

Thoughts On the Fetishization of Cyberspeech and Turn from “Public” to “Private” Law
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“Circulation bursts through all restrictions as to time, place, and individuals, imposed by direct barter, and this it effects by splitting up, into the antithesis of a sale and a purchase, the direct identity that in barter does exist between the alienation of one’s own and the acquisition of some other man’s product”
- Marx¹

The Internet is often taken as a place of liberty, where “individuals” and the “public” function without interference from governmental or other laws.² Many have pointed out the difficulties in that formulation; in particular, many have pointed to the ways that power, both governmental and corporate, can easily adapt to an online environment.³ In the following, I wish to take a different path and argue the somewhat paradoxical-sounding thesis that not only should developments in cyberspace not be assumed to create a libertarian utopia, but that the current intersection of the discursive environment of the Internet and its legal codification in intellectual property law are *destructive* to the existence of a “public,” and that this destructive intersection is significant for reflection on cyberspace as a medium of communication. In cyberspace, at least, the “public” increasingly presents the disappearing marker of a certain kind of freedom – a freedom from a highly disciplined “private” space. If this is correct, the libertarian line

¹ *Capital* vol. I, trans. Samuel Moore and Edward Aveling (Moscow: Progress, 1954), 115.

² For a frequently cited example, see David G. Post, “Anarchy, State and the Internet,” *1995 Journal of Online Law*, art. 3 (May 1995). Post does not, strictly speaking, say that there will be no rules in cyberspace. Rather, he says that cyberspace will evolve into a series of disaggregated networks which have their own rules but which cannot be regulated from above. He then envisions these networks competing in a market. The libertarian assumption which requires questioning emerges in the following: “the prospect of relatively unfettered individual choice among competing sets of rules is surely an attractive prospect, to the extent that what emerges represents the rules that people have *voluntarily chosen* to adopt *rather than* rules that have been *imposed* by others upon them” (par. 43; emphasis added). I should add that the following discussion is confined to the U.S. legal system.

³ See in particular Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999); David G. Boyle, “Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors,” *University of Cincinnati Law Review* 66 (Fall, 1997), 177-205; Jack L. Goldsmith, “Against Cyberanarchy,” *University of Chicago Law Review* 65 (Fall, 1998), 1199-1250; and Keith Aoki “Considering Multiple and Overlapping Sovereignities:

according to which the dichotomy between a “public” space where people encounter one another but only as subject to governmental oversight, and a “private” space where people operate without oversight but encounter only those they know, will be *aufgehoben* such that one meets others without oversight, is profoundly misguided. The argument’s binarism turns out to ignore the constituted nature of both public and private, and that the former’s (only) semi-regulated status may turn out to imbue it with a feature well-worth preserving – precisely for meeting the libertarian agenda of personal freedom and autonomy. One needs, in other words, to ask about the nature of regulation in the public and private spheres, and about what it means to be a member of each.⁴

Hence, what one means by “public” is both important and difficult to specify. In the context of speech, particularly mass-media (where one often encounters the term now), it seems to represent the partial determination (individuation) of one’s listener. To understand this moment of partial individuation, it will perhaps be useful to begin with a gesture to the Habermasian space of “private people come together as a public.”⁵ In this regard, one should

Liberalism, Libertarianism, National Sovereignty, ‘Global’ Intellectual Property, and the Internet,” *Independent Journal of Global Legal Studies* 5 (Spring 1998), 443-473. Many more could be adduced.

⁴ In other words, one should avoid assuming that the only kind of interference is governmental. As Keith Aoki puts it, “the rhetoric of privatization and market discipline thus becomes a tool in eliding the distinction between public and private This valorization of the private obscures ... the fact that, in important ways, public and private institutions do have different and not always contiguous functions. These institutions are significantly mutually constitutive – public institutions such as legislatures, courts and agencies underwrite and make possible market transactions in the so-called private sphere” (451-452). Cf. also James Boyle: “There *is* no ‘natural,’ unregulated state of affairs. Without the rules of contract, tort, and property there would not *be* a market The choice is not between ‘unregulated’ and ‘regulated’ but between different kinds of regulation,” *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass: Harvard UP, 1996), 89; and Sam Pooley: “the extension of international capital has its own contradictory political logic: utilizing the capitalist state and at the same time trying to avoid the regulatory functions of its own or any state,” “The State Rules, OK? The Continuing Political Economy of Nation-States,” *Review of Radical Political Economics* 22:1 (1990), 45-58: 46. For the argument that the public domain is both vital and under-theorized, see Jessica Litman, “The Public Domain,” *Emory Law Journal* 38 (Fall 1990), 965-1023.

⁵ Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger (Cambridge, Mass: MIT Press, 1989), 27. For a useful summary of current discussions of the “public,” including in Habermas, see Seyla Benhabib, “The Embattled Public Sphere,” in *Reasoning Practically*, ed. Edna Ullmann-Margalit (New York: Oxford UP, 2000), 164-179. Benhabib seems fully justified in warning that “there is a tendency in the electronic media toward the presentation of the individual as a type” and that “the iconographic public sphere flattens out the

highlight the constituted nature of the public space and the extent to which that constitution is simultaneous with the constitution of the subjects who inhabit it. What turns a set of subjects into a “public” is precisely the recession of those subjects as such: the point of addressing oneself to “the public” is that one does not know all of the details about those to whom one is speaking.⁶ If this public space could become knowable – not by the empirical method of opinion-polling, but by constituting individuals such that the behaviors and possible desires of any given individual could be known *in advance*, this would effect a profound shift in the constitution of the public as such. It would resemble, in Habermasian terms, more of a clique than a public. Rather than presenting a necessary excess of meaning in efforts at knowledge, the public would present a closed discursive space whose meanings could, in principle, be completely known. Such knowledge would be the complete individuation of all members of the public as fully knowable subjects.

In what follows, I will suggest that developments in intellectual property law as it applies to cyberspace suggest that such a transformation is indeed in process, at least as a desideratum of capital. Hence the much-maligned “one size fits all” model of industrial capital turns out to have contained a hidden virtue: in forcing a gap between production and consumption such that the two never perfectly harmonized – that is, in forcing a circulation phase in which commodities (objects or signs) have to “go to market,” not “knowing in advance” their destination and the other commodities for which they will be exchanged – the model prevented the complete subsumption of the social space of consumption by the capitalist model of production.⁷ In this

complexity and the co-constitution of self and other perspectives” (177). For an interesting general discussion of the effect of new technologies on the “cultural space” of communications, see M. Ethan Katsh, “Rights, Camera, Action: Cyberspatial Settings and the First Amendment,” *Yale Law Journal* 104 (May 1995), 1681-1717.

⁶ This is why Habermas is able to observe the rise in public opinion polls: these are precisely efforts at producing knowledge about members of “the public” which can then be mapped onto individual subjects.

⁷ As this formulation suggests, and although I will not undertake to do so here, I believe that this analysis could be developed usefully using Antonio Negri’s work on the distinction between the formal and complete subsumption of

respect, the disappearance of the public would mark the collapse of the circulation phase, which would turn out to be an inefficiency in the capitalist mode of social organization which individuals would attempt to remove. In Foucauldian terms, the “public” marks the limit to a disciplinary regime: a limit on what can be known about a subject; the removal of this limit would allow a market-based disciplinarity in which the state would return as the guarantor that everyone agreed to play by market rules in the first place.

