

## The Tory Anarchism of F/OSS Licensing

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*This Article uses the example of free and open-source software licenses to show that granting authors relatively strong control over the modification of their work can increase rather than impede both the creation of future work and the variety of that work. Such licenses show that form agreements that enable authors to condition use of their work on the terms that matter most to them may give authors the incentive and assurance they need to produce work and make it available to others. Such licenses may therefore increase both the amount of expression available for use and the variety of that expression, even if enforcement limits the freedom of downstream users. These facts give reason to oppose recent decisions that make license terms harder to enforce through preliminary or permanent injunctive relief.*

### INTRODUCTION

Among their other virtues, free and open-source software licenses (F/OSS licenses) annoy almost everyone. The licenses cause academic knees to jerk in different directions. They are “take it or leave it” forms that in some cases seek to extend the influence of an author through several levels of future production, which most scholars think is bad,<sup>1</sup> but they do so in the name of “openness” (as opposed to proprietary “closed” code), which most scholars think is good.<sup>2</sup> The licenses worry in-house counsel, who rightly believe that their engineers or overseas contractors might include licensed code in a product without documenting that fact. The licenses befuddle many practicing lawyers.

Such annoyances are often valuable. They may force more careful thinking about things too often taken for granted, and careful thought may reveal holes in arguments once considered tightly knit. In this Article, I want to use the example of F/OSS licenses to shed light on two topics: (1) whether such licenses should be considered contracts or simple conditional permissions to use intellectual property, and (2) whether as a presumptive matter they should be enforced through injunctive relief rather than damages.

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<sup>1</sup> See, for example, Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S Cal L Rev 1239, 1279–82 (1995), citing *Vault Corp v Quaid Software Ltd*, 847 F2d 255 (5th Cir 1988).

<sup>2</sup> See, for example, Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 Mich L Rev 462, 530 & n 258 (1998).

On each topic, I argue in favor of allowing authors maximum freedom to tailor the conditions under which they make their work available to the public. I argue that it does not matter very much whether judges treat the licenses as contracts or conditional permissions so long as judges do not use contractual treatment to weaken remedies for violations of the license terms. I argue as well in favor of presumptive injunctive relief and against the current trend of cases reading *eBay Inc v MercExchange, LLC*<sup>3</sup> to weaken the presumption of irreparable harm in copyright cases.

More generally, I contend that the arguments that support these positions tend to refute the dominant strain of academic thought concerning copyright law and licensing, which holds that injunctive relief and licensor conditions are opposed to innovation and, in a somewhat diffuse sense, to freedom. Just the opposite is more likely true. Apart from the unusual case of monopoly (in which case all solutions are imperfect) or fraud, courts will tend to enhance freedom and creativity by enforcing conditions licensors impose on the use of their works and, presumptively, enjoining violations of those conditions. Such enforcement empowers licensors to undertake new projects on which they might not otherwise be willing to work. It does not limit the freedom of those who prefer not to assert their rights; they remain free not to do so.

Following George Orwell's description of Jonathan Swift, I refer to this approach as "Tory anarchism."<sup>4</sup> It is Tory in the sense that it affirms the traditional preference for injunctive relief for infringement of intellectual property rights; it is anarchistic in the sense that the relative centralization of control in authors produces a varied and robust expressive environment that is, I argue, richer than would be the case with alternative approaches.

## I. WHY F/OSS LICENSES ARE INTERESTING

F/OSS licenses are forms that set forth a software author's view of what those who use the code may do and, in certain circumstances, must do.<sup>5</sup> Two aspects of this definition are worth elaborating.

F/OSS licenses are forms, but unlike many forms they are used by licensors with widely varying interests working in widely varying

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<sup>3</sup> 547 US 388 (2006).

<sup>4</sup> See Part III.

<sup>5</sup> For a discussion of other common types and features of F/OSS licenses, see Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 Harv J Legis 359, 369–87 (2010).

contexts. An example of varied interests might be the requirement typical of F/OSS licenses that a downstream author who distributes modified code identify her modifications and give credit to previous authors. Some authors might value such credit a great deal and want to secure it as a means of enhancing their professional reputations.<sup>6</sup> Others might not care much about being named, wanting only to be sure they are not blamed or praised for code they did not write.

