires that one imagines a fence surrounding each individual website; thus, commentators have described the use of links as potentially a form of trespass. The question becomes: what property rights does the creator of the webpage have in his website? An analogue to this question lies in copyright law: which elements of the website are protected expression and which are open to fair use? Such an analogy prompts additional questions: what law controls Cyberspace? Is it the common law of contract, property, and tort? Is it the body of intellectual property law? Or is there some other set of rules and standards yet to be developed and named?[66]

The analogy to property in some ways presupposes an answer. My point in this article is to draw a better and tighter analogy: linking through hypertext and many uses in Cyberspace are examples of gray markets. The principles developed in the "law of the gray market" should, at least, inform if not prevail in drawing boundaries in Cyberspace.[67]

B. THE LAW OF THE GRAY MARKET IN REAL SPACE

The phrase "law of the gray market" is intentionally tinged with irony, for legal analysis of the gray market is wrought with problems of definition and application analogous to the problems pervading the law of

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[64] The cases cited *supra* note 15 demonstrate a range of theories based on both federal and state law. There is clearly not one dispositive set of theories. The varieties of legal theories suggest that linking is an activity in need of a descriptive and predictive model.

[65] The real property analogy is most striking in the title of Professor O'Rourke's paper, *Fencing Cyberspace*, *supra* note 3. I do not disagree with the analogy; rather, I think that it is lacking in some ways and potentially limiting. The irony is that Cyberspace is not a place or a space in the three-dimensional sense that real property conjures. Given how multi-dimensional Cyberspace is, we are perhaps like the citizens of Flatland attempting to comprehend the three dimensional world. EDWIN A. ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS (Penguin Books 1984) (1884).

[66] For a debate over the proper model of Cyberspace law, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (advocating a sui generis body of Cyberspace law as distinct from the law governing real space) and Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996) (critiquing Johnson and Post's position as being too strong).

[67] *See, e.g.*, Ghosh, *supra* note 7 (surveying the case law); Staaf, *supra* note 50 (providing some economic data demonstrating the benefits and costs of gray marketing).

Cyberspace.[68] Part trademark,[69] part copyright,[70] part unfair competition,[71] part contract,[72] part agency,[73] "the law of the gray market" is far from a coherent whole. Application to linking or other issues in Cyberspace seems, in the first instance, far from fruitful. But the analogy is useful for two reasons. First, linking and other uses in Cyberspace illustrate nascent markets, markets yet to be developed. Similarly, gray markets fill in the gaps in the distribution of products in the global and regional marketplace. Second, links work in many ways like gray markets by providing an alternative, albeit unauthorized, channel for the distribution of a product.

In the United States, gray marketing is regulated by state and federal laws. New York and California have enacted statutes that expressly limit the selling of gray market goods; however, the statutes have largely been unenforced.[74] Federal law also limits the sale of gray market goods within the United States. Section 526 of the Tariff Act, enacted in 1926, restricts importation of gray market goods, but has been limited by two fairly broad exceptions based on the agency relationship between the United States owner of the trademark and the foreign distributor.[75] Section 337 of the Tariff Act, a more recent provision, provides an administrative remedy with the International Trade Commission; however, this remedy has rarely been sought.[76] The number of legislative measures to control the gray market contrasts starkly with their effectiveness.

In contrast to all of the legislation in the United States, in the European Union the gray market has proceeded without legislative restriction. Though the European Union has not passed legislation regulating gray

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[68] For definitions of gray markets, see Ghosh, *supra* note 7, at 373-74 and LIPNER, *supra* note 7, at 1.

[69] *See, e.g.*, A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923) (finding trademark infringement by seller of gray market goods).

[70] *See* Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 45 U.S.P.Q.2d (BNA) 1961 (1998) (surveying copyright cases dealing with the gray market and holding that the first sale doctrine is a defense against copyright infringement through gray marketing).

[71] Lever Bros. v. United States, 652 F. Supp. 403, 1 U.S.P.Q.2d (BNA) 1820 (D.D.C. 1987).

[72] Railway Express Agency, Inc. v. Super Scale Models, Ltd., 934 F.2d 135 (7th Cir. 1991).

[73] K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 6 U.S.P.Q.2d (BNA) 1897 (1988).

[74] N.Y. GEN. BUS. LAW §§ 218-99 (Consol. Supp. 1999); CAL. CIV. CODE §§ 1793.1, 1797.80-86 (West 1998).

[75] Tariff Act of 1922, ch. 356, § 526(a), 42 Stat. 858, 975 (current version at 19 U.S.C. § 1526 (Supp. 1997)); *see K-Mart Corp.*, 486 U.S. 281, 6 U.S.P.Q.2d (BNA) 1897 (1988) (discussing limitations of this provision).

[76] 19 U.S.C. § 1337 (Supp. 1997). See Ghosh, *supra* note 7, at 402-07 for a discussion of the limits of this provision.

markets, in 1998 the European Court of Justice relied upon trademark law to restrict gray markets in the European Community.[77] At issue was the resale of fashion sunglasses distributed outside of the European Union in Austria. The court held that such resale diluted and infringed upon the trademark for the sunglasses authorized to be sold within Austria. This recent opinion parallels developments in United States law that rely on intellectual property law to prevent gray market goods. Although trademark and copyright laws have historically been relied upon to challenge gray marketers, the United States Supreme Court cast a fatal blow to copyright theories in its recent *Quality King Distributors, Inc.* decision, holding that the first sale doctrine is a valid defense for gray marketers.[78] However, plaintiffs in the United States, like the successful litigants in the European Court of Justice, still have trademark law on which to base their challenges.

1. Comparing Real Space and Cyberspace. Gray markets in real space exist in a legal shadow, seemingly controlled by laws without teeth. The legal status of gray markets in Cyberspace is equally vague. The uncertainty offered by the law reflects a fundamental inability to balance the various interests affected by gray markets, whether in real or Cyberspace. Gray markets help consumers by providing price competition for branded products; they hurt consumers when gray market goods are of lower quality or are not supported by service or warranties. Gray markets hurt manufacturers by undercutting goodwill and investment in retail establishments; they help manufacturers by providing competition for the counterfeit good market, which sells cheap knock-offs of the real product. Upon close examination, the same tensions arise with gray markets in Cyberspace.

A gray market in Cyberspace is the unauthorized distribution of a product.[79] More challenging issues relating to gray markets arise in the medium of Cyberspace because the product being distributed through an unauthorized channel is information. Suppose I develop a multi-page

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[77] Case C-355/96, Silhouette Int'l Schmied. GmbH & Co. KG v. Hartlaver Handelsyesllschaft mbH, 1998-7 E.C.R. I-4799.

[78] Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 148-49, 45 U.S.P.Q.2d (BNA) 1961, 1967 (1998).