These sorts of theoretical distinctions should be taken as preliminary, and I will return to them at the end of the essay. For now, I wish to ground the discussion more specifically in the realm of American free speech law. First, in “face-to-face” communication, one knows, presumably, to whom one is speaking in at least two senses. On the one hand, one interpellates a specifiable individual or set of individuals. On the other hand, the speech act carries with it various social roles which the subjects involved act out as a necessary and knowable part of the communication itself. Conceptually, this is often presented as the thought of one subject speaking to another. Such legal/conceptual representation is undoubtedly a fiction: autonomous subjects do not exist *in re*, and the difficulty in aligning the legal subject and actual listener animates much of the debate surrounding, for example, hate speech regulation.⁸ That said, this model of subject-to-subject communication finds its analog in the extension to mass media in the notion of an “author” speaking to the “public.”⁹ In this extension, a latent ambiguity in the

society by capital. On such a development, the transition from an industrial to an information economy would mark the transition from formal to complete subsumption. For a useful start in this direction, see Tiziana Terranova, “Free Labor: Producing Culture for the Digital Economy,” *Social Text* 63 (Summer 2000), 33-58.

⁸ For a critical discussion of such difficulties, see Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997). Butler’s text offers useful reflection on the need for supporting an ambiguity as to a listener’s response to a given utterance.

⁹ For a discussion and critique of the prevalence of the “romantic author” ideology in communication law, see James Boyle, *Shamans, Software, and Spleens*. Boyle’s point is that the “romantic author” metaphor serves the ideological function of negotiating the aporias implicit in liberalist theories of information and its dual status as a public good and a private commodity. For historical data in support of Boyle’s thesis, locating the development of non-utilitarian interpretations of copyright within French romanticism, see Calvin D. Peeler, “From the Providence of Kings to Copyrighted Things (and French Moral Rights),” *Independent International and Comparative Law Review*

determination of one's listener is structurally codified into the definition of "public" itself: one assumes *that* one is speaking to an autonomous subject, but one is not entitled to know *who* that subject is. This structural ambiguity is important because in legal discussions of speech, where the speaker can be known but the listener can only be guessed, one is entitled to restrict speech in certain ways, and on the basis of this ambiguity. Content-based restrictions are permissible if the content can be said to be immediately harmful no matter how the listener is further specified (*e.g.*, "obscene" speech, or yelling "fire" in a crowded theater).¹⁰ Restrictions can also be made in terms which respect the necessary ambiguity of who the listener is, and which respect the possibility that listeners might be different from one another. Hence, the Supreme Court has held that cable companies can be required to carry local broadcast television stations, and that one can be prohibited from saying "dirty words" on the radio when children are likely to be listening.¹¹ The point is that because one is speaking to the "public," one can make certain assumptions but not others about one's audience: members of the public are partly, but not completely individuated, and one has to get their attention in the first place as the subjects to whom one is speaking.

9 (1999), 423-456. Undoubtedly one tension in all of what follows is that between the effort to apply such a "deontological" reading of intellectual property to the American legal system, which constitutionally (Art. I, cl. 1, sec. 8) defines intellectual property in utilitarian terms.

¹⁰ Such restrictions of course have to survive judicial strict scrutiny. The definition of obscenity is of particular interest because it is given partly by local values and state laws: what is deemed harmful to a person in one location is determined in part by a democratic process which may deem the same speech not obscene in another jurisdiction. The question of "where" cyberspace speech originates and is heard makes questions of jurisdiction extremely difficult. For example, the 6th Circuit court of appeals upheld the conviction of a California couple for distributing material to Memphis, where was "obscene," when that same material would have been legally protected in California. The Court specifically avoided resolving the cyberspace jurisdiction question because the California couple had operated a subscription only BBS, including making personal telephone contact with subscribers, and so knew that the material was going to Memphis. See *U.S. v. Thomas*, 74 F.3d 701 at 711-712. The Supreme Court case which established that Internet speech should receive the highest protection is *Reno v. ACLU*, 521 U.S. 844 (1996), which struck down as overbroad and vague the Communications Decency Act's ban on "indecent" speech on the net. The majority opinion includes discussion of the distinction between protected "indecent" speech and unprotected "obscene" speech, as well as of the mechanics of how one legally accounts for the possibility that children are listening to various broadcast media.

¹¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), respectively.

The development of computer technology and the so-called digital economy throws much of this analytic framework in question, capturing the abstraction implied by “public,” but not the ambiguity. In this paper, I wish to track one aspect of this difficulty: the congruence of developments in digital technology and intellectual property law increasingly enables speakers to individuate their listeners in advance, both in terms of who those listeners are and how they will behave once they hear the message. This can be a technological achievement, such as when web search engines automatically tailor the advertising they display to what a given individual has searched for before, or what site he or she last visited.¹² It can also be a legal achievement, such as when the Copyright Act is used to stop the dissemination of a listing of what sites web-filtering software blocks.¹³ It can also be an achieved at the intersection of law and technology, as for example when the contract law system is revised to validate mass market or “shrink-wrap” licenses for the use of computer programs, requiring that those who install a program bind themselves in advance to a variety of conditions attached to its use.¹⁴

The difficulty is that, although a listener is individuated and to that extent becomes “private,” the tendency is to individuate using the most abstract assumptions applied to members of the “public,” rather than anything inherent in the actual person being individuated. In other words, listeners are assumed to be both individual and identical, a disciplinary atomism which precisely obscures the overdetermination of a nominally “private individual” by extrinsic standards which are assumed to apply to *any given* individual (of that type). In replacement of

¹² See the discussion in “Playboys, Movie Buffs, and Dreams of Closure,” below. Cf. also Lucas D. Intra and Helen Nissenbaum, “Shaping the Web: Why the Politics of Search Engines Matters,” *The Information Society* 16 (2000), 169-185.

¹³ I am referring to the settlement in the “CPHACK” case, where a program that listed what sites a popular web-filtering program blocked was removed from ISP’s because it was written by hacking the filtering program. See “Cyber Patrol case raises reverse engineering issues,” *Computer World (online)* (March 31, 2000). Cf. also the use of the Copyright Act by the Church of Scientology to stop criticism of its texts, e.g., in *Religious Technology Center v. Netcom*, 907 F. Supp 1361 (1995).

¹⁴ See “Shrink-wrapped Discipline,” below, and the references there.

(or in addition to) the myth of the autonomous speaker, then, is the myth of the autonomous listener: the individual consumer who chooses which search engine to visit, and whether or not to agree to the conditions attached to the use of mass-market software and other intellectual property. Absent the uncertainty of not knowing who one's listener is, or what his or her characteristics are in advance of speaking, communication is assumed to be immediate between a specified speaker and a specified listener. This addition of an autonomous listener precisely obscures the difficulties associated with the notion that either the speaker or the listener is truly autonomous. Absent the individuation of listeners prior to speech, it was necessary to account for a diversity of possible listeners, *i.e.*, for a variety of possible social relations between the speech act and whoever it reached. When listeners can be individuated in advance, however, and when that individuation is as an abstract, autonomous subject, it is no longer necessary to assume that listeners are diverse from one another, which means that the interpretation of the utterance seems to occur without the need for accounting for the social roles of speaker and listener. The consequence is an almost total occlusion of the power relations which might be involved. An easy example (to which I will return) will make the point clear: the shrink-wrap license between a software producer and customer is freely chosen only in theory. In a world in which 95% of personal computers use the same operating system,¹⁵ assent to that operating system's contract terms becomes obligatory. How, exactly, would the individual autonomous consumer negotiate such a contract with a multi-billion dollar company, anyway?