As to varying contexts, a F/OSS license may be one element of a for-profit business model, in which the licensor earns money from products or services that complement the licensed code. The same license may be used by a hobbyist project whose contributors have no interest in leveraging profits from the code. The GNU/Linux operating system and the Java Model Railroad Interface (JMRI) both use the GNU General Public License (GPL). But many firms that promote GNU/Linux do so to make money selling complementary services, while JMRI is a true hobbyist project whose members have no commercial aspirations for their code.<sup>7</sup> The form itself therefore says less about the contexts in which it is used than do other, more targeted forms such as parking or travel tickets or shipping forms.

Data on license use are consistent with this intuition. A leading open-source consultancy reports that nearly half of the projects it surveyed use version 2.0 of the General Public License (GPL 2). The survey included more than 230,000 projects, and it seems unlikely that the leaders of each of the roughly 110,000 projects that adopted GPL 2 made a considered determination that GPL 2 fit their projects better than any of the numerous other F/OSS licenses available for adoption.<sup>8</sup>

Because F/OSS licenses are forms used by very different authors in very different contexts, it is inevitably misleading to make general

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<sup>6</sup> See, for example, Josh Lerner and Jean Tirole, *Some Simple Economics of Open Source*, 50 *J Indust Econ* 197, 203 (2002).

<sup>7</sup> Disclosure: Following the district court's second denial of a motion for preliminary injunction, after remand from the Federal Circuit, I assisted Victoria Hall in the representation of Robert Jacobsen, the leader of the JMRI project, in *Jacobsen v Katzer*, No 3:06-cv-1905 (ND Cal filed Mar 13, 2006). The case settled on terms including a permanent injunction. See Stipulated Permanent Injunction, *Jacobsen v Katzer*, No 3:06-cv-1905 (ND Cal Feb 22, 2010), online at <http://jmri.sourceforge.net/k/docket/403.pdf> (visited Jan 31, 2011).

<sup>8</sup> For a list detailing the data on license use, see Black Duck Open Source Resource Center, *Top 20 Most Commonly Used Licenses in Open Source Projects*, online at <http://www.blackducksoftware.com/oss/licenses#top20> (visited Oct 12, 2010) (showing that almost 50 percent of open-source projects used GPL 2). The Berkeley Software Distribution (BSD) and Massachusetts Institute of Technology (MIT) licenses, which were published shortly before GPL 2, combine to account for an additional 10 percent of projects, suggesting either a form of path dependence owing to familiarity and experience with the licenses or a desire to use the license to signal certain project characteristics—or both. *Id.*

statements about what “open-source” licensing is or is not about. The most famous project, the GNU/Linux operating system, receives significant commercial support from firms whose business models would benefit from a relatively inexpensive operating system.<sup>9</sup> Other projects using the same license draw no commercial attention at all. But precisely because such a broad range of authors working in such different contexts find these forms useful, the forms provide unique insights into the relationship between copyright, licensing, and the production of expression. Whatever one might say about F/OSS forms such as GPL 2, they cannot plausibly be dismissed as reflecting a bias toward any particular type of author (corporate or individual, for-profit or nonprofit) or type of use (passive or transformative). It therefore makes sense to examine the structure of the licenses and the sociology of production they sustain to gain insights into this relationship.

The second interesting part of my definition is the deliberately vague phrase “the author’s view.” The phrase avoids taking a position on a debate over how the law should classify F/OSS licenses. Some scholars, most recently Robert A. Hillman and Maureen O’Rourke, believe the licenses should be classified as contracts.<sup>10</sup> Others, such as Eben Moglen, the scholar with by far the most experience with the most commonly used licenses, prefer to characterize them as conditional permissions to use code.<sup>11</sup>

I prefer the conditional permission construction of at least the GPL, and I argue for that construction below.<sup>12</sup> In doing so, however, I do not want to give the impression that this distinction has any intrinsic importance. It does not. It matters only to the extent courts might be tempted to use the contract label to make it harder for licensors to enjoin violations of the license terms.

The F/OSS licenses of which I am aware all allow users to run code on their computers free from any obligation. At the basic level of running programs, therefore, it is hard to tease a bargain out of the licenses because they require nothing of the user.

