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Website Access: The Case for Consent

David McGowan*

I. INTRODUCTION

This Article is about what default rule should govern access to websites and proprietary networks connected to the Internet.¹ It argues that the best default is a rule of consent supported by judicial injunctions to facilitate bargaining on terms most likely to enhance net social welfare.

Under this rule, courts should presume that a website owner who connects a website to the Internet consents to any lawful use of the website by any person who can access the website. Owners should be able to rebut this presumption by notifying users that the owner does not consent to particular uses, or consents to use subject only to certain conditions. Notice should be fitted to the use, so that automated browsing programs are bound only by notice they can read, while individual users or programmers are bound only by notice *they* can read. Conditions should be analyzed under general legal rules, such as contract and antitrust. Deviations from this regime may sometimes be warranted, but this position should be the default.

What are the other options? Instead of a rule of consent, one could argue for a rule of mandatory access. On this view, anyone who makes content available on the Internet joins a network in which anyone may access anything, and the Internet is a commons.² The extension of this

* Associate Professor of Law and Julius E. Davis Professor of Law, University of Minnesota Law School. My thanks to Brian Bix, Dan Burk, Dan Farber, Michael Froomkin, Dan Gifford, Eric Goldman, Trotter Hardy, Mark Lemley, Larry Lessig, Brett McDonnell, Miranda McGowan, and Jay Monahan. Remaining mistakes are my fault.

1. By proprietary networks, I mean individual firms, such as Intel, and individual firms that provide Internet services, such as AOL or CompuServe. The discussion therefore refers only to the “ends” of the network and not to the addressing and transmission aspects of the network. See Lawrence Lessig & Mark A. Lemley, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930-31 (2001) (describing “end-to-end” architecture).

2. Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 48-49 (2000) (describing the Internet as a “commons” while proposing a nuisance rule to govern access); see also Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the*

premise is that no right to exclude should be recognized and all uses should be privileged.

No one actually advocates a pure commons view, and with good reason. Even working solely within a utilitarian model,³ sometimes welfare is enhanced by excluding persons from websites, as with websites that must limit access to comply with the securities laws, or websites that must password-protect content to charge fees necessary to keep the site running.⁴ Some uses reduce welfare, as when persons embed pornographic images in chat rooms,⁵ or when a former employee sends an e-mail to his employer describing the sexual practices of a current employee.⁶ Because the commons view offers no justification for any form of exclusion, it cannot distinguish among such cases. Therefore, if implemented, the commons view would actually tend to diminish the diversity of social experience on the Internet. The commons view would leave all websites open for any use, meaning no websites could be reserved for particular uses. Declaring that every website is a speaker's corner would diminish the ability of particular websites to be anything other than an expressive free-for-all. Websites with more particular missions, such as classrooms or symphony halls, would have a harder time achieving those missions if they were treated as quads or football stadiums.⁷ Variations on the commons theme are possible. Such variations, however, tend to produce ad hoc positions rather than arguments, and these positions do not state premises that can justify weakening the pure commons position while stopping short of a rule of consent.

Why consent? Following basic Coasean reasoning,⁸ I argue that the real choice in the access debate is between property rules and liability

Right to Exclude Indexing, 49 J. COPYRIGHT SOC'Y U.S.A. 165, 171 (2001) ("[T]he high hopes raised by cyberspace for changing the information landscape require open access.").

3. I assume for purposes of this Article that utilitarianism is the relevant mode of analysis, rather than Lockean theories of property. I do not wish to endorse that view as such, just to limit the scope of the argument here.

4. See *infra* Part III (arguing that exclusion is essential to a website's social function).

5. See E-mail from Jay Monahan, Associate General Counsel, eBay.com, Inc., to David McGowan, Associate Professor of Law, University of Minnesota Law School (Mar. 4, 2003) (on file with author) (describing problems eBay has faced).

6. Cf. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Ct. App. 2001) (regarding suit for access by former employee who sent e-mails complaining about employment practices to existing employees), *rev'd*, 71 P.3d 296 (Cal. 2003).

7. See *infra* notes 136–38 and accompanying text (discussing attempts to homogenize the Internet).

8. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 153–56 (1988) [hereinafter COASE, *FIRM, MARKET AND LAW*] (arguing that in the absence of transaction costs, bargaining produces socially optimal results); R.H. COASE, *THE INSTITUTIONAL STRUCTURE OF*

rules. Property rules are preferable because bargaining over access is possible and bargaining is a surer guide to the welfare effects of access than alternatives, such as judicial cost-benefit analysis. Though theoretical claims of market failure have been advanced in the access debate, those claims are not borne out by the cases.⁹ In addition to the general arguments in favor of bargaining, I argue that judicial second-guessing of access decisions, as would occur under a liability rule, would have undesirable effects. Such second-guessing would impair the discretion website owners need to constitute the expressive environments in which website users and network users, including employees, operate. By limiting website owner discretion, judicial oversight would tend to homogenize environments.

Part II of this Article explains the trespass to chattels doctrine, which several courts have used to implement consent as the principle governing website access. It argues that this doctrine does not deserve the severe academic criticism it has received. Part III discusses how different access rules affect the internal constitution and managerial authority of website owners and firms connected to the Internet. Among other things, it explains why the idea that there is a free speech right to access websites and networks is normatively and doctrinally wrong. Part IV takes up the general normative question of whether access to websites and networks should be governed by a rule of mandatory access or a rule of consent. It provides reasons for favoring consent, and thus a property rule, over other competing rules.¹⁰

PRODUCTION 8–9 (1991) [hereinafter COASE, STRUCTURE OF PRODUCTION]. Professor Trotter Hardy was the first to discuss the property rights implications of this intellectual tradition for the type of problem I discuss here. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217 [hereinafter Hardy, *Property*]. Professor Hardy does not discuss trespass theory as such in this article, though he does in a later one. I. Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, 1996 J. ONLINE L. art. 7, at <http://www.wm.edu/law/publications/jol/articles.shtml>. For the classic relation of bargaining to property rules and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972). More recently, Professor Richard Epstein has advanced views similar to the argument I make here. Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 76, 79 (2003).

9. See *infra* Parts IV.E–F (stating that traditional arguments against bargaining do not undermine consent, which should prevail as the default rule).

10. I do not claim to prove this case conclusively. Because I assume here that utilitarianism is the relevant mode of analysis, I argue only that there is better reason to believe that net social welfare would be higher under a property rule than a liability rule. This conclusion is further qualified by the concession, which utilitarianism requires, that if net welfare would be enhanced by applying a different rule to a particular set of cases, then that is what the law should do.

II. POSITIVE LAW AND NORMATIVE CONSIDERATIONS

This Part discusses the doctrine of trespass to chattels, which courts have used to regulate access to websites, and the academic critiques of that use of the doctrine.¹¹ It argues that the doctrine has received unjustifiably bad press in scholarly circles.¹² Courts applying the doctrine to enjoin use of specific websites have extended it to protect an interest the law recognizes but expects to be protected by self-help. Injunctions in such cases achieve the results contemplated by existing law; critics of injunctions implicitly maintain that the cause of action must remain the same, even if that means the doctrine produces different results than it did in the past.

A. *Judicial Adoption of the Trespass to Chattels Tort To Regulate Access*

Section 217 of the *Second Restatement of Torts* (“*Restatement*”) says a defendant may be liable under the doctrine of trespass to chattels either for “dispossessing another of the chattel” or for “using or intermeddling with a chattel in the possession of another.”¹³ As the disjunctive language indicates, “dispossessing” and “intermeddling” are two different things. Section 221 of the *Restatement* defines “dispossession” to include taking a chattel from another, obtaining it by fraud, barring the owner’s access to the chattel, destroying the chattel, or taking it into the custody of the law.¹⁴ Comment e to section 217

11. Significant cases extending the doctrine include *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249–50 (S.D.N.Y. 2000); *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1028 (S.D. Ohio 1997); and *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468 (Ct. App. 1996). For a case refusing to enjoin linking, see *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000). The most important case rejecting extension of the doctrine is *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

12. The most important critique is Burk, *supra* note 2, at 39–54 (criticizing use of trespass causes of action in cyberspace). For other critiques, see also Elkin-Koren, *supra* note 2, at 165 (arguing for open access on the Internet); Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 566 (2001) [hereinafter O’Rourke, *Analogy*] (arguing that in order to define Internet property rights the law needs a framework that is aware of competitive concerns); Maureen A. O’Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 VAND. L. REV. 1965 (2000) [hereinafter O’Rourke, *Shaping Competition*] (describing the nature of competition and property rights on the Internet).

13. RESTATEMENT (SECOND) OF TORTS § 217 (1965).

14. *Id.* § 221.

defines “intermeddling” as “intentionally bringing about a physical contact with the chattel.”¹⁵

The distinction between dispossession and intermeddling is reinforced in section 218, the *Restatement’s* liability provision. A person is liable for trespass to chattels if she dispossesses another of the chattel, impairs the condition, quality, or value of the chattel, deprives the owner of the use of the chattel for a substantial time, or causes bodily harm to the possessor or to “some person or thing in which the possessor has a legally protected interest.”¹⁶ Dispossession without harm may create a basis for liability.¹⁷ In unusual cases, so may uses that neither dispossess the owner of the chattel nor harm the chattel.¹⁸

The doctrine is legally significant even where it will not provide a basis for damages. The *Restatement* says trespass to a chattel “may . . . be important in the determination of the legal relations of the parties” even if the trespass is “not . . . actionable because it does no harm to the chattel or to any other legally protected interest of the possessor.”¹⁹ Most importantly, even in cases where no harm is done to a chattel, a trespass “affords the possessor a privilege to use force to defend his interest in its exclusive possession.”²⁰

The *Restatement* links the possessor’s privilege to defend her interest in a chattel to what comment e to section 218 refers to as “[t]he interest of a possessor of a chattel in its inviolability.”²¹ That comment states that an owner’s interest in the inviolability of a chattel differs legally from “the similar interest of a possessor of land,” because the chattel-owner’s interest “is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel.”²² The *Restatement* takes the position that this differential treatment of “similar” interests is justified because “[s]ufficient legal protection of the possessor’s interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.”²³

15. *Id.* § 217 cmt. e.

16. *Id.* § 218.

17. *Id.* § 218 cmt. d.

18. *Id.* § 218 cmt. h. The *Restatement* gives the example of one who uses the toothbrush of another. Though the use may not damage the toothbrush, the owner might reasonably feel less keen on using the chattel again. *Id.*

19. *Id.* § 217 cmt. a.

20. *Id.*

21. *Id.* § 218 cmt. e.

22. *Id.*

23. *Id.*

The *Restatement* therefore does not recognize fundamentally different *interests* between owners of land and owners of chattel. Instead, it refers to both types of owners as having a “similar” interest in inviolable possession.²⁴ The *Restatement* does treat them differently with respect to remedies for harmless invasion of that interest; the landowner gets an action for nominal damages, while the chattel owner gets a privilege to use self-help to stop the invasion.²⁵

The trespass to chattels doctrine became prominent in access cases following *Thrifty-Tel, Inc. v. Bezenek*.²⁶ Thrifty-Tel provided long-distance telephone service.²⁷ The Bezeneks were the parents of two teenage boys who obtained a Thrifty-Tel access code from a friend.²⁸ The boys used that code to enter the Thrifty-Tel system in an effort to obtain an authorization code that would allow them to make free long-distance calls.²⁹ They failed, but on their second attempt they employed an automated calling strategy that clogged the system and denied some customers access.³⁰

Thrifty-Tel sued the boys’ parents and won on the theory that the boys had converted the access codes.³¹ On appeal, the court worried that the tort of conversion might not apply to such intangible property.³² It resolved the worry by affirming liability on a trespass to chattels theory.³³ The court said the tort creates liability “where an intentional interference with the possession of personal property has proximately

24. See Epstein, *supra* note 8, at 77–78 (emphasizing the inviolability of a possessor’s interest under the *Restatement*).

25. See O’Rourke, *Shaping Competition*, *supra* note 12, at 1995. Professor Epstein suggests the law recognizes a cause of action for harmless trespass to land but not chattels because the cause of action is useful to settle title disputes over land. Where two parties disagree on who owns land, it would be silly to require harm in order to bring the case to court. For chattel, the same purpose is served by recognizing a cause of action for dispossession without regard to harm. Epstein, *supra* note 8, at 78. He also suggests the *Restatement* recognizes a self-defense privilege rather than a cause of action because “[n]o one in his right mind sues for nominal damages.” *Id.*

26. *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468 (Ct. App. 1996).

27. *Id.* at 471.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 471–72.

32. *Id.* at 472.

33. *Id.* The court said the trespass theory had been argued in the trial court, where “defense counsel essentially conceded Ryan and Gerry trespassed, but maintained the mislabeling of the cause of action as one for conversion was fatal.” *Id.*

caused injury,”³⁴ and it held that this theory avoided the question of whether intangible property may be converted.³⁵

The trespass to chattels theory found its way to Internet access cases through *CompuServe Inc. v. Cyber Promotions, Inc.*,³⁶ in which the court employed this theory to enjoin Cyber Promotions from sending bulk e-mail, or spam, to CompuServe customers over CompuServe’s network. CompuServe customers paid for the time they spent on the system, so wading through spam cost them money.³⁷ Many customers complained to CompuServe about spam, and some cancelled their subscriptions.³⁸ CompuServe complained to Cyber Promotions and insisted that it stop spamming CompuServe customers, but the complaints did not work.³⁹ CompuServe tried blocking Cyber Promotions’ spam, but that did not work either,⁴⁰ so CompuServe sued.