In Marxian terms, one can speak of the apparent collapse of the circulation phase of commodified information. This is of course a mystification: information is not bartered or directly or "immediately" exchanged, but rather is bought and sold through a highly complex

¹⁵ This figure derives from the findings of fact in the Microsoft antitrust case, *U.S. v. Microsoft*, 84 F. Supp 2d 9 (2000), para. 35.

process of commodification. Nonetheless, one of the effects of the development of the “information economy” seems to be the naturalization of (and hence, apparent disappearance of) the market apparatus through which it functions. On the one hand, this allows the prominence of libertarian discourses which ignore the complexity of this market apparatus. For example, one is not to use commodity language in describing information transactions, and insofar as such language is unavoidable, one invokes a regulatory structure to protect the “private autonomy” of *the commodity itself* from damage in the “public” act of going to market. On the other hand, insofar as information itself is the commodity in question, there is a confluence of the object domain of the “public” space of the circulation of discourse and the “circulation phase” of commodities. The apparent disappearance of the latter, then, threatens similarly to occlude the former, constituting a direct threat to virtues normally associated with “public discourse.”¹⁶

Some specific examples will help to illustrate the point.

Metallica in the Age of Mechanical Reproduction

In 1988, the title track of rock band Metallica’s *..And Justice For All* opened with the following lyrics:

Halls of justice painted green
 Money talking
 Power wolves beset your door
 Hear them stalking
 Soon you’ll please their appetite
 They devour

¹⁶ For a lengthy and sustained argument that the combination of current free speech doctrine, copyright law, and antitrust law narrows the diversity of mass speech available by reducing incentives for innovation in an increasingly homogenous corporate oligopoly, see Jon M. Garon, “Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas,” *Cardozo Arts and Entertainment Law Journal* 17 (1999), 491-621. Garon argues that the “impact of the First Amendment’s in speaker’s rights serves to protect the interests of the most powerful speakers – the corporations that both create and distribute content” (507). See also his discussion of the power held by Internet “portals” (578ff).

Hammer of justice crushes you
Overpower¹⁷

On April 13, 2000, Metallica filed suit in a Los Angeles federal court against Napster.com, a popular Internet website which (basically) allowed users to share music with each other.¹⁸ In a press conference two weeks later, the band called for congressional legislation to shut down sites like Napster “before this whole Internet thing runs amok.” Guitarist and lead singer James Hetfield added that “Napster is a big machine The person who invented Napster is an employee of the big machine as we speak. They’re doing it for the potential IPOs.”¹⁹ Rather than belabor the obvious difficulty in the multi-platinum Metallica – “one of the greatest rock bands of all time,” according to its record label’s website²⁰ – calling anyone else “employees of the big machine,” I would like to pause at two moments of the band members’ rhetoric, in order to highlight some aspects of the rhetoric which enables the naturalization of the market. In particular, one should note, how this state of affairs requires the exercise of old-fashioned state coercion to operate, but legitimates this requirement by casting it in terms applied from areas of the law where the state has historically intervened.

First, Metallica’s position is that their music is art, and that they object to its being freely swapped “like a commodity.” Drummer Lars Ulrich issued the following statement announcing the suit on Elektra records’ website: “We take our craft, whether it be the music, the lyrics, or the photos and artwork very seriously. It is therefore sickening to know that our art is being traded like a commodity rather than the art that it is.”²¹ Second, despite the band’s having delivered to

¹⁷ “...And Justice for All,” *And Justice for All* (Elektra Records, 1988).

¹⁸ As of the present writing, Napster is required by a preliminary injunction to block access to copyrighted songs on its website. For purposes of the following discussion, the point is how Metallica constructs the issue.

¹⁹ “Metallica on MP3-Swap Services: Kill ‘Em All,” *The Internet Standard* (online) May 2, 2000, article at: <http://www.thestandard.com/article/display/1,1151,14708,00.html> (visited May 2, 2000).

²⁰ <http://www.elektra.com> (visited May 2, 2000).

²¹ “Digital copyright dispute; Suit targets Internet site, universities,” *Chicago Sun-Times*, April 16, 2000.

Napster's offices a document of over 60,000 pages in length, on which are listed by name 335,435 individual users alleged to have illegally swapped Metallica recordings on the Internet, Hetfield nonetheless reported in the same press conference that "Metallica has always felt fans are family" ("Metallica on MP3"). That there is commodified artwork involved is less the point than the way Metallica understands this commodity form. Hence, the band's insistence on family-based rhetoric discloses the extent to which, for them, the market relationship and commodity form which the music assumes has entirely disappeared from view.

Initially, and at the risk of pointing out the obvious, one should note that Ulrich has matters exactly backwards: a commodity is measured by its exchange value (rather than its "use-value"), which is to say that commodities are those objects which are measured in terms dictated by a phase of circulation – "the market." Absent this market relationship, the object cannot be considered as a commodity. As Marx puts it, "exchange-value is the only form in which the value of commodities can manifest itself or be expressed," and "to become a commodity a product must be transferred to another, whom it will serve as a use-value, *by means of an exchange*."²² Something which is freely given and taken therefore cannot be a commodity. It is instead valued by its use, understood broadly; in this case, presumably some aesthetic consideration on the part of listeners.²³ Metallica's music, on the other hand, is produced and sold precisely as a commodity: those who wish to listen to it on their own schedule are supposed

²² *Capital I*, 46, 48, emphasis added. See generally *Capital I*, 43-87: "They are, however, commodities only because they are something two-fold, both objects of utility, and, at the same time, depositories of value. They manifest themselves therefore as commodities, or have the form of commodities, only in so far as they have two forms, a physical or natural form, and a value form" (54).

²³ The inequality between use and exchange value should be retained. Although the music industry insists on the existence of a 1:1 ratio between albums copied and sales lost, *i.e.*, that use value can be measured by exchange value, the claim suppresses a highly dubious premise, that someone who is willing to expend the minimal resources to obtain a free copy of something values it enough to spend the considerably greater resources to purchase one. Presumably, many of those who are willing to download a copy for free do not find the music valuable enough to spend \$15 for it. Obviously, the separation between "art" and "commodity" cannot be made completely, even in theory, in a capitalist society. See Theodor Adorno, *Aesthetic Theory*, trans. Robert Hullot-Kentor (Minneapolis: U. Minnesota Press, 1997).

to purchase a copy of it on a CD. Those who wish a copy of ...*And Justice for All* will discover that their copy reports that its copyright is owned by Elektra Records. This presents two difficulties in the present case. First, it means that the *correct* reading of the relationship between Metallica's music and commodification is that the music assumes a commodity form, abstracting and presenting the various activities involved in its production as the fifteen dollars of homogenous labor power required for an album purchase. What the band objects to is this music being released from the network of exchange relationships that determine its trajectory from the Elektra studios to individual consumers' living rooms. In other words, Metallica objects to its *removal* from the commodity relationship, a move which would allow the music to be valued as purely as possible on aesthetic grounds, as art.