[79] In real space, the product is a good, a manufactured product sold through retail outlets. Cyberspace, of course, can facilitate the gray markets which exist in real space; for example, K-Mart or Sam's Club could have a website on which gray market goods are distributed. However, this use of the Internet would best be viewed as merely an *extension* of gray markets in real space.

website detailing the history of the British Royal Family. The site is filled with details that I have uncovered, and each page contains advertisements for myself and my genealogical skills. A fellow cyber-citizen arrives and creates another website, which contains links to the pages on my website that have the juiciest details of the dalliances of the Royal Family; the links skip over the fascinating historical details I have uncovered and, more importantly, allow the reader to skip over the advertisements for myself. My contention is that links of this sort create a gray market in information. Just as real space gray markets transport goods from one region to another, Cyberspace gray markets transport information from one part of the Internet to another.[80]

2. *Contracting Issues and Web Linking.*[81] As described above, United States law has performed poorly in answering the question of the rights of gray marketers. This difficulty has arisen because of the problem of finding the proper balance between consumer and producer interests. In the Cyberspace arena, a similar balancing problem arises. The owner of a website can finance the site generally through three different ways:[82] (1) subscriptions by users of the site; (2) goods or services sold on the site; and (3) advertisements placed on the site. Access to websites funded by subscriptions are limited through the use of a password required for entry. For such websites, linking has no effect, because the need for a password prevents entry. Websites that are funded by the sale of goods and services can be linked to and arguably are aided by the gray market created by the link. Finally, websites that are financed by advertising face the greatest risk of harm because linking can allow users to circumvent the advertising on the site. The appropriate legal regime for gray marketing entails balancing the potential harm to websites that are financed by advertising with the gain to websites financed by the sale of goods and services. Analogously, the legal regime governing gray markets in real space entailed, in part, balancing the

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[80] Jeffrey K. Mackie-Mason & Hal R. Varian, *Economics FAQs About the Internet, in* INTERNET ECONOMICS 27, 28-29 (Lee McKnight & Joseph P. Bailey eds., 1997); and Martyne M. Hallgren & Alan K. McAdams, *The Economic Efficiency of Internet Public Goods, in* INTERNET ECONOMICS 455, 466-77.

[81] For a discussion of the contracting issues, see AMERICAN BAR ASSOCIATION, WEB-LINKING AGREEMENTS: CONTRACTING STRATEGIES AND MODEL PROVISIONS (1997) (providing model terms for a web-linking contract presuming that contracts are used to create rights to link).

[82] For a discussion, see O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 625-29; AMERICAN BAR ASSOCIATION, *supra* note 81, at 21-26. For other pricing schemes, see Mackie-Mason & Varian, *supra* note 80, at 52-54.

loss of investment in goodwill by the manufacturer with the potential gains from preempting the counterfeit good market.

The effect of gray markets in Cyberspace on consumers is equally compelling. One indirect consequence is that website owners seeking to protect themselves from gray marketers may switch to subscription-based systems, thereby raising the direct cost of using sites for consumers.[83] The use of subscription sites would be accompanied by greater use of contract through web-linking agreements.[84] A switch to subscription-based systems would also raise indirect costs to consumers, particularly the cost of searching for information on the Internet. The benefits of linking, on the other hand, are the reductions in the search costs faced by consumers because consumers are capable of accessing information more quickly. However, in some instances linking, if it occurs through the use of frames,[85] may alter the manner in which the information is displayed and indirectly alter the content of the information as interpreted by the consumer. Just as gray marketers in real space can often sell goods that are materially different from the domestic product with the same brand, gray marketers in Cyberspace can materially alter information through the technologies of framing and linking. The countervailing effects on consumers of gray market information in Cyberspace are analogous to the effects on consumers of gray market goods in real space.

But the question arises: is not linking from one website to another in Cyberspace different from the selling of trademarked goods through unauthorized channels? While linking may affect the market for advertising or the market for online transactions, the heart of the issue concerns the right to control the distribution of information to the public, not the right to control interests in market transactions. Put another way, classifying linking as a gray market-like transaction presupposes that Cyberspace should

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[83] *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 627 (discussing the subscription-based model); Burk, *supra* note 14 (discussing copyright infringement on the Internet).

[84] For a discussion of the contracting issues involved when contracts are used to create linking rights, see AMERICAN BAR ASSOCIATION, *supra* note 81.

[85] Framing potentially alters the information because framing places the information on the linked site within borders that may contain advertisements and other information that could clash with the linked information. For example, the advertisements in the borders may be that of a competitor with the owner of the information from the linked site.

be commodified, as opposed to a non-market denominated commons regulated by custom and informal law.[86]

My response is that the gray markets in real space are also subject to the critique of commodification. At the heart of the gray market transaction is the question of whether cross-border transactions should be commodified or left open, unregulated, and not subject to market transactions. The "gray" in gray market transactions applies to the space between regional markets. If the manufacturer divides real space into regional markets, can he also commodify the space between regional markets through which gray market goods flow? In Cyberspace, the gray market is the "space" between websites, over which links aid in jumping. My gray market analogy does not presume commodification; the analogy raises the difficult question: *how pervasive should commodification be?*

The word "market" should in part be viewed metaphorically to describe a particular interaction between the provider of a good, service, or information and the receiver. Whether the interaction becomes commodified will depend largely on the legal response, but the result can be perverse. A decision, for example, to allow the gray market (i.e., to permit linking without the need for permission) would lead to more subscription-based websites, especially if advertisers are concerned that links would allow users to bypass advertising. The result of a decision in favor of gray marketers would result in further commodification of Cyberspace. Similarly, requiring gray marketers to obtain permission, a result that could be reached either by imposing a compulsory license on owners of websites, or by allowing website owners to enjoin links, would further commodify (and balkanize) Cyberspace. Commodification is seemingly inevitable under either legal regime governing gray markets.

3. The Possible Legal Regimes for Cyberspace. The previous analysis simplified the range of interactions and markets, both actual and potential, that would be affected by linking. To better understand the interactions, I turn to three bodies of law that can be used to regulate Cyberspace: (a) Copyrights and Trademarks; (b) contract and property; and (c) sui generis regulation. I will analyze each more deeply in Part III.C below. For present

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[86] *See* Radin, *Property*, *supra* note 4, at 510 (discussing the implications of the commodification of Cyberspace); Rose, *supra* note 8, at 135 (discussing the underlying facts that instigate the creation of property rights in a resource).

purposes, I will discuss each of these three bodies of law to deepen the analogy between gray markets in real space and those in Cyberspace.

a. Copyrights and Trademarks. Copyright law is designed to provide protection for original expressions from unauthorized copying.[87] Trademark law is designed to provide protection for distinctive names and symbols used to designate the source of a good or service.[88] Both bodies of law, directly or indirectly, protect the content of the expression, name, or symbol. Copyright law, while offering no protection for ideas or methods or processes, can prohibit the dissemination of original expression through literal or non-literal copying. Trademark law protects the informational value of a name or symbol by prohibiting copying of a name or symbol in a way that creates actual or potential confusion by consumers. Recent developments in the federal law of trademarks also protect the informational value of names and symbols by protecting trademark owners from blurring or tarnishment of the mark.[89]

The extent of protection through copyright and trademark law is defined by market parameters. To obtain either damages or an injunction under trademark law, the owner needs to show the likelihood of confusion among consumers.[90] Critical to demonstrating the likelihood of confusion are defining the relevant consumers and identifying, through survey evidence, recognition by the consumers of a distinction between the mark and the source. Challenges to trademark validity and defenses to infringement can hinge on demonstrating that the name or symbol has become generic to designate the product and therefore no longer designates its source.[91] The claim of "genericide" will also hinge on the proper definition of the good or service. Analogously, in the context of copyright law, defendants argue that a particular copying of the protected work constitutes fair use, a defense that rests in part on the effect of the copied work on the market for the protected

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[87] 17 U.S.C. § 106 (1994).

[88] 15 U.S.C. § 1114 (1991).

[89] 15 U.S.C. § 1125(c) (Supp. III 1997).

[90] DONALD S. CHISUM & MICHAEL JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 5[F][1] (likelihood of confusion as requirement for damages or injunction); *Id.* § 5[F][3][e] (actual confusion required for an award of damages).