The CompuServe court accepted the *Thrifty-Tel* holding that electronic signals can support a trespass claim.⁴¹ It extended that analysis by emphasizing the language of *Restatement* section 218(b), which says liability exists where a trespass impairs the “condition, quality, or value” of a chattel.⁴² The court thought spamming lowered the value of CompuServe’s systems because spam “demand[s] the disk space and drain[s] the processing power of plaintiff’s computer equipment.”⁴³ That might have been a good argument in *Thrifty-Tel*, where some customers were actually blocked out of the system,⁴⁴ but the evidence in *CompuServe* showed only that the defendant’s spam placed a “tremendous burden” on the system.⁴⁵ There was no evidence that the system could not bear that burden. There was no evidence that the plaintiff’s servers crashed, that it ran out of disk space, or that its

34. *Id.* at 473.

35. The court drew an analogy to trespass to land cases holding that trespass could be established by proving that a defendant caused intangible phenomena such as dust, sound waves, smoke, and vibrations to affect a plaintiff’s land, even if the plaintiff was not put off the land or prevented from using it. In light of these cases, the court said, “the electronic signals generated by the Bezenek boys’ activities were sufficiently tangible to support a trespass cause of action.” *Id.* at 473 n.6 (collecting cases).

36. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

37. *Id.* at 1019.

38. *Id.* at 1023.

39. *Id.* at 1024.

40. *Id.* at 1019.

41. *Id.* at 1021.

42. *Id.*

43. *Id.* at 1022.

44. *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 471 (Ct. App. 1996).

45. *CompuServe*, 962 F. Supp. at 1022.

customers were actually blocked out of the system.⁴⁶ The court's endorsement of the trespass to chattels cause of action was therefore equivalent to finding that use of the system was actionable if it caused economic losses to the business the system ran.

The court also stressed that under *Restatement* section 218(d), a person may be liable for trespass that causes harm "to some person or thing in which the possessor has a legally protected interest."⁴⁷ Noting that in November 1996 CompuServe received almost 10,000 customer complaints about spam and received each day about fifty complaints pertaining to Cyber Promotions, the court concluded that harm to CompuServe's business reputation and goodwill could support a claim for trespass to chattels.⁴⁸ Finally, the court rejected Cyber Promotions' claim that the tort requires plaintiffs to show that the "alleged trespasser actually takes physical custody of the property or physically damages it."⁴⁹ The court rightly said "[i]t is clear from a reading of *Restatement* section 218 that an interference or intermeddling that does not fit the section 221 definition of 'dispossession' can nonetheless result in defendants' liability for trespass."⁵⁰

In this regard, the court found significant the owner's privilege to use self-help to stop even harmless intermeddling.⁵¹ The court interpreted this privilege to authorize CompuServe's efforts to block Cyber Promotions' spam. Those efforts failed because of Cyber Promotions' countermeasures. The court saw its injunction as remedying the failure of the self-help privilege, which the *Restatement* expected would be "sufficient" to protect the owner's interest in inviolable possession.⁵²

46. Even the decision of the California Supreme Court in *Intel Corp. v. Hamidi*, which tends to emphasize the burden of spam in previous cases in order to distinguish them from its rejection of the trespass to chattels tort in this context, claims only that, in *CompuServe*, the defendant's spam created "some interference with the *efficient* functioning of [CompuServe's] computer system." *Intel Corp. v. Hamidi*, 71 P.3d 296, 304 (Cal. 2003) (emphasis added). The court made no effort to explain what it meant by efficient, nor why inefficiency should count as harm under its reasoning. As discussed below, this type of reasoning creates perverse incentives for firms: the more costs they sink to develop capacity, the fewer rights they have. See *infra* text accompanying note 162 (arguing that the belief that only crashing is harm allows firms with high costs weaker rights than firms with low costs).

47. RESTATEMENT (SECOND) OF TORTS § 218(d) (1965).

48. *CompuServe*, 962 F. Supp. at 1023.

49. *Id.* at 1022 (citation omitted).

50. *Id.*

51. *Id.* at 1023; see also RESTATEMENT (SECOND) OF TORTS § 218 cmt. e; *supra* notes 21–23 and accompanying text (justifying self-help privilege as provided by the *Restatement*).

52. *CompuServe*, 962 F. Supp. at 1023. Indeed, the court said "technological means of self-help, to the extent that reasonable measures are effective, [are] particularly appropriate in this type of situation and should be exhausted before legal action is proper." *Id.*

CompuServe may be read as taking into account all the economic costs of the defendant's use, regardless of whether those costs were accompanied by physical harm or dispossession, which the *Restatement* seems to assume would go together. Such comprehensive accounting is what utilitarian analysis demands. On this view, the case did not extend the trespass to chattels cause of action but only applied it to a type of harm not present in earlier cases. One might disagree with this view, of course, and, opting for formalism over utilitarianism, insist that only physical harm should support a theory of recovery under trespass to chattels. Even on that view, however, the court only extended the cause of action to compensate for the failure of self-help.⁵³ The court did not invent a new legal interest.

CompuServe went some way toward establishing owner consent as the basis for regulating website access. The facts did not present squarely the question of whether a website owner could deny access in the absence of even indirect economic harm. That bridge was crossed in *eBay, Inc. v. Bidder's Edge, Inc.*⁵⁴

eBay is an Internet auction site.⁵⁵ Bidder's Edge ran a site that aggregated bids for similar items at different auction sites and posted comparative bid prices.⁵⁶ Bidder's Edge did not run auctions itself, but its users could see what an item was going for on various sites and pick the cheapest auction to bid on.⁵⁷ To run its site, Bidder's Edge needed to obtain information on eBay's auctions.⁵⁸ Bidder's Edge asked and received permission to obtain such data from certain auctions.⁵⁹ It later asked and received permission to expand the number of auctions it covered.⁶⁰ Both parties expected they would agree on terms for a licensing agreement for Bidder's Edge's queries and its use of data pertaining to auctions held on eBay.⁶¹

53. *Id.* The court also rejected Cyber Promotions' claim that the Internet is a social domain based on open access and that, by connecting to it, CompuServe irrevocably consented to the open access norm. The court agreed as a default matter that connecting to the Internet amounted to "at least a tacit invitation for anyone on the Internet to utilize plaintiff's computer equipment to send e-mail to its subscribers." *Id.* at 1023-24. The court was not willing to let this tacit consent trump CompuServe's explicit demand that Cyber Promotions stop the spamming, however. *Id.* at 1024.

54. *eBay, Inc. v. Bidders Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

55. *Id.* at 1060.

56. *Id.* at 1061.

57. *Id.* at 1061-62.

58. *Id.* at 1062.

59. *Id.*

60. *Id.*

61. *Id.*

eBay wanted Bidder's Edge to query the eBay site only when a Bidder's Edge user queried its site.⁶² eBay felt this limitation would reduce the load on its system and increase the accuracy of the data Bidder's Edge posted.⁶³ Bidder's Edge wanted to query eBay's system on a recurring basis using programs known as robots.⁶⁴ This procedure would allow Bidder's Edge to compile its own auction database, comprised partly of data copied from eBay, which would allow it to respond to queries faster than if it browsed eBay only when a user submitted a query.⁶⁵ Recursive robot searches also would allow Bidder's Edge to track auctions generally and update its users when auction activity warranted.⁶⁶

When negotiations broke down, the parties began a game of cat and mouse.⁶⁷ eBay attempted to identify the IP addresses Bidder's Edge used to query the eBay site, blocking 169 such addresses, while Bidder's Edge used proxy servers on a rotating basis to obtain data concerning eBay auctions.⁶⁸ Its self-help measures having failed, eBay sued, arguing that it "expended considerable time, effort and money to create its computer system, and that [Bidder's Edge] should have to pay for the portion of eBay's system [Bidder's Edge] uses."⁶⁹

The district court enjoined Bidder's Edge on a trespass to chattels theory.⁷⁰ The court speculated that eBay might suffer harm if it were open to all browsers,⁷¹ but this speculation was unpersuasive and had little to do with Bidder's Edge. Unlike *Thrifty-Tel*, there was no evidence that Bidder's Edge's browsing obstructed user access to eBay's system or slowed system performance.⁷² Unlike *CompuServe*,

62. *Id.*

63. *Id.*

64. *Id.* at 1060–62. A robot is "a computer program which operates across the Internet to perform searching, copying and retrieving functions on the web sites of others." *Id.* at 1060. Robots can execute "thousands of instructions per minute." *Id.* at 1060–61.

65. *Id.* at 1062.

66. *Id.*

67. *Id.* at 1062–63.

68. *Id.* Bidder's Edge was keen on this game because eBay was important to its business. Sixty-nine percent of the auction items listed on Bidder's Edge were from eBay auctions, *id.* at 1063, and Bidder's Edge claimed that denial of "access to eBay's database [would] result in a two-thirds decrease in the items listed on [Bidder's Edge], and a one-eighth reduction in the value of [Bidder's Edge], from \$80 million to \$70 million," *id.* at 1068.

69. *Id.* at 1065.

70. *Id.* at 1067, 1073. eBay alleged theories of harm to its business reputation, but it did not propose injunctive remedies tailored to that alleged harm. *Id.* at 1064. The court therefore did not consider reputational harm in deciding to enjoin Bidder's Edge. *Id.*

71. *Id.* at 1066 & n.15.

72. *Id.* at 1065.

there was no evidence that these queries cost eBay users money or eroded eBay's goodwill.⁷³ Further, there was no evidence of even indirect harm from Bidder's Edge's actions, and the court found none.⁷⁴

eBay is about use, not harm.⁷⁵ The court said eBay had a "fundamental property right to exclude others from its computer system."⁷⁶ eBay worried that, unless enjoined, Bidder's Edge might violate this right without penalty because its queries probably would never amount to a conversion of eBay's system.⁷⁷ The court enjoined Bidder's Edge on the ground that eBay was likely to prove that Bidder's Edge's queries "have diminished the quality or value of eBay's computer systems" because these queries deprived eBay of the use of a portion of its capacity and "[t]he law recognizes no such right to use another's personal property."⁷⁸

Though the court's speculation about harm detracts significantly from the normative force of the opinion, Judge Whyte was right to enjoin Bidder's Edge. Because the *Restatement* does recognize an interest in the inviolable possession of chattel, the court was right to say the law gave Bidder's Edge no right to query eBay's servers. Judge Whyte therefore could have rested his opinion on the same ground as the *CompuServe* court: his injunction protected eBay's interest "in the mere inviolability of [its] chattel"⁷⁹ when its self-defense efforts failed.⁸⁰

In economic terms, Judge Whyte favored the injunction, a property rule, because it forced the parties to bargain. Property rules left the parties freer to negotiate than they would have been under a nuisance theory of liability which, unlike injunctions, permits a court to

73. *Id.*

74. *Id.* The court did not accept eBay's claim that Bidder's Edge should pay eBay's operating costs in proportion to the amount of server capacity Bidder's Edge used. *Id.*

75. See *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 WL 1736382, at *13 (N.D. Cal. Dec. 6, 2001) ("*eBay* . . . concluded that the defendant's conduct was sufficient to establish a cause of action for trespass not because the interference was 'substantial' but simply because the defendant's conduct amounted to 'use' of Plaintiff's computer." (quoting *eBay*, 100 F. Supp. 2d at 1070)).

76. *eBay*, 100 F. Supp. 2d at 1067.

77. *Id.*

78. *Id.* at 1071. The court then reiterated the conjecture that if it declared eBay open to non-consensual searches by auction aggregators, then many aggregators might get in the game, eBay's system might become overloaded, and it might suffer irreparable harm. *Id.* at 1071-72.

79. RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965); see also *supra* notes 20-23, 51 and accompanying text (discussing self-help privilege and inviolability of owner's interest in chattel).

80. See *eBay*, 100 F. Supp. 2d at 1064 n.9 ("*eBay*'s motion appears to be, in part, a tactical effort to increase the strength of its license negotiating position and not just a genuine effort to prevent irreparable harm.").

second-guess the parties' estimates of the costs and benefits of different uses. A contrary decision might have let Bidder's Edge free ride on eBay's investment, subject to a duty to pay damages for physical harm. At a minimum, it would have made litigation risk relevant to bargaining, which would lessen the degree to which bargaining reflected the parties' estimates of the costs and benefits of the use at stake.

eBay was part of a trend of cases extending the trespass to chattels tort to deal with unwanted uses of websites and proprietary networks. To date, most courts presented with such cases have accepted the trespass tort.⁸¹ Many of these are federal cases, however, in which federal judges interpret state law.⁸² State courts remain free to reject this extension of the trespass tort, which the Supreme Court of California did in *Intel Corp. v. Hamidi*.⁸³

Hamidi was a former Intel employee who obtained a list of Intel e-mail addresses and, over a twenty-one-month period, sent six mass e-mails to thousands of Intel employees. The e-mails criticized Intel's employment practices generally, warned current employees that they were at risk from the practices, and suggested that current employees look for other jobs.⁸⁴ Intel sued to enjoin Hamidi's mass e-mailing on trespass to chattel and nuisance theories. After Intel dropped the nuisance theory, the trial court issued an injunction on the trespass theory.⁸⁵ The court of appeals affirmed the injunction, which the Supreme Court of California reversed.

The state supreme court held the trespass to chattels tort did not apply in its current form to Intel's claim because Intel alleged harm to its workers' morale and productivity rather than harm to its computers.⁸⁶ In the court's view, the trespass tort could only be brought to redress "an injury to the company's interest in its computers."⁸⁷ The court

81. In addition to the cases discussed above, see cases cited *supra* note 11, which also extended the doctrine of trespass to chattels.

82. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000); *eBay*, 100 F. Supp. 2d at 1069-72; *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451 (E.D. Va. 1998); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1020 (S.D. Ohio 1997).

83. *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003).

84. *Id.* at 301.

85. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 247 (Ct. App. 2001), *rev'd*, 71 P.3d 296 (Cal. 2003).