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<sup>9</sup> For a list of Linux Foundation members, see *Members*, online at <http://www.linuxfoundation.org/about/members> (visited Oct 12, 2010).

<sup>10</sup> See Robert A. Hillman and Maureen A. O’Rourke, *Rethinking Consideration in the Electronic Age*, 61 *Hastings L J* 311, 328–31 (2009).

<sup>11</sup> See, for example, Eben Moglen, *Enforcing the GNU GPL* (GNU Sept 10, 2001), online at <http://www.gnu.org/philosophy/enforcing-gpl.html> (visited Oct 13, 2010) (“Licenses are not contracts: the work’s user is obliged to remain within the bounds of the license not because she voluntarily promised, but because she doesn’t have any right to act at all except as the license permits.”).

<sup>12</sup> See text accompanying notes 15–22.

The licenses do require users to do something if they modify and distribute code. The obligations run from mild and undemanding, such as the requirement of the Berkeley Software Distribution (BSD) and Massachusetts Institute of Technology (MIT) licenses that a derivative author include a copyright notice acknowledging the original work,<sup>13</sup> or the requirement of the Artistic License that the derivative author provide source code for the modified work and the means to obtain the original work, to the famous “copyleft” requirement of the GPL, which requires a derivative author to distribute the derivative work under the same license governing his own use of the code.<sup>14</sup>

How many users of any given program released under any given license actually modify code and distribute modified versions is, of course, an empirical question. I note here only that there is no reason to expect the numbers to be uniform across licenses or even across projects using the same license, and there is no reason to believe that most users or even a large fraction of users actually subject themselves to these requirements. It is my impression, though no more than that, that many users of most programs fall into one of two categories. They either receive code and run it without modification or modify it for distribution within a firm but do not release the modifications more generally. Such limited distribution probably does not violate the “copyleft” requirement, and the modifications probably are treated, unproblematically, as trade secrets.

The example of nondistributing users makes it a stretch to treat F/OSS licenses as contracts unless the facts of a particular case show that the parties intended to use a F/OSS form to document an agreement. Professors Hillman and O’Rourke suggest that a licensor’s “motive to further one or more of” the goals of the F/OSS movement, “without more, should be sufficient to satisfy the bargain requirement.”<sup>15</sup> I find this argument unpersuasive, because altruism on the part of the licensor establishes no obligation on the part of the licensee. I agree that a licensor’s general desire for increased adoption of F/OSS code and development practices could count as a benefit to the licensor, though one more general and diffuse than is found in the textbook cases in which courts stretch the concept of consideration to enforce what

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<sup>13</sup> See Open Source Initiative, *The BSD License*, online at <http://www.opensource.org/licenses/bsd-license.php> (visited Oct 13, 2010); Open Source Initiative, *The MIT License*, online at <http://www.opensource.org/licenses/mit-license.php> (visited Oct 13, 2010).

<sup>14</sup> For a summary of these terms, see David McGowan, *Legal Implications of Open-Source Software*, 2001 U Ill L Rev 241, 253–57.

<sup>15</sup> Hillman and O’Rourke, 61 *Hastings L J* at 328–39 (cited in note 10).

probably were gifts,<sup>16</sup> but no licensee is obliged in any way to contribute to these goals. A licensee who runs the code contributes to the base of users and thus may make the code more attractive to developers of complementary code or services, but no licensee has to run the code and nothing stops a licensee from trying it, throwing it away, and disparaging both the project that developed it and F/OSS development more generally.<sup>17</sup>

For essentially the same reason, I do not think Hillman and O'Rourke refute the notion that most F/OSS licenses are best read as simple conditional permissions to use code. Hillman and O'Rourke draw an analogy to a conditional permission to visit land, where the condition limits the visitor's future use of knowledge gained during the visit. They see this as a bargain in which the visitor's agreement to the limitation is consideration running to the landowner.<sup>18</sup> But for many F/OSS users, this analogy gets things backward. Unlike visitors to land who will venture back out into the world and must restrain themselves according to the terms of the license from doing things that otherwise might come naturally to them, many F/OSS users simply get the code, install it on their machines, and never return it to the larger world. They do not have to restrict themselves from doing anything. Conceptually, they agree not to distribute modified versions without complying with the license conditions, but if they have no desire or capacity to do so, then this restriction is purely theoretical; the author faces no real possibility of either harm or tangible benefit from such use.