Second, all of this makes it difficult to understand the band's insistence that sites like Napster "steal outright from artists," not because freely trading in music which was produced as a commodity does or does not reduce its exchange value, but because it becomes difficult to understand who "the artists" are at a level sufficiently precise to determine that they have been the victims of an "outright" theft. At most, the record label is victim of an "outright theft," which means either that "the artists" are functionally indistinct from the record label, or that whatever theft can be said to occur from the artists is mediated by a variety of factors at the record label. We will return to this point: "Metallica" does not name a person; it names a corporate aggregation of producers, some of whom might or might not be individual artists. The strange nature of relationships between corporatized artists and their fans is disclosed by Metallica's remark that it considers its fans family members, while at the same time pursuing a legal action which would directly impede their access to the band's music. Rather than object to the impropriety of using the word "family" in this context, it would be better both to insist on its

propriety in identifying a strongly role-differentiated social relationship involving Metallica and its fans, and to follow the thought in one of two directions.²⁴

In the first case, one should carefully note the membership costs associated with this relationship and the band's construction of the relationship's purity. Appreciation of the band's music is necessary but not sufficient for family membership; another *sine qua non* is the expenditure of money to hear that music. In other words, Metallica constructs itself as the patriarch of a family of those with whom it has an exchange relationship, thus inverting the traditional construction of the family as outside exchange and market relationships.²⁵ Given the demarcation of family ties by exchange value, Metallica's offensive against their dilution and "cheapening" by permitting fans to have a different, non-exchange based relationship with the music begins to sound rather like traditional defenses of miscegenation statutes. For example, in upholding the conviction of an interracial couple for violating Virginia's prohibition on miscegenation, a state judge of the mid-1960's reported that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁶

Ten years earlier, the Virginia supreme court had declared that "the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly

²⁴ For an account of strong role differentiation and the family as a model for ethical thinking involving such strong role-differentiation, see Alan H. Goldman, *The Moral Foundations of Professional Ethics* (Totowa, NJ: Rowan and Littlefield, 1980), 1-33, *passim*.

²⁵ Obviously, like art, no family relationship today "truly" exists "outside" of exchange and market relationships, and those forms of relationship exist only as ideal types. Nonetheless, the reversal of ideal types in Metallica's case is nearly complete.

²⁶ *Qt. in Loving v. Virginia*, 388 U.S. 1 (1967) at 3. *Loving* overturned the statute in question and others like it on equal protection grounds.

divine as that which imparted to them different natures.”²⁷ The Virginia court added that it could find no requirement that a state “permit the corruption of blood even though it weaken or destroy the quality of its citizenship.”²⁸ Here, commodity exchange-based music families should not be destroyed by the unregulated impurity of use value; as Hetfield put it, “there has [*sic*] to be some laws and guidelines to go by before it gets too out of hand and sucks the life out of musicians who will stop making music.”²⁹

In the second case, one might suggest that it seems not to be the *band* with which fans have a relation; rather it is the commodified form of the music, and the band’s objection is to the “free love” of music commodities openly exchanged without the assumption of responsibility that goes with such intimacy. On this reading, Metallica is like the angry father who sits on the front porch swing with a shotgun, threatening all suitors who would cheapen and violate his music’s “gift.” Although the commodity goes to market, it apparently cannot defend itself against violation. Justice, it turns out, is not measured in terms relevant to the relationship between Metallica and its fans, but instead in the naturalized terms of a violation done to the commodity form of the music. Ulrich is “sickened” to know of the abuse to his progeny, and seeks recourse in a sodomy law banning such illegitimate forms of contact. Like a sodomy law, Metallica’s recourse will ban certain forms of contact between its object and the outside world, and it will invoke the moral high ground in so doing. Chief Justice Burger, concurring in the Supreme Court’s opinion upholding Georgia’s sodomy law said that “condemnation of those

²⁷ *Naim v. Naim*, 197 Va. 80; 87 S.E.2d 749 (1955), at 84.

²⁸ *Naim v. Naim*, 90.

²⁹ “Metallica on MP3.” As part of his campaign for consistency, Hetfield stressed that the band endorses the production of bootleg recordings of its concerts (*ibid.*). Metallica’s claim is a standard one: insufficient intellectual property rights stop production. The question of whether the current protections go either too far or not far enough is the subject of much current debate. For the suggestion that some current intellectual property protections are so strong that they undermine production, see Mark A. Haynes, “Black Holes of Innovation in the Software Arts,” *Berkeley Technology Law Journal* 14 (Spring 1999), 567-575; Garon, “Media and Monopoly;” and Boyle, *Shamans, Software and Spleens*, 119-143.

practices is firmly rooted in Judeo-Christian moral and ethical standards;” protecting them “would be to cast aside millennia of moral teaching.”³⁰ The words could equally be Ulrich’s in condemnation of Napster.

Again, the point to be made is the striking rhetorical parallels with state regulations of the family. As with other objections to miscegenation and familial deviance, this one claims statutory imprimatur under a banner containing a confusing amalgam of “family, order, property;” in the process the band that announced itself as the most revolutionary turns out to be the most counter-revolutionary. The revolutionaries of ...*And Justice for All* will invoke state action to resolve family problems: they declare that “the intent of the Napster suit ...is to spearhead some kind of activity within the powers that be – the government – to lay down the laws with the computer, to exercise some kind of control and govern the companies like Napster” (qt. in “Metallica on MP3”). The social differentiation which demarcates the Metallica family, then, is coded by a corporate agenda which requires that family membership be purchased, and which vigorously seeks state intervention to protect that corporate agenda and the purity of its familial demarcation. The point is not that commodified art is either good or bad. The point is that neither is the music of Metallica the product of an autonomous speaking subject, nor is a Metallica fan an autonomous subject *simpliciter*. The incoherence of attempts to construct them as such is brought into sharp relief by the band’s suit against Napster. “Metallica” names a location from which music issues, but that location as an origin of the music should not be fetishized. Because Napster and digital technology in general allow the music to be traded freely without being located at a concert or on a mass-media product such as a compact disc, the temptation arises to view the relationship between the music and fans as an immediate one.

³⁰ *Bowers v. Hardwick* 478 US 186 (1986), at 196. Insofar as they only list body parts (forbidding contact between genitals and mouth/anus) instead of overtly prohibiting homosexuality, sodomy statutes precisely ignore,

However, this immediacy is largely illusory: the disappearance of the object bearing the music commodity does not entail the disappearance of the commodity form itself, a reality which no amount of familial window-dressing can completely obscure. The familial bond between Metallica and its fans can only be understood through the intervention of commodities; neither Metallica nor its fans exist as such without this intervention.

Playboys, Movie Buffs, and Dreams of Closure

If digital technology creates difficulties in understanding the structure of the discursive space in which Metallica speaks to its fans – *i.e.*, if digital technology makes it possible for Metallica to differentiate the “public” to which its music commodity was formerly addressed into legally behaving members of its “family” and delinquents who are to be pursued by the law (neither group thus, strictly speaking, fully members of the “public”) – then the linguistic issues which arise are brought into even sharper focus by trademark law. Trademark law is precisely designed to prevent members of the consuming public from being confused by similarly presented marks or signs of products. In other words, it operates entirely at a discursive level. In the case of Metallica’s fans, the confusion induced by the Internet required a more careful demarcation of members of the public. In the case of trademark law, the ambiguity of the space addressed by the Internet creates what appears to be an inverse problem. Because any utterance on the Internet can be addressed literally to anyone at any place, the normal geographical and other distinctions which structured the operation of trademark law and allowed, for example, products with similar names to be marketed to geographically differentiated markets, become increasingly meaningless. The question for trademark becomes: to what extent can a word itself generate consumer confusion? In this question, the symbolic object of law is doubled: it

exoterically, the social relationships which they esoterically regulate.

functions at the level of signs in a discursive space, and in a universe whose only elements can be said to be signs functioning in a uniformly distributed discursive space. As it turns out, the very uniformity of the discursive space means that the “trademark problem” is of the same sort as Metallica’s.