86. *Hamidi*, 71 P.3d at 300.

87. *Id.*; see also *id.* at 306-07 ("That Hamidi's messages temporarily used some portion of the Intel computers' processors or storage is, therefore, not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system.").

distinguished cases extending the trespass tort on the ground that, in those cases, the use at issue either interfered, “or threatened [to interfere] with the intended functioning of the system, as by significantly reducing its available memory and processing power.”⁸⁸ The court further distinguished *eBay*’s statement that the law recognizes no right to use another’s property⁸⁹ by saying, “[w]hile one may have no *right* temporarily to use another’s personal property, such use is actionable as a trespass only if it ‘has proximately caused injury’” to the property in question.⁹⁰

The court declined to extend current trespass doctrine on the ground that there was a debate about how best to govern access to servers connected to the Internet and the court was not in the best position to resolve that debate. The court noted that some academics, such as Professor Richard Epstein, argued that extending the tort would facilitate bargaining that would produce the socially optimal result.⁹¹ Others, such as Professors Mark Lemley, Dan Hunter, and Lawrence Lessig, predicted that extending the tort would seriously diminish the social value of the Internet.⁹² In light of this debate, the court thought it would be rash for it to adopt a “rigid” or “absolute” property rule.⁹³

Hamidi acknowledges that server owners have an interest in the inviolable possession of their equipment, that self-help may be inadequate to defend that interest, and that no one else has a legal right to use the equipment without the owner’s consent. However, *Hamidi* holds that the owner has no cause of action to stop unwanted use unless that use harms the equipment itself, rather than the owner’s business. Like the academic critique it partly embraces, the *Hamidi* opinion is highly formal. I examine the doctrinal aspect of that critique in the next section. I examine the empirical predictions of that critique in Part IV.

B. Academic Criticism of the Doctrine

Many law professors, most prominently Professor Dan Burk, oppose decisions extending the trespass to chattels theory to website and network access cases. They object in particular to the injunctions the

88. *Id.* at 306.

89. *See supra* note 78 (citing the court’s statement that “the law recognizes no such right to use another’s personal property”).

90. *Hamidi*, 71 P.3d at 306 (quoting *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Ct. App. 1996)).

91. *Id.*

92. *Id.* at 310–11.

93. *Id.* at 311.

theory supports.⁹⁴ In an article that has proved prescient in many ways, Professor Burk argues that judicial use of the trespass to chattels theory in access cases has been unprecedented, unjustified, and undesirable. He favors using the nuisance tort to deal with such cases.⁹⁵

Writing after *Thrift-Tel* and *CompuServe*, but before *eBay* and *Hamidi*, Professor Burk said the former cases “recognize a novel proprietary interest for which the label ‘trespass to chattels’ is merely a convenient apology.”⁹⁶ He criticized this interest as “a new form of intellectual property, with only the most tenuous of antecedents in the law of chattels,” and noted that cyberspace trespass actions are “particularly ill-suited to a medium that draws its unique benefits from shared resources.”⁹⁷

More particularly, Professor Burk argued that *Thrift-Tel* extended the trespass tort “without any serious analysis”⁹⁸ by “blithely gloss[ing] over”⁹⁹ the distinction between trespass to land and trespass to chattels. Similarly, he believes *CompuServe* “glibly intermingles trespass to chattels with doctrines related to real property.”¹⁰⁰ Professor Burk believes that, though trespass to chattels and trespass to land “may share a common history, and even a common name,” it is a mistake to conflate them because “they secure entirely different interests.”¹⁰¹

Citing Dean Prosser, Professor Burk describes trespass to chattels as a weaker version of the conversion tort rather than a variation of the tort of trespass to land.¹⁰² In Professor Burk’s view, the “gravamen of both” conversion and trespass to chattels “lies in the dispossession of the property from its owner. In conversion, the dispossession is total; in trespass to chattels, the dispossession is only partial.”¹⁰³ Thus,

94. See Brief of Amici Curiae in Support of Bidder’s Edge, Inc. at 2–3, *eBay v. Bidder’s Edge, Inc.*, 100 F. Supp. 1058 (N.D. Cal. 2000) (No. 00-15995), available at http://jurist.law.pitt.edu/amicus/biddersedge_v_ebay.pdf (last visited Sept. 11, 2003).

95. Burk, *supra* note 2, at 53 (“[N]uisance would authorize computer owners to legally ‘defect’ from the network when necessary to avoid wasteful negative externalities, but require them to remain legally networked when necessary to generate beneficial positive network externalities.”).

96. *Id.* at 28 (setting the foundation for his argument).

97. *Id.*

98. *Id.* at 29.

99. *Id.* at 33.

100. *Id.*

101. *Id.* at 33 & n.53.

102. *Id.*

103. *Id.*

Professor Burk contends, neither tort “entails the interest in inviolability that attends trespass to land.”¹⁰⁴

For these reasons, Professor Burk charges that the courts in *Thrifty-Tel* and *CompuServe* “essentially reversed several hundred years of legal evolution” by “collapsing the separate doctrines of trespass to land and trespass to chattels,” thereby effectively creating “a brand new cause of action, unknown to modern jurisprudence.”¹⁰⁵ Other scholars, notably Professor Maureen O’Rourke, have offered related criticism.¹⁰⁶

These cases do not deserve such condemnation. The *Restatement* makes clear that “dispossession” and “intermeddling” are alternative theories of recovery,¹⁰⁷ and that liability even for intermeddling may rest on harm “to some person or thing in which the possessor has a legally protected interest.”¹⁰⁸ The *CompuServe* decision rested explicitly on this analysis, rejecting the proposition that “dispossession” is required to sustain the tort.¹⁰⁹ Its rejection is consistent with the language of *Restatement* section 217.

More fundamentally, the premise that current law recognizes no interest in the inviolable possession of chattels is not true. It is true that the *Restatement* provides an action for nominal damages for harmless intermeddling with land but not for harmless intermeddling with chattel.¹¹⁰ It is also true, however, that the *Restatement* states that chattel owners have an interest in the inviolable possession of chattel, which it believes enjoys “sufficient” protection through the privilege to

104. *Id.*

105. *Id.*; see also *supra* notes 21–23 and accompanying text (discussing the distinction between trespass to land and trespass to chattels in the *Restatement*). These arguments are echoed in an amicus brief filed in *eBay* by twenty-eight law professors, who wrote in part that Judge Whyte’s analysis in *eBay* “relies on a principle of ‘inviolability’ of property that has never been the rule for personal property and certainly not for information.” Brief of Amici Curiae in Support of Bidder’s Edge, Inc., *supra* note 94, at 18. The opening brief for Ken Hamidi in *Hamidi* makes the same argument, as do amici in the case. Opening Brief on the Merits at 2, *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (No. 98-AS-05067), available at 2002 WL 1926521.

106. O’Rourke, *Shaping Competition*, *supra* note 12, at 1995–97.

107. See *supra* notes 13–18 and accompanying text (differentiating between disposition and intermeddling, and stressing their independent bases for liability for trespass to chattels).

108. RESTATEMENT (SECOND) OF TORTS § 218(d) (1965); see also *supra* note 47 and accompanying text (stressing that the chattel itself need not be harmed to sustain a trespass to chattels cause of action).

109. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997).

110. See *supra* notes 22–23 and accompanying text (accounting for disparate treatment of trespass to land and legal protection afforded each: a landowner may sue for nominal damages whereas a chattel owner may resort to self-help to protect her possession).

use reasonable force “to protect his possession against even harmless interference.”¹¹¹

The problem these cases present is that technology has undermined this expectation. In the cases following *Thrifty-Tel*, defendants used technical means to defeat the owner’s self-help measures; self-help therefore was not “sufficient” to protect the plaintiffs’ legal interest.¹¹² If it had been sufficient—if CompuServe and eBay had succeeded in blocking input from Cyber Promotions or queries from Bidder’s Edge—then Cyber Promotions or Bidder’s Edge could have gained access to the websites only by obtaining the plaintiffs’ consent. The injunctions in *CompuServe* and *eBay* forced the defendants to try to obtain the plaintiffs’ consent for their uses. Those injunctions therefore actually mimic the results noted in the *Restatement* when it said self-help would be “sufficient” to protect an owner’s interest in the inviolable possession of chattel.

Apart from *Hamidi*, which is willing to divide an owner’s entitlement from a legal remedy for violation of that entitlement, the cases extend the doctrine to compensate for the failure of self-help, but they do not alter the real-world results that would occur if, as the *Restatement* contemplates, self-help worked. For these reasons, courts should not be condemned for wrongly conflating trespass to chattels and trespass to lands.¹¹³ The torts actually do protect comparable

111. *CompuServe*, 962 F. Supp. at 1023 (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. e). Comment e refers to section 77 of the *Restatement*, which falls under the topic heading “Defense of Actor’s Interest in His Exclusive Possession of Land and Chattels.” RESTATEMENT (SECOND) OF TORTS § 77 cmt. a. Comment a to section 77 says that “the use of force to prevent or terminate even a harmless intermeddling with a chattel is privileged,” *id.*, and that section 80 of the *Restatement* “states a similar rule as to putting another in apprehension of a harmful or offensive contact and imposing a confinement upon another for the purpose of protecting the actor’s exclusive possession of land or chattels,” *id.*, which is indeed what section 80 does. These sections do not distinguish between the privilege to defend land and the privilege to defend chattels. *See id.* §§ 77, 80.

112. *See, e.g., Intel Corp. v. Hamidi*, 71 P.3d 296, 301 (Cal. 2003) (“Intel’s attempt to block internal transmission of the messages succeeded only in part; Hamidi later admitted he evaded blocking efforts by using different sending computers.”); *see also, e.g., eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1062–63 (N.D. Cal. 2000) (describing defendant’s use of proxy servers to evade plaintiff’s blocking efforts); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 448 (E.D. Va. 1998) (citing admission in discovery that defendant tried to evade AOL anti-spam filters); *CompuServe*, 962 F. Supp. at 1017 (“CompuServe has attempted to employ technological means to block the flow of defendants’ e-mail transmissions to its computer equipment, but to no avail.”).

113. In any event, in the type of case at issue here, trespass to land doctrine began converging with nuisance doctrine long ago. *See Bradley v. Am. Smelting and Ref. Co.*, 709 P.2d 782, 786 (Wash. 1985) (stating that “little of substance remains to any distinction between” trespass and nuisance “when air pollution is involved”). Convergence in doctrines traces at least to *Martin v. Reynolds Metal Co.*, which affirmed liability for dispersion of fluoride compounds that rendered

interests.¹¹⁴ The only difference relevant here is that the law traditionally protected harmless invasions of chattels by giving owners a privilege to use self-help rather than by giving them a cause of action, which owners of land did have.

Finally, Professors Burk and O'Rourke have suggested that copyright law may preempt the trespass tort, and that it at least balances incentives to create and distribute information that courts should not disturb by extending the trespass tort.¹¹⁵ The tort is not preempted. Spam cases, in which users attempt to send or "push" data through a network, or place data on a website,¹¹⁶ do not resemble copyright cases. Even in "pull" cases, where a user copies data from a website with an eye toward distributing it or making it available to others, trespass doctrine forbids use without regard to copying or distribution, while the Copyright Act forbids copying and distribution even where use of a particular copy is lawful.¹¹⁷ Because the Copyright Act has an express preemption provision,¹¹⁸ I would hesitate to endorse penumbral preemption of the trespass tort. As a general matter, it is fair to counter the move of classifying all sites abstractly as databases, and thus beyond copyright's protection,¹¹⁹ by treating the trespass tort abstractly as well.

More substantively, websites do not function socially as phone books. They play varied and dynamic social roles, the success of which

land unfit for raising cattle. *Martin v. Reynolds Metal Co.*, 342 P.2d 790, 794 (Or. 1959). *Bradley* maintained the distinction somewhat arbitrarily by holding that if particles did not accumulate, then a plaintiff could sue only for nuisance; accumulation constituted trespass. *Bradley*, 709 P.2d at 791. The court modified trespass doctrine in such cases, requiring that the plaintiff show harm, but it did so largely because of worries over transaction costs. See *id.*; *infra* note 187 (discussing the *Bradley* court's conversion of the property rule of trespass into a liability rule).

114. See *Poff v. Hayes*, 763 So. 2d 234, 240 (Ala. 2000) ("Trespass to real property is similar to trespass to chattels in that trespass, generally, 'is a wrong against the right of possession'." (quoting *Jeffries v. Bush*, 608 So. 2d 361, 362 (Ala. 1992))).

115. Burk, *supra* note 2, at 35 (arguing that the tort creates a new IP right of inviolability); O'Rourke, *Analogy*, *supra* note 12, at 590, 592 (raising preemption and policy concerns).

116. *E.g.*, *Am. Online*, 46 F. Supp. 2d at 452-53 (enjoining spammer on trespass to chattels theory); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (enjoining spammer on trespass to chattels theory); *CompuServe*, 962 F. Supp. at 1028 (enjoining an advertising company from sending spam based on trespass to chattels theory); *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Ct. App. 2001) (involving a suit to enjoin a former employee who sent e-mails complaining about employment practices to existing employees), *rev'd*, 71 P.3d 296 (Cal. 2003); *Thriftly-Tel v. Bezenek*, 54 Cal. Rptr. 2d 468 (Ct. App. 1996) (finding liability based on trespass to chattels theory). On the distinction generally, see O'Rourke, *Analogy*, *supra* note 12, at 569.

117. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000).

118. 17 U.S.C. § 301(a) (2000).

119. The Copyright Act will not protect facts or information; it will only protect databases if the compiler's particular organization or arrangement falls within its scope. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-51 (1991).

may depend on the right to exclude. For example, website owners are likely to have contracts with the people a user would like to reach by sending content through the owner's website, as in *CompuServe* or *Hamidi*. It is therefore relatively easy for recipients, website owners, and users to internalize social costs and benefits through contracting. The utilitarian argument for judges or other officials to engage in cost-benefit analysis of their own in such "push" cases is therefore relatively weak.