In *Jacobsen v Katzer*,<sup>19</sup> the Federal Circuit did use the language of contract to describe the Artistic License,<sup>20</sup> but I think the court's language should not be read literally. The court noted that in general F/OSS communities emphasize collaboration, and it wrote that in "exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible."<sup>21</sup>

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<sup>16</sup> See, for example, *Hamer v Sidway*, 27 NE 256, 258 (NY 1891).

<sup>17</sup> At points Hillman and O'Rourke seem to have in mind benefits such as status or reputational gains that developers may enjoy from having their work included in a prominent project. See Hillman and O'Rourke, 61 *Hastings L J* at 328–29 (cited in note 10). But no project maintainer need include any particular contribution in a program.

<sup>18</sup> *Id.*

<sup>19</sup> 535 F3d 1373 (Fed Cir 2008).

<sup>20</sup> *Id.* at 1379–82.

<sup>21</sup> *Id.* at 1379.

The court's description works as an idealized vision of a F/OSS project, but, as noted above, no exchange is required for many and perhaps most users of code produced by many and perhaps most projects. The court also noted possible reputational benefits for developers,<sup>22</sup> which comes closer to a conventional bargain situation, but even a desire to gain a reputation imposes no reciprocal user obligation to read credits files or do anything else. *Jacobsen* therefore points to general descriptions of aspirations and probabilities that may be relevant in some cases but that cannot be presumed to exist as concrete fact in any particular case—and in all likelihood are not present in any serious way in a large fraction of cases. And it is the facts of particular situations, not generalities about uncertain probabilities, that should matter for purposes of formation analysis.

## II. WHY INJUNCTIVE RELIEF IS IMPORTANT TO F/OSS LICENSING

Regardless of one's view of the contract–permission distinction, remedies matter to F/OSS licensing. They do not necessarily matter more to authors using F/OSS licenses than to authors using more conventional proprietary documents, but in some cases the structure of F/OSS production makes it easier to see what is at stake in deciding whether to enjoin violations of license terms or simply to price them through litigation. In both F/OSS and more conventional proprietary licensing, licenses both govern use and sustain expectations that allow authors to produce works in many different ways. Violations of those terms can cause harm that is either hard to count in dollar terms or for which authors would not count money as adequate payment.

As a practical matter, until recently remedies for breach of a license term differed depending on whether the term was considered a limitation on the scope of use or a promise. As the Federal Circuit put it in *Jacobsen* (applying Ninth Circuit law), “if the terms of the Artistic License allegedly violated are both covenants and conditions, they may serve to limit the scope of the license and are governed by copyright law. If they are merely covenants, by contrast, they are governed by contract law.”<sup>23</sup> The Artistic License stated that the content it covered could be used and modified “provided that” its terms were met, and the court found that this language stated a condition rather than a covenant.<sup>24</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> 535 F3d at 1380.

<sup>24</sup> *Id.* at 1382.

For this distinction, *Jacobsen* relied on *Sun Microsystems, Inc v Microsoft Corp*,<sup>25</sup> where the Ninth Circuit addressed a license from Sun that allowed Microsoft to make and distribute products embodying Sun's Java technology.<sup>26</sup> The license required that Microsoft's products be compatible with the most recent versions of Java. The question was whether this term was a promise by Microsoft to Sun or a limitation on Microsoft's right to use Sun's technology.