[91] *See, e.g.*, Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921) (holding "aspirin" to be a generic term and therefore not protected by trademark law).

work.[92] Although copyright and trademark rights are often discussed in property terms, the extent of such rights in each case will hinge on understanding and discerning market effects.

Surprisingly, the question of market definition in the context of copyrights and trademarks has received little academic or practical attention.[93] This lack of focus on the definition of market surfaces as gaps and sometimes confusion in the case law. Two examples from copyright law illustrate such confusion. In *American Geophysical Union v. Texaco, Inc.*,[94] the Court of Appeals for the Second Circuit (Second Circuit) held that photocopying by Texaco's research scientists of technical journals published by American Geophysical had an adverse effect on the market, because such unlicensed copying foreclosed the creation of a market for licenses between subscribers and publishers.[95] In contrast, the Court of Appeals for the Ninth Circuit (Ninth Circuit) in *Sega Enterprises Ltd. v. Accolade, Inc.*[96] held that copying of a competitor's computer program for the purposes of reverse-engineering constituted fair use, even though, arguably, such copying could also be licensed.[97] I am convinced that the Ninth Circuit's ruling is correct, and the Second Circuit's specious. What is troubling is how courts can engage in the kind of circular reasoning evinced by the *American Geophysical Union* opinion when analyzing the market effects in copyright cases.

When copyright fair use analysis is applied to gray markets, the underlying confusion continues. In determining the effect that linking has on the market, one has to begin with isolating the proper market. The three pertinent markets are (1) the advertising market, (2) the market for the goods

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[92] The fair use defense, codified at 17 U.S.C. § 107 (1994), allows certain infringing uses of copyrighted materials to be immune from liability for copyright infringement. The defendant using the defense needs to show that his use of copyrighted works is protected under a balancing test. The test requires a balancing of four factors: (1) the purpose and character of the use, whether it is commercial or non-commercial; (2) the nature of the protected work, whether it is fictional or factual; (3) the amount of the copyrighted work used; and (4) the effects of the use on the market for the copyrighted work. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 225 U.S.P.Q. (BNA) 1073 (1985) (recognizing harm to the market for the protected work as an important factor in determining fair use).

[93] In contrast with the area of antitrust, where market definition is the crucial question, both academic commentators and practitioners have neglected to define "market" when speaking of market effects in the context of copyright and trademark law.

[94] 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1994).

[95] *Id.* at 931.

[96] 977 F.2d 1510, 24 U.S.P.Q.2d (BNA) 1561 (9th Cir. 1992).

[97] "[W]here disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law." 977 F.2d at 1527-28.

and services sold on the website, and (3) the market for the website and its information content. The first two markets are the simplest to define and analyze, since both involve traditional transactions. However, linking has opposite effects on each market. Linking can undercut the advertising market by allowing consumers to avoid advertising placed on a website. In contrast, linking can promote and complement the market for goods and services sold on the website by reducing the transaction and search costs associated with finding the products. Thus the market effects in a fair use analysis for linking are mixed.

The effects are confounded by the analysis of the third market, the market for the website and its information content. This third market is not structured in terms of traditional market transactions; in fact, the product is best classified as an "impure public good," one that can only be partly excluded from consumption by others. Though linking increases the value of the website by making it more accessible, it could also lower its informational value through dilution.[98]

The effects of controlling gray marketing in Cyberspace through copyright and trademark law are difficult to disentangle without clearer definitions of what constitutes the relevant market. For gray markets in real space, the relevant market for copyright purposes is, after the recent *Quality King Distributors, Inc.* decision, the global market.[99] For trademark purposes, there has always been a tension between universalist theories of trademark and territorial theories, a tension that translates into the appropriate geographic definition of the market. In Cyberspace, because of the different types of transactions implicated and the crucial question of whether Cyberspace is to be commodified, the problems regarding market definition are exacerbated and cast further doubt on the applicability of copyright law and trademark law to limit gray marketing.

b. Contract and Property. Contract law and property law provide background rules that permit market transactions in real space. To the extent that Cyberspace is to be commodified, contract law and property law will play crucial roles. Contract law will govern basic transactions and

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[98] For an example of dilution in the trademark context, see Chemical Corp. of Am. v. Anheuser-Busch, Inc., 306 F.2d 433, 134 U.S.P.Q. (BNA) 524 (5th Cir. 1962) (holding that "Where there's life, . . . there's bugs" diluted the trademark owner's "Where there's life, . . . there's Bud").

[99] Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 145, 45 U.S.P.Q.2d (BNA) 1961, 1965 (1998).

provide default rules to help in the enforcement of promises. Property law's role is more complicated, since Cyberspace is clearly not a real property system. But certain fundamental notions of property, such as misappropriation and conversion, will offer foundational rules for allocating rights in Cyberspace. As in real space, property and contract can work in tandem to protect current entitlements and future expectations.

The role of contract law and property law in Cyberspace gray markets is as confounding as the role of copyright and trademark. Contract law protects subscription-based websites, since the sale of the subscription in Cyberspace is analogous to sales of subscriptions to a service in real space. To the extent that permitting gray markets leads to a greater use of subscription-based sites, contract law will provide the legal foundation for such sites. Sites supported by advertising and sites promoting the sale of goods and services are also protected by the law of contract, but it is far from clear that contract law would protect such sites against gray marketers. Arguably, linking to sites in a way that permits the circumvention of advertising is a tortious interference with the advertising contract between the website owner and the advertiser. But such a conclusion would, in many jurisdictions, be a stretch of existing law.[100] Website owners may attempt misappropriation claims against the creator of the link, but under existing case law, misappropriation claims would be limited because of preemption by federal copyright law[101] and the problem of market definition. Thus, contract law and property law would effectively provide little protection against gray marketing through linking.

The analogy with gray markets in real space is clarified by consideration of the role of contract law and property law. Contract law cannot directly stop the gray marketer, because of lack of privity of contract. Contract law works in a responsive way by allowing manufacturers of the product to prevent gray marketing through their pricing policies (i.e., avoiding discriminatory pricing). Property law is more limited in responding to gray

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[100] Contract claims in gray market cases in real space have been successful in only two reported cases: Railway Express Agency v. Super Scale Models, Ltd., 934 F.2d 135 (7th Cir. 1991); DEP Corp. v. Interstate Cigar Co., 622 F.2d 621, 206 U.S.P.Q. (BNA) 673 (2d Cir. 1980).

[101] *See, e.g.*, Columbia Broad. Sys., Inc. v. DeCosta, 377 F.2d 315, 318-19, 153 U.S.P.Q. (BNA) 649, 652-53 (1st Cir. 1967) (stating in dicta that misappropriation claims are limited because of preemption by federal copyright law). The classic preemption cases are Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 140 U.S.P.Q. (BNA) 524 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 140 U.S.P.Q. (BNA) 528 (1964).

marketing in Cyberspace than in real space because the property interest affected is difficult to define in Cyberspace. The difficulty with using contract law and property law to regulate gray markets reflects the fundamental problem in any regulation of gray markets: defining the underlying market that is affected by the act of gray marketing.

c. Sui Generis Regulation of the Gray Market. In real space, sui generis regulation of the gray market takes the form of state and federal statutes that directly prohibit the sale or importation of gray market goods. As discussed above, such sui generis protection has been largely toothless, because the statutes are either under-enforced or subject to substantial exceptions. In Cyberspace, analogous sui generis protection would be in the form of statutes restricting linking or rules regulated by Network Solutions, Inc., the private organization currently managing the registration and use of domain names, that require licensing or otherwise police linking. Because of the conflicting interests affected by linking, such regulation would have the same effect as the rules governing gray markets in real space.[102]

The above discussion of the potential legal regimes to govern gray marketing demonstrates the parallels between gray markets in real space and in Cyberspace. In the next section, I discuss the legal implications for gray markets in Cyberspace.