The contrasting results of two federal court cases will serve to illustrate the issue, which was usefully summarized in one of the opinions:

The Court is mindful of the difficulty of applying well-established doctrines to what can only be described as an amorphous *situs* of information, anonymous messenger of communication, and seemingly endless stream of commerce. Indeed, the very vastness, and manipulability, of the Internet forms the mainspring of plaintiff’s lawsuit.³¹

The first case is *Brookfield Communications v. West Coast Entertainment*, decided by the ninth circuit court of appeals in 1999.³² Beginning in 1987, Brookfield marketed software for searching about movie information, initially intended for entertainment industry professionals. Beginning in 1993, Brookfield marketed, under the trade name “MovieBuff,” a similar but smaller software package designed for individual users and sold through retail outlets such as Borders and Virgin Megastores. Brookfield subsequently expanded to the Internet, offering its software through its website, and obtained federal trademark registration for the term “MovieBuff.” Meanwhile, West Coast, a video rental chain, attempted to launch on its website – “moviebuff.com,” which it had successfully registered as a domain name prior to Brookfield’s bid for the term – a searchable database similar to the one sold by Brookfield.³³ The court ruled

³¹ *Playboy v. Netscape*, 55 F. Supp. 2d 1070 (1999) at 1073; affirmed at 109 U.S. App. Lexis 30215 and 202 F. 3d 278

³² 174 F.3d 1036 (1999).

³³ *Brookfield v. West Coast*, 1041-1042. There is intense competition for top-level domain names, since these have to be unique. This competition led, among other things, to the practice known as “cybersquatting,” where an individual would register a company or famous person’s name as a “.com” address, and then ransom the name to the

in Brookfield's favor, based primarily on Brookfield's having used the term as a trade name first. Two aspects of the ruling should be highlighted: (a) West Coast's use of "MovieBuff" was likely to create actual consumer confusion about the products, and profit from the good name that Brookfield had gained from its products;³⁴ and (b) West Coast's use of the term would likely cause "initial interest confusion" – usage of the term in the coding of West Coast's WebPages would cause people who search the Internet for "moviebuff" to generate a list including West Coast, and a certain number of people who looked for the search engine based on their brand recognition of "moviebuff" would go to West Coast's site instead of Brookfield's.³⁵

The ruling in and of itself seems relatively straightforward. The conceptual difficulty lies in reconciling its reasoning with that found in the subsequent *Playboy v. Netscape*. In that case, Playboy Enterprises, Inc. ("PEI") brought suit against Netscape and Excite based on their sale of banner ads tied to a given person's Excite searches. Basically, the appearance of certain banner ads (as opposed to others) was linked to which words a person used to search. Thus, for example, searching for "car" might generate advertising from auto manufacturers. In this case, searching for "playboy" generated adult-oriented advertising, and Excite, operating as a liason, collected a few cents of revenue from those advertisers every time their ads appeared. PEI asserted that the term "playboy" was a trademark owned by it, that Excite was thereby illegally profiting every time a user typed the word "playboy" into the search engine, and that the profusion of sites and advertising generated by the word "playboy" would confuse customers and

company. This practice was explicitly banned in the U.S. in 1999 with the passage of the "Anti-Cybersquatting and Consumer Protection Act" (Title III of the Intellectual Property and Communications Omnibus Reform Act of 1999 (106 P.L. 113)). The practice apparently continues elsewhere: in a particularly bizarre instance, Cambridge philosopher Mark Hogarth registered the names of 130 writers such as Jeanette Winterson. For Winterson's account, see Jeanette Winterson, "My name is my dot-com," *The Times (London)* (March 29, 2000). The interest in *Brookfield* lies partly in its *not* being an instance of cybersquatting.

³⁴ *Brookfield v. West Coast*, 1054ff.

³⁵ *Brookfield v. West Coast*, 1062ff.

divert them away from PEI's own products.³⁶ The court, distinguishing its ruling from

Brookfield, ruled against PEI on all counts:

As English words, “playboy” and “playmate” cannot be said to suggest sponsorship or endorsement of either the web sites that appear as search results (as in *Brookfield*) or the banner ads that adorn the search results page. Although the trademark terms and the English language words are undisputedly identical, which, presumably, leads plaintiff to believe that the use of the English words is akin to use of the trademarks, the holder of a trademark may not remove a word from the English language merely by acquiring trademark rights in it.³⁷

Independently, this also seems straightforward. However, it is not initially easy to see how the exact same reasoning could not apply to “moviebuff,” particularly given that the *Brookfield* court carefully indicated that capitalization and much punctuation did not differentiate sufficiently between trademarks expressed as domain names. If anything, one would be inclined to think that many more people associate “playboy” with PEI than associate “MovieBuff” with *Brookfield*.³⁸

The problem is evident enough. Assuming that the function of language is referential – which in the case of trademark law (the trademark is *of* a product or service) and Internet search engines (one is using the word to look *for* something) it undoubtedly is – it becomes difficult to

³⁶ As of this writing, typing the word “playboy” into Excite generates a banner ad for the magazine of the same name, several links to Excite directories, and a list of sites. The first is in fact the PEI site; however, of the top 10, most are to other adult sites. See <http://www.excite.com> (visited May 22, 2000). A search on Altavista for “playboy” reported 450,000 results (!) <http://www.altavista.com> (visited May 22, 2000). In the following discussion, one should keep in mind the ironic result of searching for the phrase “movie buff:” the search generated 6,149 results, of which the *first* listed was “WESTCOASTVIDEO.COM: The Movie Buff’s Online Movie Store.” Searching for the single word “moviebuff” generated 441 pages, of which the first two were *Brookfield*’s “MovieBuff Online” (the third linked to a law office’s page and was in reference to the court case).

³⁷ *Playboy v. Netscape*, 1074.