The court held that this distinction mattered because in seeking a preliminary injunction a copyright licensor was entitled to a presumption of irreparable harm

only after the copyright holder has established that the disputed terms are limitations on the scope of the license rather than independent contractual covenants. In other words, before [a plaintiff] can gain the benefits of copyright enforcement, it must definitively establish that the rights it claims were violated are copyright, not contractual, rights.<sup>27</sup>

By its terms, *Sun Microsystems* pertains only to the presumption of irreparable harm enjoyed (when *Sun Microsystems* was decided) by copyright plaintiffs who show they are likely to prevail on the merits of their claims.<sup>28</sup> This aspect of *Sun Microsystems* may be moot in light of the Supreme Court's decision in *eBay*, which held that permanent injunctive relief in patent cases may issue only if a plaintiff shows it would be irreparably harmed without such relief.<sup>29</sup> Most commentators and lower courts read *eBay* as extending to all forms of injunctive relief, including preliminary injunctions in copyright cases.<sup>30</sup>

Setting the *eBay* decision aside for a moment, the *Sun Microsystems* court's distinction is useful in only a limited set of cases. The distinction traces to *Peer International Corp v Pausa Records, Inc*,<sup>31</sup> which held that the defendant's failure to pay royalties during a license term

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<sup>25</sup> 188 F3d 1115 (9th Cir 1999).

<sup>26</sup> *Id* at 1118.

<sup>27</sup> *Id* at 1121–22.

<sup>28</sup> See *id* at 1119.

<sup>29</sup> *eBay*, 547 US at 391–92 (rejecting a rule that grants injunctive relief when only infringement has been shown and requiring plaintiffs asserting patent infringement to show four elements, including irreparable harm).

<sup>30</sup> See, for example, *Salinger v Colting*, 607 F3d 68, 77–78 (2d Cir 2010); Pamela Samuelson and Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J L & Pol Info Socy 67, 72–74 (2010). For an exception, see *Marlyn Nutraceuticals, Inc v Mucos Pharma GmbH & Co*, 571 F3d 873, 877 (9th Cir 2009) (applying a presumption of irreparable harm in a trademark case).

<sup>31</sup> 909 F2d 1332 (9th Cir 1990).



did not give rise to an infringement action.<sup>32</sup> The plaintiff sought to frame the claim as one for infringement in order to claim statutory damages, which exceeded the royalty payments called for by the license and which were themselves specified as part of a statutory compulsory license. The court held that claims for unpaid royalties were contract claims rather than infringement claims.<sup>33</sup>

The court's holding makes sense because the plaintiff had agreed to exchange exclusivity for a determinate amount of money, and no policy would be served by awarding more than that amount.<sup>34</sup> In contrast, had the defendant exceeded the scope of the license, it could have created harm that would be hard to value or that the plaintiff would not treat as simply a monetary loss. In this regard, it is worth noting that even with respect to the unpaid royalties claim the court noted that the defendant's breach could support a claim for rescission,<sup>35</sup> in which case an infringement claim presumably would lie for a defendant's post-rescission exercise of exclusive rights.

Apart from such royalty disputes, practical considerations counsel in favor of treating material breaches as supporting claims for infringement. Contract law long ago adopted the doctrine of constructive conditions of exchange precisely because most parties make promises in the first place only because they expect the performance promised in return.<sup>36</sup> The doctrine determines whether the victim of the breach must tender her own performance or whether she may refuse to do so and terminate the agreement.<sup>37</sup> Where a breach is material (an inquiry that asks in part whether the victim of the breach is likely to suffer harm for which she cannot be compensated adequately), a party is entitled to treat the contract as terminated and is not required to tender its own performance.<sup>38</sup>

Contrary to the implications of the Ninth Circuit's opinion, *Sun Microsystems* was just such a case. Microsoft's refusal to develop compliant Java would deny Sun the benefit of propagating its technology as

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<sup>32</sup> Id at 1338–39.

<sup>33</sup> Id.

<sup>34</sup> The license terms varied the statutory compulsory license terms, but the point in the text is reinforced by the statutory scheme, which reflects a policy determination regarding the license fee in addition to whatever terms the parties might reach.

<sup>35</sup> See *Peer International*, 909 F2d at 1339 n 9 (noting the availability of both a cause of action for breach of contract and a cause of action for rescission).

<sup>36</sup> See Catherine M.A. McCauliff, 8 *Corbin on Contracts* § 32.2 at 134–36 (Lexis rev ed 1999). Consider, for example, *Jones v Barkley*, 99 Eng Rep 434, 437–40 (KB 1781).

<sup>37</sup> See, for example, *Jones*, 99 Eng Rep at 437–40; Restatement (Second) of Contracts §§ 237, 241 (1979).