C. LEGAL IMPLICATIONS FOR LINKING

1. Copyright. What lessons are to be learned for Cyberspace from the legal treatment of gray markets in real space? In the area of copyright law, the argument might be made that the analogy is strained and is not helpful. Copyright protection against gray marketers in real space is limited by the first sale doctrine. When the manufacturer sells the good in the overseas market, whether as part of a licensing agreement or as a part of a retail sale, the first sale doctrine holds that he has exhausted all the rents he can acquire from the copyrighted work.[103] Thus, the gray marketer can re-sell the copyrighted work with impunity.

In the context of Cyberspace, the first sale doctrine has limited application. By placing information on my website, I have not in any sense exhausted the rents that I could make from the sale of the information.

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[102] *See supra* Part III.B (discussing rules regulating real space and Cyberspace).
[103] 17 U.S.C. § 109(a) (1994).

Information placed on the Web is placed there for *storage*, available for later retrieval by the user, and potentially for a fee. By linking to the site, the gray marketer may reduce the rents to be made from the sale of the information and may expropriate it. However, gray marketing in Cyberspace through the use of links is not protected by the first sale doctrine, because linking is not a sale.

Even though the first sale doctrine is inapplicable because placement of information on a website does not constitute a sale, other aspects of copyright law are still applicable. At least three copyright rights are implicated by linking: (1) the right to exclude others from making copies of the work, (2) the right to exclude others from making derivative works, and (3) the right to exclude others from publicly performing and displaying the work. The first two rights have been analyzed extensively in the literature.[104] Linking to a website potentially infringes the copyright owner's right to exclude others from copying because the link literally *creates a copy* of the website on the accessed server. Linking may also *facilitate copying* by users themselves who can print out pages from the website; such facilitation could constitute contributory infringement.[105] Furthermore, by placing the information on the website in a new form either through framing or by incorporating the website in the linker's page, linking can violate the copyright owner's right to exclude others from creating derivative works.

The rights of public performance and display have not been extensively discussed even though both are assuredly affected by linking. The public performance right encompasses the right to perform or transmit the work publicly. The display right encompasses the right to display the whole or part of the work to the public. Linking raises two crucial questions in the context of these rights: (1) what do the rights relating to performing, transmitting, or displaying mean in the context of a website? and (2) when is a performance, transmittal, or display made publicly?

The first question is relatively easy to answer. The loading of a website onto a browser window would constitute a *display* and the transfer of the information from the website's server should constitute a *transmittal*. If the

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[104] *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 655-58 and the articles cited therein (exemplifying the notion of Cyberspace as an extension of real space).

[105] Direct infringement is prohibited under the Copyright Act in 17 U.S.C. § 501 (1994). Contributory infringement, or the imposition of liability for the direct copyright infringement of someone else, has developed through case law. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 443, 220 U.S.P.Q. (BNA) 665, 678 (1984) (stating that videotaping constitutes fair use).

linked site contains any audio-visual work, activating the work would constitute a *performance*. However, the difficulty raised by linking is that the link merely facilitates the performance, transmittal, or display. If the user merely entered the URL of the linked site, and thereby loaded the site onto his browser, no infringement of the performance, display, or transmittal right occurs. Linking is no more an infringement of these rights than sending an e-mail containing a URL to a colleague is.

On the other hand, linking may be analogized to the wired performance system at issue in *On Command Video Corp. v. Columbia Pictures Industries*,[106] which involved the familiar system used in motels of transmitting motion pictures to a guest's room upon request. Such systems often involve the guest selecting from a menu a channel which transmits the desired movie to the television set contained in the room. The district court for the Northern District of California held that such a system infringed the motion picture owners' copyright in the films.[107] A website that contains a menu of links to other sites is arguably no different from the infringing system in *On Command Video Corp.*

The right of performance and display extends only to transmittals that are made "publicly." The Copyright Act defines "publicly" to mean "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[108] The transmittal to the public may be in a form that will allow members of the public to receive the performance or display "in the same place or in separate places and at the same time or at different times."[109] A transmittal can be public even if the performance or display does not occur at the same time or place. An infringement of the right to perform or display publicly can occur even if individuals view the performance or display *in seriatim*. This qualification creates special problems for linking. Individuals accessing the link can accumulate into a public performance or display even if each transmittal is to an individual user.

However, the case law is far from clear regarding the definition of what constitutes a public performance or display. While a wired performance system to a hotel room does constitute a public performance, renting videos

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[106] 777 F. Supp. 787, 21 U.S.P.Q.2d (BNA) 1545 (N.D. Cal. 1991).
[107] *Id.* at 791.
[108] 17 U.S.C. § 101 (1996).
[109] *Id.*

to hotel guests to play on video recorders in the room may not be an infringement.[110] The difference between a wired performance system and a videocasette may hinge on what "public" means. One commentator has suggested that public be understood in terms of the common law right to exclude.[111] Places from which an individual can exclude the public should constitute a private place; places where the ability to exclude is limited should be deemed public. As applied to linking, if much of the linking occurs in the sanctity of one's home or the shared sanctity of one's workplace, the resulting performance or display is not public. One court, however, has held that transmittal of information onto an electronic bulletin board does constitute a public display.[112] Although this case suggests that the location of the user may not be dispositive, the decision can be distinguished from linking. Transmittal to a browser is distinguishable from transmittal to an electronic bulletin board, which is open to the public like a display case in a storefront window. Transmittal to a browser via linking occurs through the discretion of the user, and, as pointed out above, is substantively the same as the user typing in the URL and connecting to the desired site.

Even though the first sale doctrine does not sanction gray marketing in Cyberspace, as it does in real space, it is far from clear that gray markets in Cyberspace infringe on copyright rights. Gray marketers provide access to information in ways that may skirt the limits of copyright law, because of the technology of copying and transmittal and because of the meaning of public in the context of Cyberspace. Even if rights are infringed, gray marketers in Cyberspace would have a very strong fair use defense. The elements of that defense have been analyzed extensively in the literature.[113] I will focus on the elements of fair use in light of my analogy with gray markets.

The fair use defense has rarely been relied upon by gray marketers in real space. Prior to the *Quality King Distributors, Inc.* decision,[114] the first sale doctrine offered a more viable line of defense. It is not even clear that gray

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[110] Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 224 U.S.P.Q. (BNA) 641 (3d Cir. 1984).

[111] PAUL GOLDSTEIN, COPYRIGHTS 5:134-6 (2d ed. 1996).

[112] Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 29 U.S.P.Q.2d (BNA) 1827 (M.D. Fla. 1993).

[113] *See* Willie Skinner, *Preventing Gray Markets: Is Copyright Law the Solution?*, 26 SYRACUSE J. INT'L L. & COM. 315, 332-36 (1999) (analyzing the limits of fair use defense in gray market cases).