In some cases, users who copy and distribute data, thus "pulling" it from websites, may generate positive effects that are harder to capture through contracting. One might argue that this was the case in *eBay*, though so long as Bidder's Edge was free to charge for information on its website it is fair to question the degree to which its benefits could not be internalized. Still, to the extent distribution of information generates positive externalities that could not be captured through contracting, the policy argument for preempting the trespass tort in some "pull" cases may have greater appeal than in "push" cases.¹²⁰

C. Why Normative Analysis Is Needed

As the discussion in Part II.A shows, before *CompuServe*, the trespass to chattels doctrine had not been extended to create a right of action for harmless intermeddling. Before *CompuServe*, however, courts had not had to deal with the prospect of one firm running its business and profiting from another firm's investment, without the consent of that firm, but also without harming the physical manifestation of those costs—the network. When faced with a case in which the use did not at least clog the network for a time, as in *Thrifty-Tel*, a court would either have to change the doctrine or allow a change in the results that doctrine produced. The court in *CompuServe* chose the former result; the court in *Hamidi* chose the latter.

Common law courts have the power to adapt doctrine to new circumstances.¹²¹ The preceding discussion shows that, at worst, judges who have extended the trespass tort to cases in which the use at issue did not harm a computer have done so in a plausible way that vindicates an interest the law already recognizes. That is a useful point, if for no other reason than to be fair to the judges, but it does not show that these

120. See *infra* Part IV.E (noting that there may be positive effects that parties cannot internalize in data harvesting cases); see also *infra* Part IV.G (stressing the need to distinguish between instances of data pushing and data pulling).

121. MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 5 (1988); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 12–13, 293 (1960).

courts got it right. The real issue is normative: Should access to websites and networks be governed by consent or some form of mandatory access? By a property rule or a liability rule?

In addressing this normative question, academic criticism of trespass should deal more openly with the *Restatement's* explicit recognition of an interest in the inviolable possession of chattels. The right to an injunction should align with the underlying legal interest. If the law is right to recognize an interest in the inviolable possession of chattel, then courts should enjoin unwanted use, unless some more specific policy trumps the general right. Otherwise the interest varies with the owner's physical strength or, on the Internet, with the cleverness of the owner's counter-hackers.

Such characteristics are not relevant to the policies justifying the recognition of, or a refusal to recognize, a right to exclude. They therefore should not affect the decision of whether to enjoin unwanted use. If the law is incorrect in recognizing such an interest, then the owner should have no privilege to use force to defend it. Instead, the owner should be enjoined from self-help to give users easier access to the website.

Either way, no social purpose is served by what the court of appeals in *Hamidi* rightly called a pointless and "wasteful cat-and-mouse game" of self-help and countermeasure.¹²² There is no principled basis for the supreme court's decision in *Hamidi* to sever an owner's interest in inviolable possession, and the corresponding absence of a user's right to use the owner's hardware, both of which the court acknowledged, from a cause of action that would give effect to these principles. Here, as in the law generally, a right without a remedy is hollow.¹²³ The court's rather formal approach is inconsistent with the common law tradition of accommodating legal principles to changing circumstances.¹²⁴

122. *Cf. Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 249 (Ct. App. 2001) ("Hamidi acknowledges Intel's right to self help and urges Intel could take further steps to fend off his e-mails. He has shown he will try to evade Intel's security. We conceive of no public benefit from this wasteful cat-and-mouse game which justifies depriving Intel of an injunction."), *rev'd*, 71 P.3d 296 (Cal. 2003).

123. *See* RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY* 215 (1998); JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER* 4 (2002) ("A right without a remedy is a strange animal, as strange in the legal world as a dog without a bark and without a bite in the zoological world."); Donald H. Zeigler, *Rights Require Remedies: A New Approach to Enforcement of Rights in the Federal Courts*, 38 *HASTINGS L.J.* 665, 667-81 (1987) (explaining the importance of remedies in defining rights).

124. EISENBERG, *supra* note 121, at 5 ("If the courts are to explicate the application, meaning, and implications of the society's existing standards in new situations, they cannot simultaneously be prohibited from formulating rules that have not previously been announced.").

This analysis says only that the cause of action and the legal interests should align. It does not say which way they should align. In the next section I explain why the alignment should vindicate an owner's interest in inviolable possession: why *CompuServe* is right, and *Hamidi* is wrong.

III. EXCLUSION AND THE SOCIAL FUNCTION OF WEBSITES AND NETWORKS

Rights to exclude or eject others from property may be used to bargain with others to amortize the cost of maintaining a place or a chattel, but that is not all they do. Every space frequented by people is instrumentally related to some end. The right to exclude gives managers the legal power to enforce these instrumental relations by excluding persons whose conduct conflicts with the instrumental relations that define the social function of the space.¹²⁵ The right to exclude therefore plays a vital role in constituting the social function of different spaces.

For example, classrooms are for instruction, not chatter. Students who persist in chattering may be expelled from the classroom because their conduct conflicts with the end to which the social space of the classroom is devoted. They may carry on their chosen activity in a social space devoted to it. They might chatter in a coffee house, but not in the classroom. That is not what it is for. If chattering could not be excluded from a classroom, then, over time, chatter would become one of the things the classroom was for, and the instructional function of the social space of the classroom would suffer.¹²⁶

The same points are true of computer hardware and the Internet. A server is no more inherently one thing or another than a marble building with columns is inherently a courthouse or a museum. It may become a newspaper, a website for investing in securities, a website for hosting e-mail, or all of these things at once. As with any other social space, however, what the website becomes will be defined in part by who may

125. This point holds even for spaces devoted to letting people do virtually whatever they want, as with Speakers' Corner. That is simply a particular kind of instrumental relationship. See Speakers' Corner, at <http://www.speakerscorner.net/> (last visited Oct. 9, 2003) (exemplifying the notion of designated spaces by allowing people to do virtually whatever they want, and reinforcing a particular kind of instrumental relationship).

126. By "classroom" I do not mean any particular physical location with any particular physical characteristic. Indeed, the same physical space could be a "classroom" at some times and a "playroom" at others. But whatever it is, at the time in question it is *that* and not something else because some person who controls the space establishes the instrumental relationship and excludes persons whose conduct conflicts with it.

use it and for what ends, which is to say it will be defined in part by the right to exclude.

Sometimes strict exclusion is necessary for social interaction to occur at all. Internet securities offerings illustrate this point. Several years ago, some firms wanted to make available on the Internet sales presentations (called “roadshows”) for registered public offerings.¹²⁷ They worried that, if the presentations were “broadcast” generally, they might violate section 5 of the Securities Act of 1933.¹²⁸ Other firms were interested in transactions exempt from the registration requirements of the Securities Act.¹²⁹ If the issuer or its agents engage in “general solicitation,” the transactions will lose their exemption.¹³⁰ Both types of firms dealt with these risks by limiting investor access through investor verification and password protection measures.¹³¹

If websites like these had to be open to the public, that fact alone would defeat their purpose. Connecting to the Internet still lowers transaction costs for issuers and investors. However, connecting to the Internet lowers the cost of capital and makes financial markets more efficient.¹³² Websites like these are no less socially useful because they

127. See Net Roadshows, Inc., SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,367, at 77,849 (Sept. 8, 1997), available at 1997 WL 555935; cf. Wit Capital Corp., SEC No-Action Letter, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,577, at 78,906 (July 14, 1999) (seeking assurances that the Securities and Exchange Commission (“SEC”) will refrain from enforcement action where investors participate in public offerings of securities through the Internet), available at 1999 WL 498545.

128. Technically, the roadshow might be a “broadcast” that would count as a prospectus under section 2(10) of the Securities Act of 1933 (the “Act”) but which would not comply with section 10 of the Act, thus violating section 5(b)(1) of the Act. *Id.*

129. See IPONet, SEC No-Action Letter, [1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,252, at 77,271 (July 26, 1996), available at 1996 WL 431821.

130. See 17 C.F.R. §§ 230.505–.506 (2003) (requiring compliance with rule 502(c) of the SEC’s Regulation D (17 C.F.R. § 230.502(c)), which prohibits general solicitation, in order to benefit from the registration exemption safe harbors under rules 505 and 506); Lamp Technologies, Inc., SEC No-Action Letter, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,453, at 78,330 (May 29, 1998) (stating that, without proper restrictions, the posting of private offering materials on a website would constitute a general solicitation and would violate rule 502(c) of the SEC’s Regulation D), available at 1998 WL 278984.

131. Wit Capital Corp., SEC No-Action Letter, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 78,908–09; Net Roadshows, Inc., SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 77,849–50; IPONet, SEC No-Action Letter, [1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 77,272–73.

132. See generally Tamar Frankel, *The Internet, Securities Regulation, and the Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1341–43 (1998) (noting lower information costs and corresponding increase in liquidity due to Internet technology); Lynn A. Stout, *Technology, Transaction Costs, and Investor Welfare: Is a Motley Fool Born Every Minute?*, 75 WASH. U. L.Q. 791, 807 (1997) (recognizing that technology has lowered transaction costs for secondary trading but that this is bad as it decreases investor welfare).

are exclusive; they are socially useful precisely because they are exclusive.

Even websites that do not face such legal constraints may wish to exclude some users. A firm sponsoring a chat room may wish to bar offensive expression or images from the chat room. An auction website may choose not to host auctions for artifacts of the Nazi regime or slavery. Such choices define the practices that constitute the social function and significance of the website. When users know they are going to a chat room that bars racist speech,¹³³ that fact is an important element of what it is that the users are doing by going there rather than a chat room devoted to racist speech.¹³⁴ America Online (“AOL”) posts an extensive set of “web chat rules and etiquette,” covering topics like offensive expression, threats, and topicality, to enforce precisely this point.¹³⁵ As in physical space, the right to exclude gives effect to such choices.

If society chooses not to recognize such a right, then website owners will be less able to define such communities. When all spaces are fair game for everything in general, no spaces are for anything in particular. That might look like diversity at first glance, but it is not any more than would be the case if every space on a campus functioned as a quad.¹³⁶ I doubt that any rule would truly homogenize the Internet,¹³⁷ but treating the Internet as a true commons would probably lessen the diversity of social experience on the Internet.¹³⁸

133. See Joey Gardiner, *AOL Accused of Failing To Halt Racial Slander*, SILICON.COM, at <http://www.silicon.com/news/500016/1/1026988.html> (Aug. 31, 2001) (reporting that AOL runs 14,000 chat rooms and has “zero tolerance” for racist speech).

134. See, e.g., Official Website of the Alabama White Knights of the KuKluxKlan, at <http://www.kukluxklan.net> (last visited Sept. 12, 2003) (dedicating site to Ku Klux Klan materials).

135. See AM. ONLINE, INC., AOL INSTANT MESSENGER WEB CHAT RULES & ETIQUETTE, at <http://www.aol.com/community/rules.html> (last visited Sept. 12, 2003) (containing list of web chat rules and etiquette).

136. See David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 911–17 (1991) (discussing different expressive environments within universities).

137. I concede that website owners might still attempt to devote sites to particular purposes, but there will always be a risk of encountering something inconsistent with what the site is for, as in the case of pornography in the eBay chatroom. That risk alone would affect the way users orient themselves toward the site. It would be as if one chose to go to a tearoom but worried that a barroom discussion would erupt in the middle of tea. If one wanted bar talk, one would have gone to the bar. Some diversity might survive, but the risk introduced by the open access regime would, like any other form of risk, lessen the value of sites that tried to preserve it.

138. Members of the commons could agree among themselves to respect such rights, but that process would be relatively costly, if it worked at all.

For this reason, the risks and costs of error are greater for a rule of mandatory access than for a rule conditioning access on consent. Firms that have the right to exclude, but do not need it, need not use it. Firms that need it but do not have it are out of luck.¹³⁹ No one is stopping any firm from creating a spam-friendly service for users who like spam. But if we are to have some such networks, and some spam-free networks, and thus competition between them, then firms like CompuServe must have the right to exclude spammers.

These same points apply to the internal operations of firms as well as websites. The legal question is how to treat a firm's choice to connect its internal communications network to the Internet. *Hamidi* presented this problem. Intel depicted Hamidi as a disgruntled employee willing to lie to advance his interests.¹⁴⁰ Hamidi's e-mails made arguably incendiary factual assertions to current employees, such as "If you are on redeployment, it is highly likely that you are targeted for termination and there will not be any jobs available for you."¹⁴¹ The California Supreme Court said many employees asked Intel to block further messages, and that the messages "prompted discussions between 'excited and nervous managers' and the company's human resources department."¹⁴²

What should a court do with such a case? One might say the answer depends on whether the workplace should be a public forum for former employees to vent their anger. Venting might disclose malfeasance, or it might needlessly frighten people who in actuality have nothing to worry about. However, this is a case in which the person who gets to decide the question is more important than the decision in any particular case. Whether a judge should decide depends on whether and to what extent a manager's discretion over workplace communications policies should be subject to judicial review. E-mail is a means of communication, and policies and practices pertaining to e-mail

139. See Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 112 (1994) ("If you start from property rights, you can negotiate for free distribution; if you start from an absence of property rights, it is very hard to get to the best solution when a charge is optimal."); Hardy, *Property*, *supra* note 8, at 222 (explaining that the availability of a means for limiting copying is not a "two way street"; specifically, it allows those who wish to restrict copying to do so and it allows those who do not want to restrict copying not to do so, but the "converse is not true").