³⁸ As mentioned above, presumably one factor in the *Brookfield* court’s decision was that “moviebuff” was one word, rather than the two-word phrase “movie buff.” Still, it is difficult not to imagine that many consumers would fail to notice this distinction and search for the phrase, rather than the single word. In any event, this simply highlights the problem of referentiality discussed below. The court dismisses the similarity between “MovieBuff” and “The Movie Buff’s Movie Store” (1050); the difference between the one word and two word slogan would appear to be acknowledged by the court’s insistence on the strictness of the standard for “tacking” (the opinion favorably cites, for example, a 6th circuit opinion that “dci” and “DCI” were not legally the same mark) (1047-1050). However, that discussion seems to beg the question of the criteria for similarity in the context of domain names, for which the court allows considerably more apparent dissimilarity (1055ff).

assure that the word refers univocally to its referent. In other words, the referentiality of the sign is not something which can be known *a priori*. Rather, the usage of the trade name generates associations with the product it represents. Usages of “confusingly similar” marks to refer to something other than the products represented by the trade name, or usage of the trade name to refer to something else, tend to undermine this association. All of this indicates that the meaning of the word is partly determined by the local context in which it is heard, and by the associations which a given listener might have. This “open unity” of the discursive space of the consuming public is why trademark law makes allowances for the situation of the listener in determining the likelihood of brand confusion – for example, the same name might refer to different products, as long as they do not presently compete in the same market.³⁹

The tension between *Brookfield* and *Playboy* discloses a pressure, simultaneously centrifugal and centripetal, on the openness of the unity. Because the Internet tends to reduce distinctions of context, all utterances “in cyberspace” and which can be retrieved through hypertext tend to appear “here” and “now.” Even text which bears overt marks of its origin – marked with a date, for example – is more difficult to contextually locate, if nothing else because it is difficult to authenticate that origin.⁴⁰ The lack of a specific material location as a necessary external context for the utterance in turn makes distinction between various utterances using similar signs more difficult to sustain. From the point of view of trademark, the closure of this

³⁹ I draw the term “open unity” from Bakhtin; see M. M. Bakhtin, “The Problem of Speech Genres,” in *Speech Genres and Other Late Essays*, trans. Vern W. McGee (Austin: U. Texas Press, 1986), 60-102. The *Brookfield* court discusses geographical and other considerations which would tend to lead to or mitigate the possibility of consumer confusion in §5 (1053ff).

⁴⁰ This issue has also been discussed as a barrier to electronic commerce. As Peter J. Denning put it: “the single most important technology for Internet commerce is authentication These technologies are known, they just are not used much in practice. I think this is because designers have tended to see the role of the Internet as a conveyor of information rather than a facilitator of coordination” (“Electronic Commerce,” in *Internet Besieged: Countering Cyberspace Scofflaws*, ed. Dorothy E. Denning and Peter J. Denning (New York: ACM Press), 377-389: 386). Denning emphasizes that the current focus on encryption of such information does little to address the structural problem of authentication.

ambiguity in referentiality makes it easier to assume that it would be possible to give, legally and formally, the reference to *all possible* uses of a word or sign in cyberspace. Hence, PEI precisely does imagine the closure of the gap between the connotations of the English word “playboy” and the PEI product line, and of the subsumption of the former into the latter. Such subsumption becomes thinkable because each listener is able to be individuated by the removal of any historicity attached to his or her Internet linguistic experience: each appears as a formally given, autonomous listening subject in the “here” and “now,” an individual whose relevant characteristics can be known entirely in advance.

In other words, descriptors such as the “open unity” of language indicate an element of the historical and locational specificity of the listener into the formal specification of the referentiality of a word. This implies that the formal specification becomes necessarily incomplete. Two results should be emphasized. First, as far as PEI is concerned, an ideal language is one in which “playboy” always brings to mind in a listener the corporate products which bear that name. This generates the need for juridical enforcement: having a court declare the propriety of the PEI’s structure of referentiality helps to create it. Second, the risk posed by the Internet is the closure of this openness such that it no longer serves to indicate a necessary ambiguity of referent. If a specific possible listener to an utterance on the Internet is isomorphic with any other possible listener, and if the discursive space occupied by that listener can be (at least apparently) fully determined without reference to his or her historical specificity (all listeners appear isotopic as well), then the listener can be subject to formal and legal specification. To be sure, such a specification can never be truly complete: people will always bring their own lives to the net. However, the marked flattening out of the discursive space of cyberspace as compared to more traditional *loci* of speech, combined with an increasing reliance

on cyberspace as a means for interacting with others, suggests that listeners can at least be qualitatively more individuated than before. Furthermore, this individuation is of the sort that levels apparent differences between people. If all potential listeners are isomorphic and isotopic, the distinction between the trademark term and English language word becomes increasingly difficult to sustain: the expansion of the discursive space of trademark law into the Internet allows one to (over)determine more, not less, about individual consumers.

Shrink-wrapped Discipline

The effort against an incompletely determined “public” is nowhere more overt, perhaps, than in the efforts of the copyright industry to make an end run around those provisions of copyright law which protect the interests of the “public” by interpreting the purchase of its products not as the purchase of a copy of a piece of intellectual property, but as a license to use that (copy of that) property in certain ways. Originally cast as a revision to the Uniform Commercial Code, the movement now involves state legislatures passing UCITA (Uniform Computer Information Transactions Act) laws.⁴¹ In general, these laws render presumptively valid so-called “mass market” or “shrink-wrap” licenses for the use of commercial computer software. Anyone who has installed commercial software recently will be familiar with the

⁴¹ The following discussion needs to be read with caution: much of the criticism is directed at the desiderata of the software companies such as Microsoft and AOL which are heavily lobbying for UCITA. Whether or not these desiderata will actually all be enacted into state contract law is an open question, as there is growing opposition to the bill as presented. At present, Virginia and Maryland are the only two states to have passed UCITA laws. Maryland diluted considerably some of the powers available to manufacturers, and Virginia delayed implementation for a year to study those powers. See “Md. software law expands protection for consumers,” *USA Today* (April 27, 2000), 3D; and “Software law could be a hard sell,” *USA Today* (March 29, 2000), 3D. For discussion of UCITA as part of Virginia’s bid to become “Internet capital of the world,” see Craig Timberg, “Gilmore Signs Bill On Software; State Is First to Enact Industry-Backed Law,” *Washington Post* (March 15, 2000), B01. For a general discussion and criticism of the status quo provisions, see Joseph Menn, “Software Makers Aim to Dilute Consumer Rights,” *Los Angeles Times* (Feb. 4, 2000), A1 (financial desk).

procedure: after purchasing but before installing the program, the user is required to assent (by clicking “I agree”) to a lengthy “contract” governing the usage of the software.

UCITA and its predecessor, UCC 2B, have been criticized on many grounds.⁴² Here I wish to focus on a few aspects of these criticisms, and how they indicate that shrink-wrap contracts differ in significant ways from what one normally means by “contract.” First, shrink-wrap licenses require assent without negotiation, usually *after* one has purchased the product. Of course, there is a right to a refund and an implied warranty given by consumer protection laws, but equally certainly, the presence of a lengthy and confusing license and the lack of alternative products which do not utilize such licenses creates disincentives for consumers to exercise that right, which in any case is limited. Furthermore, unless one is a large corporate customer, it is difficult to see how one could meaningfully negotiate the terms of the contract. The structure under which a shrink-wrap contract is effectuated, then, is one in which the unequal negotiating position of the parties allows the more powerful party – the software company – to dictate the terms to its advantage. As a matter of rhetoric and policy, however, the language of contract tends to occlude these unequal positions by suggesting that somehow both parties come, equally empowered, to an imaginary negotiating table.⁴³

Second, there is a pervasive fear among commentators that the content of these contracts will become increasingly restrictive. Insofar as the privatization of the purchase as a contract removes it from the public sphere, the provisions of copyright law – “fair use” – designed to

⁴² See David Nimmer, Elliot Brown and Gary N. Frischling, “The Metamorphosis of Contract into Expand,” *California Law Review* 87 (1999), 17-77. Nimmer *et al.* are criticized by Joel Rothstein Wolfson in “Contract and Copyright are Not at War,” *California Law Review* 87 (1999), 79-110. See also the criticisms in Charles R. McManis, “The Privatization (or ‘Shrink-Wrapping’) of American Copyright Law,” *California Law Review* 87 (1999), 173-190; in Julie E. Cohen, “Copyright and the Jurisprudence of Self-Help,” *Berkeley Technology Law Journal* 13 (Fall 1998), 1089-1143; and the critique of the ideology behind regimes such as UCITA in Julie E. Cohen, “Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management,’” *University of Michigan Law Review* 97 (November, 1998), 462-563. My debt to these articles in the following should be apparent; many of the examples here are taken from them.