[114] Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 45 U.S.P.Q. (BNA) 1961 (1998).

marketers in real space would have a successful fair use defense. Since the gray marketer's infringement is in the context of a commercial use of the copyrighted work, it is very likely that on that prong alone the fair use defense will fail. The fact that gray marketers directly compete with the manufacturer in the United States market would also weaken the fair use defense. However, since linking does not implicate a commercial use, gray marketers in Cyberspace would have a stronger line of defense. Links typically have not been sold to the public; therefore, unlike the gray market sale of products, linking does not implicate a commercial use. Even if the site that contains a link is a subscription site, requiring users to pay to obtain access, the link may be such a small part of the entire site that the link may not be the primary item of sale on the site. Arguably, even as part of a subscription-based site, linking would not constitute a commercial use; rather, it would be a means of low-cost information retrieval for users.[115]

A use of a copyrighted work is not a fair use if it has an inordinate effect on the market for the copyrighted work. This limitation creates some perplexing problems for linking in Cyberspace. The most obvious one is that of defining the relevant market that is affected by linking.[116] Website

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[115] In some instances a first sale defense may arise in gray marketing in Cyberspace. In *Storm Impact, Inc.*, discussed *infra* Part III.D, the court held that the repackaging of Shareware was not fair use because it affected the market of the copyright owner. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 48 U.S.P.Q.2d (BNA) 1266 (N.D. Ill. 1998). In cases in which linking itself may be for sale, a similar argument could be made that such linking would not be fair use, especially if the linked information is given away for free. Alternatively, in *Futuredontics, Inc.*, also discussed *infra* Part III.D, the court left open the possibility that framing could constitute the creation of a derivative work. Futuredontics, Inc. v. Applied Anagramics, Inc., 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

[116] In fact, this is a perplexing problem for most fair use analyses. In *American Geophysical Union*, the Second Circuit found that unauthorized photocopying inordinately affected the market for copyright licenses. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1994). As pointed out through the *American Geophysical Union* opinion, a market for copyright license presupposes the need to license the protected work; based on the assumption that a license is required, a court found that the copying was not a fair use. *Id.* at 929-31. The circularity of the Second Circuit's reasoning could be resolved in the following way: a court is more likely to find infringement if there is an existing set of market relationships that would be affected by the unauthorized use. For instance, in the context of the photocopying at issue in *American Geophysical Union*, the court looked to the existence of the Copyright Clearance Center (CCC) as an existing market mechanism for the sale of photocopying licenses. Contrast the analysis with that in *Sony Corp. of America*, in which the United States Supreme Court held that videotaping was fair use. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984). The Court based this holding on the fact that videotaping permitted valuable time-shifting. But, of course, the argument could be made that private videotaping could hurt other markets, such as those for videotaped movies and pay-per-view services or other satellite broadcasts. However, none of these markets was developed at the time of the *Sony Corp. of America* decision. The intriguing question is whether the *Sony Corp. of America* decision would have been the same if the

owners can restrict access to sites by requiring subscriptions for entry. Links cannot be used to circumvent the requirement of needing a password in order to enter. Linking presumptively does not affect the market for the information contained on the site or for the site itself. For websites financed through cybershopping, where the site is actually a "store front window" for electronic commerce, linking would actually enhance the market for the products sold on the site. The effect of linking would be analogous to opening up another entrance to a shopping mall or increasing the number of parking spaces. Furthermore, a firm is better off having a new store, even a competing store, opening in the same mall as opposed to the same store opening in a mall some distance away.[117] A new store in the same mall would increase the amount of foot traffic while a new store in a different mall would *ceteris paribus* steal customers. In terms of the market for the information content of the site and the market for the goods actually sold on the site, linking has either no effect or a positive effect.

The market for advertising could be adversely affected by linking. Linking permits the user to circumvent any advertisements that have been purchased on the linked site. A simple rule would be that linking is fair use *if it does not permit the user to circumvent advertising*. The problem with such a rule is that linking arguably could expose the advertisement to a wider audience, just as linking permits a wider audience for cybershopping. A user, after linking to a page in the site that lacks advertising, can still page through the linked cite and come across the advertising.[118] Concluding that circumventing advertising through linking is a commercial harm would be tantamount to saying that since consumers can skip over the advertising in

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invention of the VCR for private home recording had come after such technological and market developments.

This last consideration, while admittedly counterfactual, has important implications in how linking should be treated. Linking should be treated more like the VCR in *Sony Corp. of America* than the photocopying in *American Geophysical Union*. In the context of linking, markets that could be affected by permissive linking have not yet developed. Thus, courts find themselves in situations where the treatment of the new technology will affect the development of market relations. For reasons elaborated in this article, the more permissive stance of *Sony Corp. of America* is appropriate for Cyberspace issues such as linking.

[117] For a discussion of this point and the relationship between growth, development, and complex systems, see PAUL R. KRUGMAN, THE SELF-ORGANIZING ECONOMY 22-29 (1990) and PAUL R. KRUGMAN, DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY 40-41 (1995).

[118] These are the terms of the debate in *Ticketmaster Corp. v. Microsoft Corp.*, No. 97-3055 DDP (C.D. Cal. filed May 9, 1997). *See* discussion *supra* note 62, and Futuredontics, Inc. v. Applied Anagramics, Inc., 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998); *see also infra* text accompanying notes 148-153.

newspapers and magazines, advertising has no effect. Thus, just like in printed media, advertisers in Cyberspace would respond to linking by creating more open and lavish advertisements, ones that would be more difficult to circumvent. Whether such responses would constitute an adverse effect on the market remains an empirical question, based in part on consumer response and in part on the costs of advertising.

Market effects in the context of fair use have never hinged on detailed cost-benefit analyses of markets. Instead courts have used the market effects prong of the fair use analysis as a basis for discussing the policy of requiring the licensing of copyrighted materials. The policy is analyzed against the background of existing institutional arrangements for the licensing of copyrights. The policy of consumer benefits is also considered, especially in terms of the effect of the infringement on the demand for the copyrighted work. The difficult question in the context of new technological or institutional environments is gauging the effect of infringement on potential markets. In considering markets that have not even been contemplated or that are undeveloped, courts must confront the conflicting effects of copyright. On the one hand, property rights are needed for the formation of markets; on the other hand, if property rights are too strong, innovation and the creation of new markets may be hindered. Courts have resolved this tension, in part, by finding that reverse-engineering is a legitimate basis for fair use.[119] In other contexts, courts have based their determination of fair use on whether the infringement actually complements existing markets, as opposed to creating substitutes. The VCR provides an example of this approach. In holding that video recording constituted fair use, the United States Supreme Court, in part, concluded that such use complemented the distribution and sale of copyrighted works in the broadcast media.[120] The finding, however, was based on empirical evidence, as well as influences from

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[119] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 181 U.S.P.Q. (BNA) 673 (1974) (discussing reverse-engineering in the context of trade secret law). Although the United States Supreme Court has not directly addressed the issue, most lower courts do find reverse-engineering to be fair use under copyright law. *See, inter alia*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 24 U.S.P.Q.2d (BNA) 1561 (9th Cir. 1992) (stating that disassembly of a copyrighted computer work for study or examination of unprotected aspects of the computer program constitutes fair use).