140. Respondent/Plaintiff Intel Corporation's Answer Brief on the Merits, *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (No. S103781), 2002 WL 1926523, at *8 [hereinafter Intel Response]. Hamidi's reply said only that this fact was irrelevant. Reply Brief on the Merits, *Hamidi* (No. S103781), 2002 WL 1926520, at *10 n.7.

141. Intel Response, *supra* note 140, at *6 (quoting Hamidi's e-mail message).

142. *Hamidi*, 71 P.3d at 301.

constitute part of the communicative environment of the workplace. Just as an employer who permits centerfolds to be tacked up on cubicle walls creates a different environment from one who bans them, an employer who limits employee e-mail use will create one sort of environment, and an employer who does not will create another.

For this reason, the ability to control e-mail practices is an important aspect of the employer's managerial authority over the workplace. If a court defers to a manager's policies concerning the use of a firm's network, the court leaves it to the firm to decide what expressive environment is best suited to its particular workplace. That is the ordinary legal approach to managerial decisions about the use of firm resources, as evidenced by such deferential doctrines as the business judgment rule.¹⁴³ As that rule implies, the law generally counts on labor, product, and financial market competition to constrain managerial discretion in such matters.

If the court limited Intel's discretion, that limitation alone would affect the expressive environment at Intel. Judicial oversight of managerial discretion alters in subtle but fundamental ways the social relationships built on that discretion. For example, suppose employment termination decisions are treated as state actions, so that an associate who objected to being made to write a brief a certain way could bring a free speech claim if she were fired for her refusal. She could then argue to a judge that she was right to insist on writing the brief her way. Even if matters never reached that end game, adding judicial review as a check on the partner's power to dictate the content of briefs would turn every brief writing assignment into a potential bargaining game. Work would suffer, while no First Amendment values would be served.¹⁴⁴

Managerial discretion over the expressive environment of the workplace is sometimes truncated to advance particular values. The ethics rules prevent the associate from lying in the brief and give her leverage to resist if the partner demands that she lie.¹⁴⁵ The hostile workplace environment cause of action provides a closer analogy to the general problem presented in *Hamidi*. An employer who would like to encourage pin-ups and cat-calls at work will find himself in a

143. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 93-108 (1991) (arguing that courts need not actively police corporate decisions because the market influences already serve the policing role).

144. Cf. ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 237 (1995).

145. See MODEL RULES OF PROF'L CONDUCT R. 3.1, 3.3 (1999) (stating that a lawyer shall not knowingly make a false statement).

bargaining game with employees who demand reform, wielding Title VII as leverage.¹⁴⁶

At least prior to *Hamidi*, the same was not true of a firm's policies regarding communication equipment. Employers had discretion over whether employees could use the Internet, whether to block access to certain websites, or whether to block e-mails from certain persons, such as Hamidi. Even after *Hamidi*, employers presumably retain the power to regulate their employees' use of a network.¹⁴⁷ As we have seen, the *Hamidi* opinion tries to duck the normative questions in the case, producing the odd result that employers have the right to do these things but that, at least with regard to blocking incoming e-mail, the law will not help vindicate that right.

Not every court will be so enamored of formalism, however, so the question of whether courts should pass judgment on a firm's communication policies remains. Subjecting general communication policies to judicial review would diminish employers' ability to tailor the expressive environment to the particular job at hand. That would be unfortunate, because different environments work better in different contexts, and employers have better information about their workplaces than do busy generalists like judges. Unlike judges, employers both bear the costs of erroneous decisions and negotiate with employees who, if they favor Hamidi-like spam, may demand that the employer allow it.

Judicial incursion on managerial authority might be warranted if there were significant free speech interests at stake, as Hamidi argued,¹⁴⁸ but there are not. Doctrinally that argument is awkward. The First Amendment gives speakers no right to subsidies or to use the property of others.¹⁴⁹ Nor does the First Amendment create a general free speech right within the workplace—not even for government

146. See, e.g., Miranda Oshige McGowan, *Certain Illusions About Speech*, 19 CONST. COMMENT. 391, 404 (2002) (describing elements of cause of action and cases interpreting them).

147. *Hamidi*, 71 P.3d at 299 (noting that Intel “permits its employees to make reasonable nonbusiness use of this system” (emphasis added)).

148. Opening Brief on the Merits, *Hamidi* (No. S103781), 2002 WL 1926521, at *43–47 (arguing that the injunction against him is a “state action that must comply with the free speech guarantees of the California and United States Constitutions”).

149. See, e.g., Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (concluding that a public television station did not violate the Constitution in excluding a third-party candidate from a televised debate); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a newspaper's refusal to print a letter to the editor did not violate the First Amendment); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (determining that a shopping mall had right to prohibit distribution of handbills on mall property); Adderley v. Florida, 385 U.S. 39, 47–48 (1967) (opining that civil rights protestors did not have a right to protest on prison property).

employees.¹⁵⁰ Even if it did, those rights could be waived as a condition of employment.¹⁵¹ With such paltry free speech rights within the employment relationship (none if the state action requirement is taken seriously), it is hard to justify a right for non-employees to speak within that relationship.

More fundamentally, there are good reasons why free speech rights do not limit managerial discretion within the employment relationship. Content regulation is both necessary and unobjectionable when the purpose and social function of expression is to achieve something other than the type of deliberation and debate the First Amendment tries to foster.¹⁵²

Different expressive environments are constituted differently. Regulations affect them in different ways. Not all workplaces are or should be public forums.¹⁵³ Courts should not presume to the contrary as a premise for extending into workplaces the free speech jurisprudence of the street corner.

To the extent that any aspect of free speech theory is relevant to cases such as *Hamidi*, it is that the First Amendment cares about the social meaning of speech, which is the product of both the expressive conduct at issue and the social contexts in which it occurs.¹⁵⁴ As noted at the beginning of this Part, the right to exclude plays an important role in constituting different expressive contexts. Thus, if anything, free speech values weigh in favor of giving private parties discretion to form different contexts that support a wide variety of expression. As we have seen, that means such values weigh in favor of granting site owners the right to exclude rather than in favor of a mandatory access rule.

150. See, e.g., *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Unbehre*, 518 U.S. 668, 673 (1996) (discussing the balancing test applied to speech claims by government employees and extending test to independent contractors); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985) (holding that a federal funding campaign was not a public forum, and charity seeking to be included in the campaign could be rejected on grounds of workplace efficiency); *Sheppard v. Beerman*, 317 F.3d 351, 352 (2d Cir. 2003) (affirming summary judgment rejecting First Amendment claim of a fired law clerk).

151. See *Snapp v. United States*, 444 U.S. 507, 510 (1980) (holding a CIA agent liable for breaching a contractual duty not to disclose information).

152. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (arguing that free-speech rights are limited within the managerial domains of the government).

153. McGowan, *supra* note 146, at 448.

154. David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. (forthcoming December 2003).

IV. THE CASE FOR CONSENT

The previous sections demonstrate that access cases present a fundamental normative choice between property and liability rules. This Part argues that website access is better governed by a property rule than a liability rule. To justify this position, this Part examines the case for open access.

A. *Mandatory Open Access*

One normative argument is that website owners should not be able to bar users from websites, or portions of websites, because the website owner chose to connect to the Internet. The fundamental premise of this argument is that the Internet is a social domain constituted by a norm of open access to the networks connected to it and to content or persons on those networks. It is a commons.¹⁵⁵ To connect to the network is to assent to that norm and place one's website in the commons.¹⁵⁶ A related idea is that it is unfair for websites to free ride on the network while withholding their content or bandwidth from network users.¹⁵⁷

For many thoughtful scholars who care deeply about the Internet, this premise is an irreducible truth. It is a statement of what the Internet *is*, and therefore how the law must treat it.¹⁵⁸ For now, I will merely point out that there is nothing *inherent* in the Internet that makes this premise true, just as there is nothing *inherent* in real property or chattels that entitles an owner to an injunction. Whether the Internet will be governed by open access is a choice.

The first thing to notice about the open access argument is that the consent idea is just rhetoric. As applied to owners who agree to open access, it is unnecessary. As applied to owners who disagree with open access, it is a fiction. Whether it is a good fiction depends on how it is used. Shedding the consent rhetoric allows us to focus on the premise that the Internet is a commons. If that premise is accepted, the argument is sound, and the cases we have examined are wrong.

155. See, e.g., Ken Hamidi, Ken Hamidi's Message, at <http://www.faceintel.com/hamidimessage.htm> (last visited Sept. 12, 2003) (describing the Internet as a public domain and a commons, and suggesting that persons working for firms connected to the Internet were, to that extent, "Netizens" rather than mere employees).

156. We saw a version of this argument rejected in *CompuServe*. See *supra* notes 36–53 and accompanying text (explaining the *CompuServe* case).

157. See Burk, *supra* note 2, at 51 ("[P]ropertization in a networked environment encourages the holder of the exclusive right to attempt to free ride upon the external benefits of the network, while at-will avoiding contribution of such benefits to others.").

158. E.g., Burk, *supra* note 2, at 47–48 (arguing that public benefits of the Internet are diminished by propertization); Elkin-Koren, *supra* note 2, at 171 ("[T]he high hopes raised by cyberspace for changing the information landscape require open access.").

The open access premise is flawed, however. It is too broad to accommodate exclusions that obviously enhance welfare, and it provides no basis for distinguishing among materially different cases. It produces only a binary choice with extreme variance between the two options: either you do not connect to the Internet at all, or everyone with a connection may do what they want on your website.

For example, nothing in this argument justifies a rule allowing owners to prevent access to their websites with passwords. Such websites would free ride on the network as much as any other.¹⁵⁹ Indeed, nothing in this argument allows e-commerce sites to encrypt personal financial information from customers. These implications are disturbing, to say the least. The problem is that the commons argument leans so heavily toward the interests of the community, it leaves no room for those owners to decide for themselves how to structure access to their website. The result is a conventional example of strong communitarianism trumping private interests.¹⁶⁰

Having done away with password protection and privacy, we have only physical harm to the network to consider. I will argue that a website owner should not have to show harm to exclude others. Because the prevailing academic critique of the trespass to chattels doctrine has focused on physical harm, however, I consider here how the commons view deals with harm.

Nothing in the open access argument provides a reason why a user who causes harm to the computers that run a website should have to pay for it. To the contrary, the argument supports, if it does not entail, a privilege to use websites regardless of harm. If the computers become part of a common by connecting to a common, by what logic does a single private party have a right of action if the computers are harmed in the common? Does physical harm to computers count just because the *Restatement* says it counts? Is there no normative principle at issue?

I know of no one who actually defends this view, though neither do critics of the trespass tort make any effort to distinguish on normative grounds physical harm to computers from economic harm to a firm. To the contrary, they criticize courts for taking economic harm into account

159. See Burk, *supra* note 2, at 47–51 (pointing out disparity when a site requires a password but itself free rides on the network).

160. Cf. Amartya Sen, *Personal Utilities and Public Judgments: Or What's Wrong with Welfare Economics*, 89 *ECON. J.* 537, 544–45 (1979) (arguing that only the ordinal properties of the individual utility functions are to be used in social welfare judgments); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 *J. POL. ECON.* 152, 152 (1970) (stating that there is a tension between supporters of the “majority decision” perspective and the concept of “individual liberty”).

where physical harm is lacking.¹⁶¹ Nevertheless, to take the argument in its strongest form it is best to modify the premise of the open access argument to take harm into account. The revised argument would rest on the premise that the Internet is a social domain constituted by a norm of open access to users and uses that do no harm to content and networks connected to it. It is a commons subject to a harm principle. To apply the argument to concrete cases, we now must define harm in a way that explains why persons who cause it should bear its cost.

Defining harm is hard. The open access argument offers no way to define it, and there is no neutral, objective baseline from which to measure it. Instead, what counts as “harm” depends on baseline entitlements of owners and users, which cannot be taken for granted in defining harm. If one accepts the proposition that firms are entitled to own their productive resources outright, free from unwanted use, then the free riding of Cyber Promotions and Bidder’s Edge count as harm. One may reject that proposition, of course, but unless the only logic at hand is the process of elimination, to reject one rule is not to supply an argument in favor of another.

The open access argument provides no basis for distinguishing between economic harm involving server crashes, which trespass to chattel critics seem to regard as harm, and economic harm such as that at issue in *CompuServe* or even the opportunity cost (under a property rule) present in *eBay*. Normatively, the distinction makes no sense. The risk of crashing relates inversely to site or network capacity. Capacity is costly. Firms that spend money to build excess capacity, and whose computers thus face only a low risk of crashing, will have less control over their investment than firms with barely enough capacity to get by; those firms could argue that unwanted use took up a relatively high percentage of their available resources. In other words, the notion that only crashing is harm gives weaker rights to firms that have high costs than to those that have low costs, even though the high-cost firms have a greater need to cover their costs, which the right to exclude might help them do.¹⁶²

Against what I said in this section, it might be argued that the implications I discuss are straw men. No one is actually trying to force password-protected websites to open up or to disclose consumer

161. Burk, *supra* note 2, at 36. “The Restatement test clearly speaks in the first instance to the impairment of the chattel” rather than a business run by the chattel. *Id.* (emphasis omitted).

162. It is not enough to say that only server crashing counts because only physical harm supports a lawsuit. The normative question at hand is what kind of harm should support a lawsuit.

financial information. That is true, but the question is: Why not? If the argument discussed in this section is sound, then it compels these conclusions. That serious people shy away from these conclusions suggests the argument is unsound.