benefit the public sphere become irrelevant. An analogy to purchasing a book should make the point evident. Under the well-established “first sale doctrine” in copyright law, the copyright owner can profit only from the first sale of the copy of the work. The owner of the copy – the purchaser of the book – is then just that: the owner of a piece of property which he or she can then transfer to others, sell to a used bookstore, etc. On the other hand, shrink-wrap licenses can explicitly forbid any such resale. One can imagine more troublesome scenarios: suppose the software came shrink-wrapped with the provision that one was not allowed to write a bad review of it? Writing a bad review would then subject the reviewer to legal action by the software company to suppress the review and collect compensatory damages. Suppose that *books* came shrink-wrapped, with similar such “no bad review” provisions? Suppose that CD’s came shrink-wrapped with the provision that no parodies were allowed? In the last case, the copyright industry would have succeeded in circumventing an explicit Supreme Court decision that parody is “fair use.”⁴⁴ In general, one may note, all of these provisions would undermine another central tenant of copyright law: not all fair use is consensual. In other words, that the copyright owner does not *like* what I do with his or her work is not itself proof that I have broken copyright law. Under UCITA, presumably, it could be proof that I have violated the contract to which I “agreed” in accessing the product.

Third, combined with the tendency to increase restrictions on use is the increasing technological ability to enforce those restrictions. After all, one response to the argument that these contracts are abusive is that software companies will only litigate against flagrant corporate violators: litigation would be too expensive to pursue against isolated users. However, the technology enables these contracts to be self-enforcing and for software companies unilaterally

⁴³ This latter point is made with particular force in Julie E. Cohen, “Lochner in Cyberspace.”

⁴⁴ *Campbell v. Acuff Rose*, 114 S.Ct. 1164 (1994).

to execute “self-help” provisions. For example, the software might detect that it is being copied onto another machine and delete itself. Or, the manufacturer could require the user to assent to a “destruct button” which allowed the manufacturer to delete the software from the user’s machine, in the event that the manufacturer decided that the user had broken the terms of the contract. One might also imagine that the software simply prevented itself from being copied. Furthermore, under the provisions of the current copyright law, individuals are explicitly forbidden from attempting to circumvent any such technological provisions built into the software.⁴⁵ Self-enforcement is strictly a one-way street.

Against such contract provisions, presumably, individual users have two recourses: either to “negotiate” the contract or to invoke the doctrine that the contract is “unconscionable.” The latter option seems unpromising, since very few contracts for use of software would be considered unconscionable. Of the first option, legal scholar Julie E. Cohen notes that the “freedom of contract argument ... is simple and elegant – and breathtakingly sophomoric,” adds that UCC 2B “sanctions the control of people, not products; it negates agency, and calls the result freedom,” and offers the following analogy:

Consider ... your living room sofa. Suppose, first, that the purchase agreement states that no more than three people may sit on the sofa at a time. When a fourth person (say, perhaps, the small child of an adult sofa-sitter) attempts to join the others, the sofa vanishes, dumping its erstwhile occupants onto the floor. This is repossession, swift and (largely) bloodless. Now suppose, instead, that the child's approach activates an invisible force field, such that the child may not sit while all three adults remain. There is no repossession (the sofa remains) and no loss of “use” (as defined by the licensor), but only regulation of use. There is little risk of physical injury, and little need for invasion of privacy in the informational sense.

⁴⁵ This is the notorious §1201 of the Digital Millennium Copyright Act. For a critical discussion of the anti-circumvention regulations, see Pamela Samuelson, “Why the Anti-Circumvention Regulations Need Revision,” *Communications of the ACM* 42:9 (September, 1999), 17-21. Julie E. Cohen, in “Copyright and the Jurisprudence of Self-Help,” which was written prior to the passage of the DMCA, argues that circumvention ought to be explicitly allowed as a mechanism which allows consumers self-help of the sort that UCITA intends to grant copyright owners.

Yet I suspect most readers will feel that from the standpoint of personal autonomy within a space hitherto conceived as private, there is not much difference between the two scenarios. Article 2B stands for the proposition that intellectual property is different enough from sofas that licensors can, with straight faces, propound and demand acceptance of precisely the latter sort of regime (“Copyright and the Jurisprudence of Self-Help,” 1115-1116).

From the point of view of the argument developed here, the result should be recognizable: it is not that people do or do not have rights, but that the commodity itself is granted rights for its own “protection,” in much the same way that Metallica attempts to prevent its music from misuse at the hands of violators. In other words, the result is a complete and explicit fetishization of the commodity form. The universe of those who use computer software is closed in advance by the requirement that such users adhere to technologically self-enforcing contract terms; part of the ideology which sustains this situation is the libertarian notion that UCITA contracts are private legal documents which are freely negotiated between equal parties.

Again, the loss of the “public” (in this case, the “public domain” and “fair use”) discloses the increasing individuation of those who participate in the discursive space of the Internet. Such individuation discloses a regime of discipline, in the precise sense used by Foucault. In particular, Foucault notes that contract regimes can be the sites of the manifestation of disciplinary power; such manifestation is marked when the contract regime codifies unequal distributions of power:

The acceptance of a discipline may be underwritten by contract; the way in which it is imposed, the mechanisms it brings into play, the non-reversible subordination of one group of people by another, the ‘surplus’ power that is always fixed on the same side, the inequality of position of the different ‘partners’ in relation to the common regulation, all these distinguish the disciplinary link from the contractual

link, and make it possible to distort the contractual link systematically from the moment it has as its content a mechanism of discipline.⁴⁶

UCITA has all of the features of such a disciplinary power masquerading under the rhetoric of “contract.” Its operation is doubly masked: once under the fiction that equal members of the public enter into private negotiations for the usage of intellectual property, and a second time under the fiction that such negotiations result in anything like a contract, even an imbalanced one. Members of the public, nominally privatized into contract relations with intellectual property owners, find themselves cast back into the “state of nature” by a mass-contract process that grants rights to commodities and removes the state protections of the public sphere against those commodity rights.

The Disappearance of the Public

All of these examples, Metallica’s description of its lawsuit against Napster, the incongruous district court decisions about the status of “playboy” and “movie buff,” and the copyright industry’s efforts at self-enforcement through contract law, point toward at least one common denominator: the increasing *ex ante* individuation of relations between producers and consumers. In this sense, the examples suggest the further diffusion of techniques of discipline, as the effort to “eliminate the effects of imprecise distributions, the uncontrolled disappearance of individuals, [and] their diffuse circulation” (Foucault, 143). Because it enables a more precise individuation of consumers of information-based commodities, and because this individuation occurs without reference to the material specificity of those consumers, the technology enables

⁴⁶ Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage Books, 1977), 222-223. There are numerous studies of disciplinary power in cyberspace. One early and important example is James Boyle, “Foucault in Cyberspace.” Although he does not explicitly invoke Foucault as much as Boyle, Lawrence Lessig’s *Code and Other Laws of Cyberspace* argues from an essentially Foucauldian perspective that the architecture of cyberspace itself facilitates strategies of social control.

their precise organization according to their patterns of consumption.⁴⁷ Because it is possible to clearly categorize and demarcate consumers, it also becomes possible to draw a boundary between those who behave as consumers and those who do not. This is the significance of the copyright industry's endorsement of contract law as a mechanism for enforcing copyright: it is not so much that the industry requires a new mechanism to enforce its property rights against infringing members of the public, it is that the industry seeks to make such infringements impossible in advance, thereby bypassing the enforcement question altogether, or at least displacing it to the question of banning technology which would enable circumvention of technological access controls. Once someone has acceded to the regime of access control, one is no longer a member of the public, but someone with whom the industry has a contractual, "private" relationship.