[120] *See Sony Corp. of America*, 464 U.S. at 423-24. The Court found that the video recorder permitted time-shifting, a use to which the copyright owner did not have exclusive rights. Because video recording permitted time-shifting, the audience for broadcasted works expanded.

the nature of the use and its relationship to existing markets for broadcast media.[121]

Against this background, linking would likely have little effect on the advertising market and would likely constitute fair use. As suggested above, linking may actually complement the advertising market by providing a basis for wider consumer exposure to advertisements. Furthermore, in light of *Sony Corp. of America*, the fact that consumers can circumvent advertising through linking may not be crucial for the fair use analysis. In fact, the holding in *Sony Corp. of America* is directly applicable to linking, because home use of the VCR permits the user to ignore, even excise, the advertisements from broadcast programs. Since at the time of the *Sony Corp. of America* decision, broadcast programming was overwhelmingly funded by advertising, it stands to reason that if videotaping constitutes fair use, then so should linking. Linking exemplifies in space the type of time-shifting that was crucial in *Sony Corp. of America* for the Court's finding that videotaping constitutes fair use.[122] In fact the analogy with broadcast media is stronger. Subscription sites are the equivalent of pay television (TV). Copying of pay TV programs would less likely constitute fair use. In fact, such copying is impossible to achieve since pay TV signals are broadcast scrambled. It is technology that prevents copying, just as it is the requirement of a password for access to subscription sites that prevents linking.

2. *Trademarks.* Trademark law has been used against gray marketers in real space. Cases against gray marketers in real space have hinged on whether the gray market goods are materially different from similarly trademarked goods sold for the domestic market.[123] In undertaking this analysis, the courts have failed, confusing quality differences, such as those stemming from tastes, with those stemming from legal and physical aspects of the product.[124] The analysis in the context of Cyberspace would be even

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[121] *Id.* at 424-25.

[122] *See supra* note 120 (discussing the holding in *Sony Corp. of America*).

[123] *See* Lever Bros. v. United States, 652 F. Supp. 403, 1 U.S.P.Q.2d (BNA) 1820 (D.D.C. 1987) (holding that prohibition against importation of merchandise bearing trademark owned by United States corporation did not bar merchandise bearing foreign trademark where foreign and domestic trademark holders were both subsidiaries of a foreign corporation); Martin's Herend, 112 F.3d 1296 (holding that trademark infringement under Lanham Act results where foreign goods bearing trademark are imported by a gray market importer and such goods are materially different from goods sold by authorized seller of trademarked goods in domestic market).

[124] *See* Ghosh, *supra* note 7, at 392-97 (concluding that gray marketed goods should be excluded under trademark law only if goods are inferior to goods marketed through authorized channels).

less exacting. The basic problem is that gray marketing in Cyberspace primarily allows the user to obtain the underlying information on the website more quickly than he would through research using printed media. Further, linking does not change the information content; therefore, gray marketers in Cyberspace, almost by definition, are not providing a materially different product than the product to which they have linked.

Linking may be challenged on the grounds of material difference in terms of how the information is packaged. Framing may alter the components and arrangement of the information and, as a result, affect its accessibility.[125] This material alteration is largely a question of trade dress rather than trademark.[126]

It is substantially more difficult to obtain protection for trade dress than to obtain protection for trademark. Trade dress is protected if it is distinctive or if it has acquired a secondary meaning.[127] Secondary meaning for trade dress of websites would be difficult to establish, partly because of how recent the medium is and partly because a user may associate the arrangement of a website with any particular source.[128] Because of the uncertain legal standard, establishing the distinctiveness of trade dress is even more difficult. Currently, there is a division in the Courts of the Federal Circuit on how to determine the distinctiveness of trade dress.[129] The

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[125] *See* Futuredontics, Inc. v. Applied Anagramics, Inc., 45 U.S.P.Q.2d (BNA) 2005, 2007 (C.D. Cal. 1998) (holding that framing may be altering the underlying information and layout and hence producing a derivative work).

[126] Trademark law protects marks, symbols, and words that are used to designate the origin of a product or service. Trade dress law is a subset of trademark law, which protects the design and configuration of a product that designates the origin of a product or service. For example, the word "Coke" would be the subject of trademark law, while the design of the bottle, if protected, would be the subject of trade dress law. CHISUM & JACOBS, *supra* note 90, at § 5[C][2][c].

[127] Secondary meaning applies to marks that are descriptive of the product or service being sold, where the use of the mark by the public has created secondary associations with the source of the product or service. For example, the phrase "ever ready" is descriptive of a battery, but also has secondary associations with the manufacturer of the battery. CHISUM & JACOBS, *supra* note 90, at § 5[C][3][a].

[128] Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 763, 23 U.S.P.Q.2d (BNA) 1081, 1081 (1992) (holding that trade dress that is inherently distinctive is protectable under section 43(a) of the Lanham Act without a showing that it has acquired a secondary meaning). For an academic discussion of trade dress protection for computer interfaces, see Lauren Fisher Kellner, *Trade Dress Protection for Computer User Interface "Look and Feel,"* 61 U. CHI. L. REV. 1011 (1994) (advocating trade dress protection for user interfaces, such as for Apple and Lotus).

[129] *Compare, e.g.*, Chrysler Corp. v. Silva, 118 F.3d 56, 58, 43 U.S.P.Q.2d (BNA) 1375, 1377 (1st Cir. 1997) (acknowledging the United States Supreme Court's extension of section 43(a) of the Lanham Act to claims for infringement of trade dress) *with* Kohler v. Moen, Inc., 12 F.3d 632, 634, 29 U.S.P.Q.2d (BNA) 1241, 1250 (7th Cir. 1993) (stating "It is apparent, however, that perpetual trademark protection

various tests developed by the different courts share the idea of functionality; trade dress is not distinctive if it is a necessary aspect of the product for it to work.[130] Without delving too deeply into the meaning of "necessary for the design of the product," it seems very likely that a functionality test[131] is perhaps underinclusive and would provide trade dress protection to almost all websites. After all, what is necessary for a website except perhaps for linear writing on a page so that the content is readable? Even without venturing into the question of when linking to a website materially alters it, the more basic question of when a website is protected as trade dress remains. Because of these two uncertainties, linking will almost certainly be difficult to contain through the application of trademark law.

The final question remains of whether linking could be protected by trademark fair use.[132] This argument has been made cogently in the literature.[133] Trademark fair use has not been raised in the context of gray markets in real space and would undoubtedly not be successful, since trademark fair use applies when the use of the mark is non-commercial or

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under the Lanham Act for a product configuration or design is not the equivalent of impermissible perpetual patent protection").

[130] *See In re* Morton-Norwich Products, Inc., 671 F.2d 1332, 215 U.S.P.Q. (BNA) 9 (C.C.P.A. 1982) (holding a functional design, meaning one that is utilitarian, is not adequately distinctive to warrant protection). After *Two Pesos, Inc.*, there are three tests used by courts to assess the distinctiveness of trade dress. The first is what I will call the "intentionality test," which looks to see if the creator of the trade dress intended to use it as a way to distinguish his product. Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1995) (paraphrasing Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 163, 34 U.S.P.Q.2d (BNA) 1161, 1162 (1995); quoting 15 U.S.C. § 1127 (1994)). The second is the "arbitrariness test," which would accord protection for trade dress if "the features of the trade dress sought to be protected are arbitrary and serve no function either to describe the product or assist in its effective packaging." Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc., 659 F.2d 695, 702, 212 U.S.P.Q. (BNA) 904, 911 (5th Cir. 1981). Finally, some courts have also used what I call the "market based test," which accords trade dress protection if "the design, shape or combination of elements is so unique, unusual, or unexpected in this market that one can assume without proof that it will automatically be perceived by customers as an indicia of origin." 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 8.02 [4] (1992); Seabrook Foods, Inc. v. Bar-Well Foods, Ltd., 568 F.2d 1342, 196 U.S.P.Q. (BNA) 289 (C.C.P.A. 1977) (court ruling pre-*Two Pesos, Inc.* but cited often on this issue in post-*Two Pesos, Inc.* cases). For an excellent comparison of these three tests, see Krueger Int'l, Inc. v. Nightingale, Inc., 915 F. Supp. 595, 40 U.S.P.Q.2d (BNA) 1334 (S.D.N.Y. 1996) (criticizing the intent test, endorsing the market based test, and applying a combination of the market based test and the arbitrariness test).