B. Why the "Take the Bitter with the Sweet" Position Is Unpersuasive

As a fallback from the open access argument, one might say password-protected websites have chosen to remain "closed," and therefore imply nothing about websites like eBay, which have chosen to be "open." This idea implies that a website may be closed or open, and it even may have some closed areas (as for storing financial information) and open areas (as for shopping). But to the extent it is open, it must be open to all. It cannot be open only to the persons or uses the website owner favors.¹⁶³

This fallback position suffers from three flaws. The first is that it cannot be justified by consent because its view of consent is a fiction. It is true that password-protected websites have chosen to be "closed" and eBay has chosen to be "open." It is also true that eBay has chosen to be open subject to certain terms. Reasons must be given to disregard *that* choice while respecting the choice of password-protected websites to remain "closed." Such reasons cannot be derived from utilitarian analysis, which values bargaining because actual consent serves as a proxy for the parties' view of the net welfare effects of transactions among them.¹⁶⁴ It is inconsistent with utilitarian methodology to substitute a fiction for the parties' expressed preferences.

163. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 170 (2001) ("No one forced eBay to open itself to the World Wide Web. But if it did, it should live by the [open access] norm.")

164. This is also true of a related argument, which holds that in responding to queries, hardware "consents" to the request and "gives" away the requested page. See Burk, *supra* note 2, at 42; O'Rourke, *Analogy, supra* note 12, at 590. The *Hamidi* court made a particularly notable mistake on this point when it said the "undisputed evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and *intended* operation." Intel Corp. v. Hamidi, 71 P.3d 296, 303 (Cal. 2003) (emphasis added). This argument makes an error that disables utilitarian analysis. The automatic response of a piece of hardware does not reflect anyone's perceptions of welfare in a particular case. It therefore cannot measure welfare for purposes of utilitarian analysis of that case. In this regard, it is telling that the *Hamidi* court made no effort to specify whose intentions it had in mind, nor why they counted. It could not have meant Intel's intentions in the case at hand, because Intel wanted Hamidi to stop sending messages to its network. It might have meant to refer to Intel's intentions in general, but the court gave no reason why general intentions should trump Intel's intentions in particular cases. Worse yet, the court might have meant to invoke the intentions of the firms that built the hardware to support the idea that, in transmitting Hamidi's e-mails, the computers just processed data, which is what they were built to do. That approach drives welfare analysis even farther away from the case at hand, to the point where the identity and conduct of both parties is essentially irrelevant.

The second flaw is that to concede that owners may password-protect websites is to concede that, at *some* level, the law should grant website owners a right to exclude. Password protection is not the private creation of a right; no protected website has bargained with all potential users and obtained their agreement to keep closed.¹⁶⁵ The only remaining question is whether the law should require password protection as a condition of recognizing the right to exclude, or whether it should recognize that right when “open” websites object to particular uses.¹⁶⁶

We cannot measure precisely the welfare effects of these options.¹⁶⁷ We can say, however, that website owners have little or no incentive to exclude uses that produce net benefits.¹⁶⁸ That is why, even after cases like *eBay*, sites complain about not getting noticed rather than about being browsed.¹⁶⁹ It is why they pay search engines to promote them.¹⁷⁰ It is why, even though all but one court to face this issue between 1997 and 2003 extended the trespass tort to allow owners to regulate access to websites,¹⁷¹ and even though the major search engines can and do skip websites that ask to be skipped,¹⁷² predictions that giving websites a right to exclude would undermine the benefits of

165. In addition to which, if website owners do not have a right to exclude persons from their websites, then they have no consideration to give in return for subscribers' payment. A person who accesses a protected website without consent or payment has no contract. If they are to be excluded—which they must be for bargaining to work generally—the law must recognize in the website owner a right to exclude.

166. This implication is consistent with my earlier point that the state should enforce interests it deems worthy of recognition when parties cannot enforce those interests themselves. Otherwise, one's rights depend on such ethically trivial characteristics as physical strength or hacking ability.

167. Regarding the measurement problem, *see infra* Part IV.C (describing how actual measurements of the marginal utility effects of different legal rules are exceptionally difficult).

168. *See infra* Part IV.C (detailing the measurement problem specifically).

169. *See* Elkin-Koren, *supra* note 2, at 190 (worrying that trespass rights would “allow every site owner to control the way its site is referred to and indexed” while acknowledging that “[m]ost sites, however, are unlikely to exercise such a right since they are highly dependent on search engines for reference”). I find the latter statement persuasive and believe it ameliorates substantially the worry of the former.

170. *See, e.g.*, GOOGLE, INC., GOOGLE ADVERTISING, at <http://www.google.com/ads/overview.html> (last visited Sept. 12, 2003) (describing Google's “premium sponsorships” program); *see also* John Markoff & G. Pascal Zachary, *In Searching the Web, Google Finds Riches*, N.Y. TIMES, Apr. 13, 2003, § 3, at 1 (describing Google's revenue model), available at LEXIS, News Library, The New York Times File.

171. *See* cases cited *supra* note 11 (extending trespass to chattels doctrine). The exception was *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. 2000).

172. *See infra* notes 193–94 and accompanying text (noting that leading search engines will respect standardized instructions posted on websites that limit automated browsing).

electronic commerce have not been borne out.¹⁷³ None of the scholars who warned of dire harm from extension to the trespass tort, and whose work the *Hamidi* court cited,¹⁷⁴ pointed to any harm that such rulings had caused in the several years in which courts had extended the tort.

Because real-world experience tends to falsify such conjectures, the harms they predict should be discounted at a high rate.¹⁷⁵ The net expected cost of recognizing a right to exclude for “open” websites is therefore probably very low.¹⁷⁶ The only benefit from a rule requiring websites to “close” as a condition of recognizing a right to exclude is that the rule would avoid this expected cost. That means the gain (cost

173. See Brief of Amici Curiae in Support of Bidder's Edge, Inc., *supra* note 94, at 3–6 (stating the reasoning employed in that case “may have disastrous implications for basic types of behavior fundamental to the Internet”). In deciding not to extend the trespass tort, the *Hamidi* court cited predictions of harm in an amicus brief filed by many of the same intellectual property professors who submitted a similar brief two years earlier in *eBay*. *Intel Corp. v. Hamidi*, 71 P.3d 296, 310–11 (Cal. 2003). These predictions seemed to be based on the premise that the lower court ruling in *Hamidi* would require all users to obtain *advance* consent before *any* use of a site. Brief of Amici Curiae in Support of Bidder's Edge, Inc., *supra* note 94, at 12–13. The lower court in *Hamidi* did not say that, however. Instead, it rejected the assertion that extending the trespass tort implied that “every personal e-mail that an employee reads at work could constitute a trespass.” It held that “*where the employer has told the sender the entry is unwanted and the sender persists, the employer's petition for redress is proper.*” *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 250 (Ct. App. 2001) (emphasis added), *rev'd*, 71 P.3d 296 (Cal. 2003). Nor did precedent support such a position. The *CompuServe* court addressed the issue squarely and held that consent could be presumed when an owner connected a server to the Internet, but that the presumption could be rebutted by actual notice to a user. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 2d 1015, 1023–24 (S.D. Ohio 1997). Most of the cases following *CompuServe* involve defendants who persisted in uses to which an owner objected even after the owner notified the defendant of the objection, see *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 WL 1736382, at *2 (N.D. Cal. Dec. 6, 2001); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1063 (N.D. Cal. 2000); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 549 (E.D. Va. 1998), or in which the defendant does not deny that it had notice of the policy it violated, see *Register.Com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 448 (E.D. Va. 1998) (noting steps defendant took to elude AOL filtering software). Finally, as Justice Mosk pointed out in his dissent in the supreme court's *Hamidi* decision, the formalism of the trespass critique would allow a cause of action if a computer were harmed even though a user would have no way of knowing in advance whether the marginal effect of his or her use would be too much for the computer. *Hamidi*, 71 P.3d at 331 (Mosk, J., dissenting). Thus, the claim the amicus brief conceded could be made presented the very risk of liability without notice that this argument decries.

174. *Hamidi*, 371 P.3d at 310–11.

175. Indeed, if critics of the trespass to chattels doctrine are willing to tolerate password-protected sites, they must explain why society should accept the risk that all sites will choose that option, producing the harms they predict from cases such as *eBay*. I suspect the answer is that everyone knows most websites will not choose that option. Owners go on the Internet to get noticed; commercial websites make their living that way. They have no incentive to make it harder for people to find them. The incentive to make access easy does not change if we allow exclusion without password protection.

176. I say net costs because while excluding uses will always be a cost to the excluded user, exclusion might produce a net social gain by avoiding the costs of the use.

avoided) from such a rule would be low. The cost of such a rule would be the sum of very small transaction costs spread over perhaps millions of users. Each user would incur a small cost, in other words, to keep out a free rider like Bidder's Edge. It is hard to estimate that sum, but it is probably high relative to the small benefit of the rule. Utilitarian analysis would reject the rule as wasteful.¹⁷⁷

Third and finally, "take the bitter with the sweet" statements are not arguments. There is no *logical* difference between "If you want to exclude people, then password protect" and "If you want tenure, vote Republican." That is because neither statement has any analytical content at all. Unless additional propositions explain *why* one must take the bitter to get the sweet, and why imposition of the bitter is normatively acceptable, such statements have no analytical value. Without more, such statements are simply positions that, when adopted, reflect only the power to adopt them.

Here, the power comes from the cost that sites would incur if the law forces owners to make access for all users more costly in order to stop a particular user like Hamidi or Bidder's Edge. If one assumes that use relates inversely to the cost of use, such as remembering and entering passwords, then the prospect of avoiding that cost would serve as leverage in favor of open access if we adopted the "bitter with the sweet" position as law. Requiring sites to password protect when they would prefer to be open to most uses would limit the ability of site owners to tailor access to the costs and benefits of particular uses. That might benefit users, but it presumably makes site owners worse off, so it would generate no predictions about net welfare without more precise calculation. By limiting the parties' ability to align their estimates of the welfare effects of their interactions, the relatively crude "bitter with the sweet" rule would therefore probably produce lower net welfare than a rule that left the parties freer to bargain over different uses.

C. A Simple Utilitarian Position and Problems of Measurement

Rather than arguing for mandatory access as such, one might advance a simple utilitarian position: The rule governing access should be the rule that produces the greatest net welfare in society. If courts employ a hedonic utilitarian approach,¹⁷⁸ they would not have to define harm;

177. See O'Rourke, *Analogy*, *supra* note 12, at 616 (noting (without necessarily endorsing) the argument that "[r]equiring a site to build a fence to keep out unwanted visitors is simply a waste of resources").

178. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 5–6 (Harvard Law Sch. ed., 2003), for a distinction between a simple and hedonic utilitarian approach. For Bentham's description of utility, see Jeremy Bentham, *Introduction to the Principles of Morals*

rather, harm is whatever people experience as harm, and gains are whatever they experience as gains.

Stated so abstractly, the utilitarian goal will not decide actual cases. On the Internet, there are millions of different situations involving millions of types of utility and disutility going on every minute. No one has the data necessary to sum gains and losses from different rules, certainly not busy generalists like judges.¹⁷⁹ One can think of particular cases in which losses from an open access regime would exceed gains, of course. If the open access rule extended to personal financial information stored on e-commerce websites, the losses to society would exceed the gains. There would be a quick burst of rampant theft, followed by an enormous round of transaction costs to cancel and reissue credit cards, followed by the collapse of such websites.

The problem lies in aligning that example with a normative principle that justifies it. If we decide it would be ridiculous to extend the open access norm to websites that pitch exempt offerings or to encrypted financial data, then we know we should reject premises that compel such results. We do not know from this analysis what premises to put in their place. When it is used to justify the result, rather than as a step in an argument, the statement, "*Of course* it's OK to encrypt and password protect personal financial data, you fool," is the analytical equivalent of "because."

Setting aside external ethical critiques, the problem of utilitarianism is the problem of measurement. It is easy to employ the rational actor assumption to support consequentialist conjectures. One might say that granting website owners the right to exclude will produce an anti-commons nightmare, or that granting users a right of access will increase both allocative and dynamic efficiency. Theories are not measurements, however, and they therefore do little to satisfy the utilitarian requirement that costs and benefits be summed. Actual measurements of the marginal utility effects of different legal rules are exceptionally difficult. Problems in the real world must be solved using presumptions and heuristics that relate human behavior to expected welfare effects.

and *Legislation*, in JOHN STUART MILL, UTILITARIANISM AND OTHER WRITINGS 33–35 (Mary Warnock ed., 1962).

179. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (disclaiming knowledge of marginal effects of rules); Easterbrook, *supra* note 139, at 104.

D. *The Case for Consent*

The case for consent rests on the presumption that bargaining over resources produces results that more closely approximate the optimal utilitarian regime than any other method of decision, such as litigation. The underlying behavioral assumption is that persons act rationally; the logical extension of that assumption as regards net welfare is the Coase theorem.¹⁸⁰ The legal extension is that courts should favor property rules where transaction costs are low and liability rules where they are high.¹⁸¹

Briefly, the argument is as follows: actions have both costs and benefits, and rigorous analysis must consider both. The rational actor assumption implies that if parties reach a voluntary and informed bargain, then both parties are better off than they would have been without the bargain.

On this account, if certain conditions are satisfied, such as that the transaction is bilaterally voluntary and informed and occurs in a reasonably competitive market, bargains provide a crude measure of the sum of utility (though not the distribution of gains) in the transaction.¹⁸² They therefore satisfy the utilitarian criterion better than top-down consequentialist theorizing, which generates predictions rather than even the very crude measurements derived from bargains. Conversely, if persons in such circumstances can bargain but do not reach an agreement, we may infer that the joint gains from trade were not enough to leave each side better off.¹⁸³ That idea suggests courts might reduce net welfare if they either compel dealing between parties who are able to bargain but have not reached an agreement or allow one party to take and use a resource, for which use the court will later try to fix a price.¹⁸⁴ These propositions support the general conclusion that bargains produce higher expected net utility than compulsory dealing.

180. See COASE, FIRM, MARKET AND LAW, *supra* note 8, at 95 (arguing that in the absence of transaction costs bargaining produces socially optimal results); COASE, STRUCTURE OF PRODUCTION, *supra* note 8, at 10–11.