It is in this sense that I mean that "public" names the place of consumers who are impossible to fully individuate. The turn from "public" to "private" law in the information economy, then, suggests the disappearance of the need for capital to concede that there is any such incompletely individuated consumer in existence. Rather than speaking to a consumer *in potentia*, speakers in the digital economy speak only to consumers who have surrendered private information about themselves and who have agreed to play by a series of pre-determined rules: consumers *in actu*. The distinction between potency and act, however, is an important one. If every member of the public is a potential customer, then the formation of that potential customer into an actual customer presupposes the functioning of a variety of forces in the customer's context and requires at least some allowance for their operation. If, on the other hand, everyone is either an actual customer or not a customer at all, then it becomes possible to regulate the

⁴⁷ In other words, in Marxian terms, it allows the overdetermination of the materially specific consumer by the abstract (and universal) "consumer" in the same way that "labor power" overdetermines the labor of individual

context in which someone arrives, fully formed, as a consumer. The “public,” as the marker of unformed potentiality, disappears altogether.

What seems to be at stake can perhaps be illustrated with reference to Althusser’s discussion of ideology, which, he says, functions to “‘recruit’ subjects among the individuals ... or ‘transform’ the individuals into subjects ... by that very precise operation ... [of] *interpellation* or hailing.”⁴⁸ As Althusser alludes (“at the risk of being taken for a Neo-Aristotelian” (126)), this transformation seems precisely to function as a movement from potentiality to actuality: individuals are “always already subjects” (131), which implies that individuals in a given public space will correctly recognize their interpellation and turn around in response to the “hey you.” Even before they enter into concrete relations of subjectivity, those relations exist potentially, in the same sense that a new baby has to become the person it already is (132). On such a turning around, the individual becomes a subject in act. Now, as Judith Butler suggests, interpellation requires this responsive movement, and she resists legal theories which codify in advance how a subject is constituted by interpellation.⁴⁹ The existence of this moment of responsivity as a site of resistance, however, presupposes that one initially appears (in any given situation) as an individual, only then to be hailed and make the movement to being a subject. In other words, the presupposition is that one appears as what I have been calling “incompletely individuated” from the point of view of the ideological apparatus of the market, as lacking the determination of being a subject (consumer) in act. On this reading, the move to privatize law is the move to use what Althusser calls the repressive state apparatus to insist on

workers.

⁴⁸ Louis Althusser, “Ideology and Ideological State Apparatuses (Notes Toward an Investigation,” rpt. In *Mapping Ideology*, ed. Slavoj Žižek (London: Verso, 1994), 100-140: 130.

⁴⁹ Cf., for example, her discussion of Katherine MacKinnon in *Excitable Speech*. Butler suggests, against Althusser, that interpellation does not require an absolute subject (“Subject” with a capital-“S”) to function. In the present instance, “the market” seems to function as such an absolute subject for its advocates precisely in the doubly-mirrored sense Althusser discusses.

the “always already” of one’s interpellation as a subject – to ensure that the phenomenal appearance is always already as a subject, not as an individual. In other words, the movement is to close the gap between interpellation and responsivity, or between illocution and perlocution, to ensure the smooth movement from potential subject to actual subject (in this case, consumer). The place where one sees such individuals who have not yet actually been hailed and who are not already in concrete relations of consumption is precisely “the public.” Hence, the need to eliminate such a place: one is to be either in a privatized, fully specified relationship, or one is to be in the state of nature and subjected to the force of the law.

To return to the topic with which I began, all of this effects at least two reversals, which should be taken as aspects of the same thing. First, the focus on the speaker’s rights in the application of First Amendment law to cyberspace obscures the power relation between the speaker and his or her audience. Whereas formerly it was necessary to protect a speaker against “the public” (represented in the form of governmental codes designed to uphold common morality, stop sedition, etc.), by allowing the speaker to individuate himself or herself from the public sufficiently to author a speech act, in the absence of a public from which a speaker is to be individuated, exactly the opposite protection is (also) necessary.⁵⁰ If, as we are often told, the speaker is always and already individuated by a technology which enables anyone to “publish,” and if that speaker is further enabled by a technology which requires that listeners individuate themselves before even hearing the utterance (via agreement to licensing terms, for example), then it is not speakers who require more protection. Listeners also require protection from having the meaning of utterances legislated for them in advance. The fiction of a “marketplace

⁵⁰ Cf. the defense of the “right to read anonymously” in Julie E. Cohen, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace,” *Connecticut Law Review* 28 (Summer 1996), 981-1039. Cohen ties protection of anonymous reading to protection of the right to circumvent access control technologies; the latter protections were substantially eliminated by the 1998 Copyright Act.

of ideas” requires the circulation of those ideas and the need for speakers to present the best possible ideas in order to attract the attention of indefinable members of the public. If all members of the public can be defined in advance, then there is no public, nothing like a marketplace remains, and the protection accorded to a speaker against the public becomes a protection against there being a public: a protection against being “misread.”

Second, the libertarian idea that business functions better without government turns out not only to be wrong, but to be exactly the opposite of correct. “Markets” might or might not function better with more or less state regulation. However, the future contemplated by the intellectual property industries does not, in a technical but important sense, involve markets at all. “Markets” presuppose the ambiguities of the circulation phase – that is, of the public. In order for the circulation phase to become less ambiguous, *more* state intervention is required. This necessity of state intervention functions not just at the level of the need for a contract system, even as that contract system has to expand considerably to cover such mass-market licenses. It also requires the imposition of punitive measures against those who refuse to behave as well-disciplined customers. In the absence of something like a “public” to indicate the location of the formation of an individual as a consumer, and in the replacement of this process by the binary classification of individuals as either consumers or not, the market loses its own resources for converting individuals into consumers. The fully fetishized and naturalized market can only relate to those who are already consumers because it can see no other form of legitimate social relation. In the place of standard market-based inducements to get individuals to behave according to market and commodity relations – advertising, for example – industry comes to rely on the state to ensure that no individual behaves other than as a consumer. This situation perhaps explains the disproportionate and increasing severity of penalties for violation of intellectual

property law. It is also why Metallica can have recourse to family-based rhetoric and state sanctions to understand its relation to its fans who refuse to treat its music as a commodity: the commodity form of the music appears natural, and so attempts to extract that music from the commodity relation appear as a violation of the laws of nature. Conceptual efforts to naturalize certain aspects of the appearance of cyberspace do not just make a theoretical mistake. They require an increasing application of power, both in the form of covert mechanisms of discipline and in the form of overt state power, to support their fetish and thereby produce a world which behaves like the one they imagine. Literally and figuratively, “the public” as a site of materiality and difference – an excess of meaning – becomes explicitly targeted for corporate eradication.