[131] *See supra* note 130 (discussing the different functionality tests).

[132] *See* New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308, 23 U.S.P.Q.2d (BNA) 1534, 1538 (9th Cir. 1992) (holding that use of a trademark or famous name to refer to a product or persons, as opposed to branding a product or a service, does not constitute infringement).

[133] *See* O'Rourke, *Fencing Cyberspace*, *supra* note 3, at 681-84 (discussing cases in which trademark infringement by linking is protected by trademark fair use).

nominative. Gray market transactions in real space are commercial transactions involving the sale of goods or services. Gray market transactions in Cyberspace are not generally commercial and therefore would arguably constitute trademark fair use. Though the differences between real space and Cyberspace demonstrate the trademark law would not apply, one unanswered legal question is whether the fair use principles in the context of trademark would translate over into trade dress in an infringement analysis.

3. Contract and Property. If trademark and copyright fail to restrict gray marketing, then contract law and property law may provide the key for website owners seeking to restrict access to information. Such a response, aptly called by one author the "Lochnerization" of Cyberspace,[134] parallels in some ways the response to gray marketing in real space. Early gray marketing cases turned to trademark law as the basis for excluding gray market goods; over time gray market plaintiffs turned to state and federal statutory law affecting imports. Interpretation of the federal law rested often on principles of agency and contract. Although gray marketing in Cyberspace has not been attacked through statutes, other than the Lanham and Copyright Acts, a simple response to gray marketing is through contract, specifically through the use of subscription-based sites requiring a password for entry, which would be provided for a fee.

A reasonable prediction is that website owners may switch to subscription sites if linking is not prohibited. This decision rests on comparing the respective benefits and costs of subscription sites and open linking. One would predict that as the market value of the information contained on the site increases, the likelihood of the site becoming a subscription site increases. Of course this prediction is based on the assumption that a market independent of web-based distribution determines the value of the information contained on the site. For example, distributors and producers in existing markets for information, such as the market for print news or broadcast entertainment, will likely turn to subscription sites if web-based distribution systems are used for the same product. The difficult question is what will happen to informational products that will be distributed on the Internet for the first time in an undeveloped market. Will website owners for new informational products turn to subscription sites, or

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[134] *See* Cohen, *supra* note 2 (coining the phrase based on her title).

will they open sites with the possibility of creating a gray market for their information through linking?

The problem rests in part on the economics of information. If a website is created for distribution of articles from the *New York Times* and is authorized by the publisher, consumers will know the nature of the product. They may not know about the interface that the website would provide with the news stories, but the reputation of the *New York Times* would provide some basis for consumers to believe that the website version would be of a similar quality. A website for a new netzine (magazines distributed solely through the Internet) however, cannot rely on such reputation. Instead, as with any new business, the owner would have to establish a reputation. He may do this by providing the site for free in order to attract customers. The owners of new netzines would value linking as a way to expand consumers' exposure to the product. The costs of open access can be recouped by switching to a subscription site after a customer base has been established.

Gray marketing through linking can promote markets and property rights. The final result of permissive linking is not a loss of incentives for web-based distribution, but the emergence of what has been called a "Tiebout equilibrium"[135] in real space. Cyberspace will divide into the equivalent of private clubs, each requiring a subscription to enter. However, some clubs may be public, especially ones that provide new informational products. Furthermore, such a system would be superior to a contractual system. Under a contractual system, website owners would place what has been described as the equivalent of "No Trespassing" signs on their site which would serve as a contractual restriction on linking.[136] A violation of the contract would provide the website owner with an action for breach of contract. Several authors have discussed the enforceability of such contracts.[137] My comments here extend to the desirability of such a system. The chief advantage is one of cost; placing the equivalent of a "No Trespassing" sign on a site is cheaper than putting up a toll booth. However, the problem is one of enforceability. For example, such a scheme could not (and the website owner most likely would not want to) discourage

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[135] Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For an excellent discussion of Tiebout equilibrium, *see* CORNES & SANDLER, *supra* note 9, at 352.

[136] Hardy, *Ancient Doctrine*, *supra* note 3, at 8 (advocating trespass model for linking).

[137] *See, e.g.*, Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995) (challenging the enforceability of shrinkwrap licenses); O'Rourke, *Copyright Preemption*, *supra* note 3 (discussing copyright preemption of enforcement of shrinkwrap licenses under contract law).

bookmarking[138] the site. Users could circumvent actual linking by simply copying the URL posted on one site into their bookmark. Even though there is no direct linking, the result would effectively be the same.

The division of Cyberspace into subscription sites and open sites would allow the market to sort information based on consumers' willingness to pay for the information contained on the site. According to some, the result would be the most efficient provision of information; permissive linking would facilitate the emergence of Tiebout equilibrium in Cyberspace, whereby Cyberspace is divided into communities much like real space.[139] Just as communities in real space are self-regulating, self-selecting, and may be, in certain situations, self-replicating, specialized communities in Cyberspace would have their own rules against a background of contract law and property law. As I have suggested, some scholars have argued that such a result would be efficient, since only those willing to pay for the information will pay. Therefore, only the information for which someone is willing to pay will be provided. The legal implication of the use of contract law and property law is the balkanization of Cyberspace.

4. Sui Generis Rules. Sui generis rules for regulating the gray market in Cyberspace can be of three types. The first type includes statutes that directly regulate interactions in Cyberspace; such Cyberspace statutes would be the analogue of state statutes that prohibit the sale of gray market products.[140] The second type includes rules and agreements among Internet Service Providers. Alternatively, these sui generis rules could be in the form of norms that arise from interactions in Cyberspace.[141] This third type of rule is analogous to the Customs regulations and European Community directives that govern gray markets in real space.[142] I contend these sui generis rules, in whatever form, will be largely unsuccessful in controlling gray markets in Cyberspace for many of the same reasons that their counterparts in real space are. First, the interests implicated by gray markets are at cross-purposes. The consumer, or end user, benefits do not support

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[138] Bookmarking a site means saving the address of the site for retrieval at a later date.

[139] See *infra* Part III.D for a discussion of recent cases that exemplify my gray market analysis.

[140] Ghosh, *supra* note 7, at 405-07; N.Y. GEN. BUS. LAW § 218-aa (Consol. Supp. 1999); CAL. CIV. CODE §§ 1793.1, 1797.80-86 (West 1998).

[141] *See* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 6 U.S.P.Q.2d (BNA) 1897 (1988); N.Y. GEN. BUS. LAW § 218-aa (Consol. Supp. 1999); CAL. CIV. CODE §§ 1793.1, 1797.80-86 (West 1998).

[142] Tariff Act of 1922, ch. 356, § 526(a), 42 Stat. 858, 975 (current version at 19 U.S.C. § 1526 (Supp. 1997)); 19 C.F.R. §§ 133.12, 133.21(c) (2) (1999).

enforcement of rules against gray marketing. Second, the disparateness of the gray marketers, their potential to benefit the white market, and their potential benefits to competition militate against enforcement of rules prohibiting gray markets.