181. Calabresi & Melamed, *supra* note 8, at 1092; see also Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 10–14 (2002) (containing a survey of recent related literature); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (arguing the proponents of liability rules in IP “carry a heavy burden”).

182. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 7 (1993); see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 29–30 (1992).

183. EPSTEIN, *supra* note 123, at 219–20.

184. *Id.*

Institutional considerations support this point as well. Contracting places decisions in the hands of persons actually affected by bargains, who have relatively good information and who bear the costs and reap the benefits of the decisions. It aligns benefits and the costs necessary to create them and internalizes at least some effects of different behaviors. It avoids the uncertainty and cost of ex post facto damages determinations by persons such as judges, who have less reliable information than contracting parties and who do not bear the costs or enjoy the gains of their decisions.¹⁸⁵

E. Why Traditional Arguments Against Bargaining Do Not Undermine the Case for Consent

As an alternative to bargaining, one might favor a damages rule, which would allow persons to use property without permission and settle up through damages after the fact if they have caused enough damage to make settling up worth the effort.¹⁸⁶ Such considerations may persuade courts to modify even conventional trespass to land doctrine into a quasi-nuisance regime, requiring a plaintiff to show damages as a condition to obtaining relief.¹⁸⁷ The case for damages leans heavily on defects that might render bargaining an unreliable proxy for the welfare effects of certain actions.

A familiar argument against a property rule and in favor of a liability rule is that transaction costs might preclude bargaining.¹⁸⁸ If bargaining is too expensive, it makes no sense to rely on it to allocate resources. Some scholars worry that recognizing property interests will lead to a tragedy of the anti-commons, where there are so many conflicting

185. See, e.g., Calabresi & Melamed, *supra* note 8, at 1093 (providing a framework for determining entitlements); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350, 355–56 (1967); (comparing the ability of private and communal ownership to internalize costs and benefits); Hardy, *Property*, *supra* note 8, at 231; James E. Krier & Stewart M. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 453–54 (1995) (containing a comparative institutional analysis); Merges, *supra* note 181, at 2655 (arguing that costs analysis from property law does not apply to intellectual property rights).

186. See Demsetz, *supra* note 185, at 348–49; Krier & Schwab, *supra* note 185, at 453–54 (noting those who ignore uncertainty regarding damages yet acknowledge bargaining difficulties).

187. See *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 792 (Wash. 1985) (worrying that giving all downwind homeowners a potential property rule as against a polluter would lead to costly strategic negotiation, and therefore limiting potential recovery in tort to plaintiffs who had suffered “actual and substantial damages”). The court in essence converted the property rule of trespass into a liability rule because of the quite reasonable fear that transaction costs would prevent the property rule from achieving an efficient result.

188. Burk, *supra* note 2, at 49 (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998)).

property interests that transacting becomes too costly and breaks down, with the result that nothing gets done.¹⁸⁹

There is no reason to believe transaction costs justify a damages rule in the types of cases we have examined. None of those cases presents a problem of prohibitive transaction costs.¹⁹⁰ In each of the cases save *Thrifty-Tel*, bargaining was possible. In *eBay*, bargaining occurred. It broke down not because transaction costs were too high, but because the parties disagreed on the substantive terms. That is not market failure.

There is no reason to expect transaction costs to be prohibitively high in such cases in the future.¹⁹¹ As to human interactions, search costs will be lower, and there will be no need to hunt for parking or wait in line.¹⁹² As to automated searches, “robots” may be instructed to obey standardized instructions posted on websites, which give website owners a way to limit automated browsing while allowing robots to index hundreds of millions of webpages at a trivial cost.¹⁹³ The leading search engines, Google, Yahoo!, and Alta Vista, respect such instructions.¹⁹⁴ Internet technologists developed this protocol on their own because they recognized its utility for themselves; it is not a lawyers’ scheme.¹⁹⁵

189. *Id.*

190. *Cf. Bradley*, 709 P.2d at 791 (modifying elements of the trespass cause of action to avoid costly squabbling about smokestack emissions).

191. *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000); *see also* LUIS GARICANO & STEVEN N. KAPLAN, THE EFFECTS OF BUSINESS TO BUSINESS E-COMMERCE ON TRANSACTION COSTS (Nat’l Bureau of Econ. Research, Working Paper No. 8017, 2000) (concluding the Internet offers potentially large efficiencies in the form of net reduction in transaction costs); Hardy, *Property*, *supra* note 8, at 236–37; O’Rourke, *Shaping Competition*, *supra* note 12, at 2004–05 (cautioning, however, that transaction costs might be more significant than appears to be the case at first glance).

192. Verification costs on non-fungible goods, such as with clothing sizes, might be higher, however.

193. *See* Martisin Koster, A Standard for Robot Exclusion, at <http://www.robotstxt.org/wc/norobots.html> (last updated June 1994) (setting forth standards for robots).

194. *See, e.g.*, ALTAVISTA CO., ADDING AND REMOVING URLS para. 16, at http://addurl.altavista.com/help/search/faq_web#17 (last visited Sept. 27, 2003); GOOGLE, INC., I NEED MY SITE INFORMATION REMOVED, at <http://www.google.com/webmasters/3.html#removed> (last visited Sept. 27, 2003); YAHOO! INC., HOW DO I STOP YAHOO! FROM CRAWLING MY WEB SITE FOR YAHOO! PRODUCT SEARCH?, at <http://help.yahoo.com/help/us/shop/shop-59.html> (last visited Sept. 27, 2003) (describing process for excluding sites from searches); *see also* GOOGLE, INC., GOOGLE TERMS OF SERVICE, at http://www.google.com/terms_of_service.html (last visited Sept. 27, 2003) (prohibiting automatic querying).

195. *See* Koster, *supra* note 193 (explaining that the standards were arrived at by a consensus of those with an interest in robots). That search engines actually adhere to the robot exclusion protocol calls into question the assertion that there is a norm of open access. *Cf. LESSIG, supra* note 163, at 170 (explaining that the World Wide Web was created to provide open access to all users). One could as well say there is a norm that users will respect instructions to skip a site, in

For these reasons, generalized statements asserting that transaction costs on the Internet are “high,” or that recognizing a right to exclude at the website level would create an anti-commons problem, should be viewed skeptically. Actual practice contradicts them.¹⁹⁶ Scholars, judges, and legislators should view with particular skepticism the idea that search engines would suffer if the law required them to do what at least the leader is doing already.

This point also applies to a particular type of transaction cost—the holdout problem. The version of that problem relevant here occurs when a project requires the cooperation of all concerned in order to proceed.¹⁹⁷ The worry is that bargaining will break down because each person will want to be the last to sign up in order to have the most leverage to obtain a disproportionate share of the gains from the project as a whole.¹⁹⁸ None of the trespass to chattel cases presents such a problem because none of the cases requires unanimous or even general cooperation regarding access to particular websites.

That is why access cases differ from particulates trespass cases, in which the doctrines of trespass to land and nuisance have largely merged.¹⁹⁹ Particulates cases involve a defendant “pushing” particulates over a wide area with many potential plaintiffs. If each plaintiff had a property right to stop any incursion, the defendant would have to bargain with all potential parties to begin any operations. The numbers of potential parties might be high. Because the consent of all parties would be necessary, holdout problems would be severe. These facts present a classic case for a liability rule because transaction costs prevent bargaining.²⁰⁰

which case the norms support owners such as eBay rather than norm-violating users such as Bidder’s Edge.

196. See *supra* text accompanying notes 180–184 (arguing that bargaining more closely attains an optimal utilitarian regime).

197. See Burk, *supra* note 2, at 49 (mentioning the holdout problem as a potential risk). A different version of the problem involves bilateral monopoly, which is not present in any case we have considered. *But see* eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (coming closest to the problem but where bargaining had occurred).

198. EPSTEIN, *supra* note 123, at 133 (applying the laws of trespass to a detailed illustration of “cattle trespass”).

199. See *supra* note 113 (describing the convergence of trespass to land and nuisance doctrines).

200. Demsetz, *supra* note 185, at 357. I say classic case because courts and academics tend to favor a liability rule in this situation. See Krier & Schwab, *supra* note 185, at 450–51. By saying this is the “classic” case, I do not mean to say it is a “conclusive” case. See *id.* at 454–55 (noting that the preference for liability rules where transaction costs are high “[m]akes no sense” because the same facts that impair bargaining impair damage valuations).

In contrast, on the Internet, users make discrete choices to visit particular websites. Websites deal bilaterally with individual users all the time. Website interactions do not require unanimous or even widespread consent; that is why eBay could reach agreements with other search engines while refusing to consent to Bidder's Edge's demands.²⁰¹ When users come to websites one at a time, the holdout problem does not preclude bargaining. This point applies to search engines as well. Leading search engines read robot.txt files and skip websites that do not want to be searched.²⁰² This practice does not prevent them from searching websites that welcome the publicity. The prediction that individual exclusion of websites will create a search engine anti-commons is at odds with current practice. Internet interactions present a different transaction cost structure than smokestack pollution or broadcasting or the distribution of electricity,²⁰³ and the difference in transaction costs justifies different rules.

A different objection is that if transaction costs are so low, then the difference between property and liability rules does not matter.²⁰⁴ Critics of the trespass doctrine have not raised this argument, but there is something to it. In the extreme case of zero transaction costs, the Coase Theorem suggests the choice of rule does not matter.²⁰⁵ I have said only that costs are low, however, not that they are zero. Holdout problems would be severe if all concerned tried to create property rights through collective bargaining, so it is better to assign them to the owner in the first instance.²⁰⁶

In addition, even very low transaction costs do not imply that litigation approximates the social optimum as well as bargaining. Judges get their information from parties, so in virtually all cases they *cannot* have better information about a party's situation than the party itself. A judge might synthesize information to get a clearer picture of the whole situation than either party has, but that is very unlikely. Neither party has an incentive to tell the unvarnished truth. Instead, parties spin their stories through lawyers, who might not understand the facts very well to begin with, and who are in any event trying to win. It

201. *eBay*, 100 F. Supp. 2d at 1062, 1068.

202. See *supra* notes 193–94 (describing how sites can be excluded from searching).

203. Burk, *supra* note 2, at 34 (illustrating situations of “trespass by electrons”).

204. See Krier & Schwab, *supra* note 185, at 448, 455 (noting irrelevance of initial assignment of rights when transaction costs are zero).

205. See COASE, FIRM, MARKET AND LAW, *supra* note 8, *passim*.

206. Krier & Schwab, *supra* note 185, at 449. As noted earlier, this is what courts actually tend to do.

follows that, most of the time, judges will have much worse information than either party or both parties put together.²⁰⁷

For these reasons, to the extent judges interject themselves into the substance of bargaining, they will tend to lessen the degree to which bargaining reflects the parties' estimates of the costs and benefits of uses. That is a cost that counts in utilitarian analysis. While judges can do some good, these considerations justify skepticism regarding judicial intervention.

A different objection puts judges in a slightly better light. It is that bargaining will not achieve optimal results because it will not account for the value of positive (network) externalities.²⁰⁸ At the network level, the social value of the Internet increases with the number of persons who use it and post content on it.²⁰⁹ Network-wide coordination is necessary on some issues, such as communication protocols.²¹⁰ Access to particular content on particular websites is not one of those issues, however.²¹¹

In some data harvesting cases, there probably are positive effects the parties cannot internalize. The nature and magnitude of those effects depend on how the data are used. The cases to date do not show that the externality concern justifies a damages rule, however. As noted earlier, owners, especially retailers and auctioneers, go on the Internet in the first place to take advantage of the lower search and transaction costs it offers. That is why they pay search engines to sponsor links or "bias" results.²¹² Owners have every incentive to invite browsing that

207. See generally STEVEN GILLERS, *THE REGULATION OF LAWYERS* 404–05 (6th ed. 2002) (excerpting MARVIN E. FRANKEL, *PARTISAN JUSTICE* 11–19 (1980)). Frankel says that, in litigation,

the deciders, though commissioned to discover the truth, are passive recipients, not active explorers. They take what they are given. They consider the questions raised by counsel, rarely any others. . . . The judges and jurors almost never make any inquiries on their own, and are not staffed or otherwise equipped to do so. The reconstructions of the past to be given in the courtroom are likely to be the sharply divergent stories told by partisans, divergent from each other and from the actual events supposed to be portrayed.

Id. at 405 (quoting Frankel).

208. The reason is that, where parties to bargaining cannot capture all the value created by the bargain, they will have too little incentive to bargain. Thus, net utility might be higher under a regime of compulsory access than under a regime of bargaining.

209. Burk, *supra* note 2, at 48 (arguing against over-propertyization of the Internet).

210. See A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 778 (2003) (containing an excellent overview).

211. See O'Rourke, *Analogy*, *supra* note 12, at 616 (discussing the difference between access to the network itself and access to individual sites).

212. Michael D. Smith, *The Impact of Shopbots on Electronic Markets* 5 (Sept. 2002) (noting that "[i]n late 2000 and early 2001 most shopbots migrated to biased listings where retailers can

produces *net* gains.²¹³ The expected cost of a property rule is therefore low.