D. IMPLICATIONS OF RECENT CASES: *BERNSTEIN, FUTUREDONTICS, INC.*, AND *STORM IMPACT, INC.*

Three recent cases illustrate gray markets in Cyberspace and the legal response: *Bernstein v. J.C. Penney, Inc.*,[143] *Futuredontics, Inc. v. Applied Anagramics, Inc.*,[144] and *Storm Impact, Inc. v. Software of the Month Club*.[145]

In *Bernstein*, the court summarily dismissed a photographer's claim that a series of links leading to a site containing an unauthorized reproduction of one of his photographs of Elizabeth Taylor constituted copyright infringement.[146] The links began at the website for J.C. Penney that contained an advertisement for Elizabeth Taylor's Passion perfume, which linked to a page on the Passion website. This site contained a biography of Taylor, which then linked to a movie database website separate from J.C. Penney's site. The linking continued from the movie database website to a Swedish university's website, which contained the infringing photographs. The court, without opinion, dismissed the claims against all the named defendants who constituted the owners of each linked site. Although we can only speculate about the court's reasoning, the following passage from the defendants' motion to dismiss is telling: "[B]ecause linking on the Internet does not constitute copying, and because it serves a substantial noninfringing purpose, linking (and especially multiple linking) cannot support a claim for copyright infringement."[147]

The 1998 decision in *Futuredontics, Inc.* illustrates an alternative approach in the context of framing. At issue was an unauthorized framed link to the website of a dental group from the website of a dental referral service.[148] The

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[143] 50 U.S.P.Q.2d (BNA) 1063 (C.D. Cal. 1998).

[144] 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

[145] 13 F. Supp. 2d 782, 48 U.S.P.Q.2d (BNA) 1266 (N.D. Ill. 1998).

[146] *Bernstein*, 50 U.S.P.Q.2d at 1063.

[147] 16 COMPUTER & ONLINE INDUSTRY A2 (Oct. 6, 1998) (citation to *Sony Corp. of America v. Universal City Studios, Inc.* omitted) (the defendant's motion to dismiss appears in its entirety in this journal).

[148] Futuredonics, Inc. v. Applied Anagramics, Inc., 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

dental group alleged the framed link violated the group's copyright in the linked materials. The referral service moved to dismiss, asserting that the framed link did not create a derivative work and would be a fair use under the Ninth Circuit's decision in *Lewis Galoob Toys, Inc.*[149] In that case, the court held the Game Genie cartridge, which permitted alterations to the display and performance of a Nintendo game cartridge, constituted fair use because the Genie cartridge was simply a lens that allowed for a different view of the Nintendo game.[150] Similarly, the defendants in *Futuredontics, Inc.* urged the court to find that a framed link was just a lens through which Futuredontics' website could be viewed.[151] The court refused to characterize the framing device in this way.[152] Instead the court held that the question of whether the framed link created a derivative work was a question that could not be determined summarily.[153]

The final case in this trilogy is *Storm Impact, Inc.*, which is not a linking case, but is illustrative of gray markets in Cyberspace. The plaintiff in *Storm Impact, Inc.* distributed a skiing game on the Internet as shareware.[154] The defendant sold a compilation CD-ROM that contained a collection of the best shareware available. The conflict was due to the nature of shareware, which allows users to sample a portion of a software program for a period of time, after which they must pay the owner of the shareware a registration fee in exchange for a key to unlock the entire program.[155] The defendant was effectively selling what the plaintiff was giving away for free. Admittedly, the defendant was providing additional value by compiling the best shareware available into a convenient CD package. But the issue was whether the defendant was infringing the plaintiff's copyright by putting together the CD.[156]

The defendant relied on the fair use defense, asserting that its compilation was a transformative work that did not harm or interfere with plaintiff's

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[149] Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 22 U.S.P.Q.2d (BNA) 1857 (9th Cir. 1992).

[150] *Id.* at 968.

[151] *Futuredonics, Inc.*, 45 U.S.P.Q.2d at 2010.

[152] *Id.*

[153] *Id.*

[154] Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 785, 48 U.S.P.Q.2d (BNA) 1266, 1267 (N.D. Ill. 1998).

[155] *Id.* at 785.

[156] *Id.* at 786-88.

market for its product.[157] The court rejected the fair use defense, finding for the plaintiff on the claim of copyright infringement.[158] On the claim of transformative use, the court found the defendant had simply copied plaintiff's work onto a CD with other works and had not transformed or added value to plaintiff's shareware.[159] The court deliberated more on the question of harm to plaintiff's market for its product than it did on any other factor. It was troubled by the fact that in none of the other copyright infringement cases cited by the plaintiff "did the copyright holder place the material on the Internet, allow limited distribution for free, and attempt to restrict this free distribution to non-commercial use."[160] According to the court, "[p]rotecting material placed on the Internet for free distribution appears to be a question of first impression."[161] The court was swayed by the fact that, in its distribution of the shareware, the plaintiff had retained rights to sell and make commercial distributions of the work.

These three cases exemplify different aspects of gray marketing in Cyberspace. *Bernstein* and *Futuredontics, Inc.* illustrate unauthorized distribution through linking with the legal conclusion that hyperlinking is protected, while framing may violate the copyright owners' right to create derivative works. *Storm Impact, Inc.* provides another example of gray marketing outside the context of linking. The defendant is a classic gray marketer, buying cheap products and reselling them at a higher price. The case, however, suggests that such forms of gray marketing are prohibited, at least when the plaintiff has retained the right to make commercial use of its product. Putting the three cases together, the apparent rule for gray marketing in Cyberspace is that certain types of gray marketing are permitted, unless the gray marketer creates a derivative work or usurps the first sale of the product. Analogously, gray markets in real space are permitted by the first sale doctrine and constitute trademark infringement only if the goods are substantially different from the domestically distributed goods. Conceptualizing the exchange of information and informational products in Cyberspace as a type of gray market is consistent with the

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[157] *Id.* at 789-90.

[158] *Id.* at 790-91.

[159] Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 48 U.S.P.Q.2d (BNA) 1266 (N.D. Ill. 1998).

[160] *Id.* at 791.

[161] *Id.*

emerging legal treatment of information in Cyberspace, whether in the cases of linking or in the distribution of shareware.

IV. CONCLUSION

The quest for the appropriate model through which to understand Cyberspace transactions has yielded one basic insight: Cyberspace is defined by a particular structure of property rights that distinguishes it from both real property and other intangible property systems. Professor Rose has dubbed this unique system as one of "limited common property." In this article, I have built on this notion in demonstrating that many legal problems in Cyberspace can be viewed as one problem of unauthorized distribution. I have proposed a gray marketing model as the appropriate one through which to understand Cyberspace. Once gray marketing is accepted as the appropriate conceptual model for understanding the distribution of information in Cyberspace, a strong legal conclusion emerges: information in Cyberspace should be protected by a regime of weak property rights and strong protection of public use.

The economic analysis in this article also serves as an antidote to what Professor Julie Cohen has referred to as the Lochnerization of Cyberspace. I have suggested in this article an economic rationale for gray marketing: the reduction of the costs of distribution. The same rationale applies to the emergence of gray markets in Cyberspace. In a companion article, I develop the formal economic theory for understanding Cyberspace transactions as gray markets. In this article, I have presented both the conceptual foundations and the legal case for a regime of "limited common property" in Cyberspace, which should shape our formation of Internet policy in the future.