Professor O'Rourke argues that websites might refuse to be browsed to preserve market power or for other socially undesirable reasons.²¹⁴ At first glance it seems odd that a website would try to preserve market power by decreasing traffic to the site, thus lowering the number of transactions in which it could engage. Professor O'Rourke suggests, however, that brand loyalty or other factors might cause consumers to forgo comparison shopping, even though comparison shopping on the Internet is relatively cheap even in the presence of some market power. If that is the case, a site might have an interest in keeping its prices off aggregator websites, on which consumers could more readily compare prices across firms.²¹⁵

As with the transaction cost argument, there is in theory a case in which this objection could be true. Market power implies that a firm could charge prices above the competitive level. If it were doing so, that might give it a reason to avoid dispersion of its prices, so long as the gains from sales at prices above the competitive level exceeded losses from sales not made because consumers did not find the website. I do not know how often that will be the case, if ever.²¹⁶

Of the cases to date, only *eBay* involves a site with a plausible claim to market power, and there was no evidence that eBay tried to leverage that power in welfare-reducing ways.²¹⁷ eBay did not object to real-time queries by Bidder's Edge, only to that firm's practice of maintaining its own database of eBay auctions, which would tend to lag

pay a fee for priority positioning"), available at <http://www.heinz.cmu.edu/~mds/isem.pdf> (last visited Sept. 12, 2003).

213. See Elkin-Koren, *supra* note 2, at 169–170 (“If you are not listed in the search results you are almost nonexistent on the web.”); O'Rourke, *Shaping Competition*, *supra* note 12, at 2004 (“Because a site generally has an incentive to attract the maximum number of customers, its policy toward indexing must reflect that which is efficient both for it and its customers.”). *eBay* illustrates this point. eBay licensed other auction aggregators but reached an impasse with Bidder's Edge because it worried that Bidder's Edge's browsing method would cause it to post outdated data. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1062 (N.D. Cal. 2000).

214. O'Rourke, *Shaping Competition*, *supra* note 12, at 1978–79 (illustrating a reason to refuse browsing capability).

215. *Id.* If brand loyalty is actually that strong, I am not sure why consumers would bother with aggregator websites, but it is certainly possible that they might.

216. *But see id.* at 2005 (pointing out that there are socially desirable reasons a site might object to use).

217. Elkin-Koren, *supra* note 2, at 166–67 (noting eBay's alternate reasons for seeking protection against Bidder's Edge).

actual bidding on eBay.²¹⁸ eBay apparently worried that old bid data would mislead consumers by understating the interest the market showed in items listed on eBay.²¹⁹ If one accepts the premise that “bidding begets bids,”²²⁰ this concern was rational. Gains to Bidder’s Edge might have been losses both to consumers, who missed auctions they would have visited if their information had been current,²²¹ and to eBay sellers, whose sale prices would be lower than if buyers had current information. (Unlike Bidder’s Edge, which reported on auctions others hosted but which did not host auctions itself, eBay had to worry about the welfare of sellers as well as buyers.) Because eBay charges a fraction of the sales price, it would bear costs, too.²²²

F. *Why Consent Should Prevail as the Default Rule*

Because the actual cases provide no support for these theoretical objections to bargaining, the objections do not undermine the case for consent. There have been many predictions that applying trespass theory to websites would produce great harm. Some of these theories, such as the holdout concern, have no logical basis. Those that do have a logical basis face a factual problem: trespass theory has been applied in

218. Professor Elkin-Koren suggests eBay might have resisted browsing to maintain “its control over the community of users that occupies its site since . . . [with crawling, users] will no longer be captured and restricted to a single site.” *Id.* at 167. No evidence in the case suggested such capture; eBay’s offer to license Bidder’s Edge if Bidder’s Edge would agree to real-term querying and eBay’s actual licensing of other aggregators contradict this thesis. *eBay*, 100 F. Supp. 2d at 1062, 1068.

219. *eBay*, 100 F. Supp. 2d at 1062.

220. See William B. Shaw, *Alt.Marketing.Online.eBayFAQ* para. 3.1.7, at <http://www.faqs.org/faqs/business/online-marketing/ebay/> (last visited Sept. 27, 2003) (explaining auctioning strategies). The posting explains that:

Many sellers believe that reserves reduce the number of bidders and hurt your final fee. Other sellers believe the opposite—by starting an auction with a low price and a reasonable reserve, you will attract early bidding and bidders will gravitate to your auction (i.e. bids beget bids). You’ll have to experiment a bit to see what works for you.

Id.

221. It would be very hard for consumers to discount accurately the information they found on Bidder’s Edge. The difference between the results in Bidder’s Edge’s database and actual bidding would depend on how often Bidder’s Edge queried eBay and how much bidding occurred in between those queries. Bidder’s Edge might have disclosed the first variable, though there is no evidence that it did; it could not have disclosed the second.

222. See O’Rourke, *Shaping Competition*, *supra* note 12, at 1983–84 (discussing relationship between profit sites and indexes). Professor O’Rourke questions the staleness argument, noting that firms now live with information that might become stale, as with advertised prices in monthly magazines. *Id.* at 1979 n.59. That would not be true of auctions, in which prices are set in real time, however, and which constitute a bidding process rather than an invitation to bid. Though we have lived with stale information in the past, it would be desirable to have fresher information in the future.

several cases spanning several years, and the harm has not occurred.²²³ Utilitarianism requires that predictions be discounted to reflect their probabilities; the expected cost of these predicted harms is very low.

Even if the expected cost were higher, however, such predictions make no affirmative case for some rule other than access. All markets fall short of conditions needed for perfect competition.²²⁴ To show that markets for website access do, too, does no more than place them within the set of all markets. Being part of the set of all markets provides no basis for treating markets for access differently from any other markets. Unless there is a general reason to believe that judicial determinations approximate the socially optimal result better than bargaining, then these objections do not make any comparative point at all, much less an affirmative case for some other rule, such as nuisance.

One way or another, it is an affirmative, comparative point that needs to be made. Owners might have sub-optimal incentives, but their information and incentives still might produce results closer to the social optimum than the information and incentives of judges. Factors that reduce confidence in bargaining tend to reduce confidence in judicial valuation as well.²²⁵ Because judges have systematically worse information than parties, which makes their utility calculations less reliable to begin with, even increasing transaction costs may not narrow the gap between bargaining and litigation very much. At a minimum, it is very hard to choose in the abstract. Contextual analysis is necessary, which is one reason I emphasize the facts of the cases rather than hypothetical risks.

Professor O'Rourke rightly says that the real question is "on which side of the coin—strong or weak property rights—should the law err at the beginning stages of a new technology?"²²⁶ Professor O'Rourke believes this is a tough call, but that "because we know so little about the direction in which technology will develop and because incentives are not always aligned optimally to ensure efficient licensing, a cautious

223. See *supra* text accompanying notes 180–184 (arguing that bargaining more closely attains the optimal utilitarian regime).

224. See O'Rourke, *Shaping Competition*, *supra* note 12, at 1967–68 (discussing why most markets are not perfectly competitive).

225. Krier & Schwab, *supra* note 185, at 453–54. Professor Polinsky made this point early on. See A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damages Remedies*, 32 STAN. L. REV. 1075, 1080 (1980) (arguing that liability rules are not generally preferable where courts have imperfect information).

226. O'Rourke, *Shaping Competition*, *supra* note 12, at 2005; see also Burk, *supra* note 2, at 53 (advocating "muddy" property rules).

approach to property rights may be appropriate.”²²⁷ For both Professor O’Rourke and Professor Burk, these facts make a nuisance rule or other “weak” entitlement, in which judges may balance social costs and benefits, preferable to the strong property rule injunctions imply.²²⁸

These arguments make a persuasive case that judges should worry about their imperfect information and the risk of unintended consequences from their decisions and should proceed cautiously in establishing access rules.²²⁹ A property rule is superior to other rules for precisely those reasons. Adopting a rule of consent is the most prudent decision judges can make because it poses the lowest risk and cost of error, and because it allows the greatest degree of self-determination among sites.

On the first point, as demonstrated in Part III, if a site wishes to leave itself open to the public, it is free to do so. A rule of consent does it no harm. If a website wishes to close itself, however, either in whole or in part, then a rule of general access will prevent it from doing so.²³⁰ No website would be able to bargain with all potential users for consent allowing it to close. Granting the right is better than either mandatory access or balancing, because it will not be used if it is not needed, and if it is needed it cannot be privately created.

On the second point, if one concedes that *some* websites in *some* circumstances should be allowed to limit access, then the only real question is who decides when closure is good. Bargaining is the best bet. The lack of information about welfare effects, which plagues scholars (who may contemplate such things at their leisure), plagues judges too.²³¹ The parties’ information is better. There is no good reason to believe that, in the general run of cases, private incentives are

227. O’Rourke, *Shaping Competition*, *supra* note 12, at 2005 (arguing against giving technological development control to few firms).

228. Burk, *supra* note 2, at 53 (advocating the application of nuisance law); O’Rourke, *Shaping Competition*, *supra* note 12, at 2001–03 (discussing nuisance law as applied to the issue of “spiders” access).

229. That case is even stronger when one considers that over 171 million IP addresses have been assigned a name. INTERNET SOFTWARE CONSORTIUM, INTERNET DOMAIN SURVEY BACKGROUND, at <http://www.isc.org/ds/WWW-200301/index.html> (January 2003). Also, there are over one billion publicly available web pages. Froomkin, *supra* note 210, at 782. The variance in the social functions of these sites is probably quite high.

230. Hardy, *Property*, *supra* note 8, at 222; *see also* Easterbook, *supra* note 139, at 112 (pointing out reasons why property rights are not always protected by owners).

231. Judge Whyte offered a commendably candid comment on this point in *eBay*. In discussing the requirement that he consider the public interest in granting injunctive relief, he said “[t]he court . . . recognizes that it is poorly suited to determine what balance between encouraging the exchange of information, and preserving economic incentives to create, will maximize the public good.” *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000).

so poorly aligned with social welfare that judges can do better than bargaining.²³²

Even if one just cannot help trusting judges more than parties, however, there is a real social cost to empowering judges to re-weight decisions about workplace expression that are currently within the domain of managerial discretion.²³³ In the best case, managers whose discretion was limited by the possibility of a judicial re-weighting of access decisions would find it harder to constitute the expressive workplace environment they feel is best suited to their particular job. In the worst case, judges would find they are no better at judging the substantive merit of e-mail messages than they were at defining obscenity and would adopt an “anything goes” posture that would homogenize at the least common denominator that portion of the expressive workplace environment that connected to the Internet.

G. Possible Exceptions to the Consent Default

No legal rule is absolute, and this Article does not advocate an absolute rule to govern website access. Injunctions should be a strong default rule, but departures could be justified by theory and evidence showing that some other rule optimizes social welfare better than bargaining. In particular, because we are working within utilitarianism, if courts can identify a set of cases where a liability rule or use privilege creates greater net welfare than bargaining, then that set of cases should be governed by such a rule.²³⁴ Like the transaction cost arguments, however, this qualification states only a theoretical point. None of the cases analyzed previously justify a preference for judicial resource allocation over bargaining.

In analyzing claims for exceptions, courts should distinguish the “pushing” of data through a network, as in the spam cases, from the

232. Professor Epstein rightly describes the open-access view as equivalent to a compulsory license and, also rightly, says, “[n]o compulsory license scheme, even with compensation, could hope to match the level of particularization and standardization achieved by contract.” Epstein, *supra* note 8, at 84.

233. A related point is that the more willing judges are to intervene when parties find it hard to bargain, the less incentive parties have to develop bargaining mechanisms and other ways of taking advantage of their superior information. See Krier & Schwab, *supra* note 185, at 464. Because there are always *some* bargaining imperfections, in the extreme case the position that imperfections justify intervention has judges setting all prices.

234. Copyright cases privileging parodies under the fair use doctrine provide an analogue here. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (holding that 2 Live Crew’s commercial parody could be protected by the fair use doctrine); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (holding aggressive parody of *Gone With the Wind* protected by fair use doctrine). My thanks to Larry Lessig for emphasizing this point.

“pulling” of data from a website, as in *eBay*.²³⁵ In the former cases, the parties are in a good position to internalize most of the costs and benefits of use. Therefore, courts should view with great skepticism claims that welfare would be enhanced through a compelled right of access to “push” data through a network. Externalities might be a greater problem in “pull” cases, depending on how harvested data are used. No such case to date presents a plausible claim that judges could approximate the optimal result better than bargaining, but if a well-reasoned and well-documented case could be made, it would be a mistake to dismiss it out of reflexive deference to bargaining.

Finally, courts should take seriously the consent default and the notice requirement to qualify or revoke consent. Owners should be required to use the means best suited to particular uses and be clear about the terms they impose. Plaintiffs should be required to demonstrate that use was not consensual, which means they should bear the burden of showing that they notified the defendant that its use was nonconsensual.

V. CONCLUSION

Courts in website and network access cases have expanded the doctrine of trespass to chattels because existing law recognizes an interest in the inviolable possession of chattels that is being violated in cases where self-help fails. By modifying the doctrine, these courts have replicated the results the *Restatement* expected the law to achieve. The criticism of these decisions, which holds implicitly that the results may change but the doctrine must remain the same, rests on a formalism that has not been adequately defended and which I believe is not defensible.

Granting website and network owners the right to exclude allows them to constitute a wide variety of different social environments. Adopting a rule of mandatory access impairs this ability. The risk and costs of error are greater in the latter case, because a website that has a right to exclude need not use it, while one that needs it but does not have it will not be able to replicate it through bargaining. It is better to have a right and not need it, than to need a right and not have it.

In addition, the owner’s discretion plays an important role in constituting and managing these expressive environments. Negating or limiting that discretion, as by judicial review under a nuisance theory, will affect these environments regardless of the results of particular

235. See *supra* notes 116–20 and accompanying text (comparing and contrasting “pull,” versus “push” websites).

decisions. Simply moving control over such resources from the managerial domain to the more ambiguous domain of judicial review will interfere with the social processes through which environments are constituted.

The argument for open access fails because excluding users from sites enhances welfare in at least some cases. Neither the open access argument nor the more modest “bitter with the sweet” position provides any basis to distinguish socially desirable from undesirable exclusions. The only question in these cases is whether bargaining or judicial review should govern access. The case for bargaining is stronger and should prevail as the default rule.