<sup>38</sup> Restatement (Second) of Contracts § 241.

a de facto standard—precisely the benefit Sun sought by entering into a licensing program in the first place.<sup>39</sup> Similarly, the comparatively few obligations placed on F/OSS licensees—recognition for work done and, in some cases, propagation of the production model through the “copyleft” provision—are likely to be important to the licensor. Why would an author agree to distribute works under a F/OSS license if a judge were likely to award only damages rather than injunctive relief, where damages would likely be low or nonexistent given the ability of numerous downstream users to distribute code for free? There is no point in making the author’s remedies turn on whether the language of an agreement strikes a judge as more like a promise or a condition. In my view, *Jacobsen* reaches the right result on such analysis, but constrained by *Sun Microsystems* as precedent, it had to take the wrong approach to get there.

As I mentioned earlier, the difference between promises and conditions is important only to the extent it affects the remedies courts will grant for violation of a license’s terms. One strand of academic criticism embraces this difference, arguing in essence that if an author distributes code under a contract then the author should be limited to contractual remedies.<sup>40</sup> The default contractual remedy is expectation damages, with specific performance or prohibitory injunctive relief being the exception rather than the rule.<sup>41</sup> The difference between promises and conditions therefore points directly to the familiar debate over property rules and liability rules. Enough has been written on that debate, to say the least, but the case of F/OSS licenses highlights some interesting aspects of it. In my view, the F/OSS example shows why the traditional preference for injunctive relief in copyright cases is correct and why the Supreme Court has been wrong to lead lower courts away from that presumption.<sup>42</sup>

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<sup>39</sup> See Mark A. Lemley and David McGowan, *Could Java Change Everything? The Competitive Propriety of a Proprietary Standard*, 43 *Antitrust Bull.* 715, 764–65 (1998) (addressing Sun’s concern that Windows’s modifications to Java would prevent its adoption as a standard).

<sup>40</sup> Unfortunately, I have not found the argument made in a published work. For an example of the argument in summary form in a podcast, see Panel Discussion, *Liability for Intermediaries under Copyright and Trademark Law* (Association of American Law Schools Annual Meeting, Jan 10, 2009) (statements of Mike Madison and Mark Lemley), online at <http://www.aalsweb.org/fri/LawandComputers.mp3> (visited Oct 9, 2010).

<sup>41</sup> Compare Restatement (Second) of Contracts § 347 (stating that “the injured party has a right to damages based on his expectation interest”) with Restatement (Second) of Contracts § 357 (stating that “specific performance of a contract duty will be granted in the discretion of the court”).

<sup>42</sup> For commentary on the tradition of injunctive relief in copyright cases, see H. Tomás Gómez-Arostegui, *What History Teaches Us about Injunctions and the Inadequate-Remedy-at-*

Hobbyist projects present the easiest illustration of my argument. Take a project such as JMRI.<sup>43</sup> The project authors do not charge for their code, so their monetary expectation damages are \$0. They might suffer harm from infringement that could in theory be monetized, such as lost reputational gains, but in many cases such losses would be highly speculative and impossible to quantify with any precision. JMRI is a hobbyist project; the authors have day jobs, often not programming for model railroads. (The project leader is a physicist at UC Berkeley.)

The authors might suffer other forms of harm, however, for which expectation damages would be particularly ill suited to compensate. For example, there is no obvious way to calculate expectation damages sufficient to compensate Howard Penny, a JMRI author who gave the following testimony at his deposition regarding his view of the infringement alleged (and found on summary judgment) in *Jacobsen*:

[G]ranted, the JMRI project being open source, anybody can look at it and use it and modify it, but they're supposed to give credit to those people who—who did it. And if I'm not going to get credit for what I did, then I would have to cease my contributions, because there really was a lot of effort in this.

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I have not contributed anything in quite some time.

Q. And why is that?

A. Well, because it's very discouraging to find it being used by others that are not giving credit for it.<sup>44</sup>

One could translate this statement into reputational-capital terms and subject it to a notional totting up of costs and benefits that would make expectation damages seem appealing. By extension, such translation would make liability rules seem appealing too. But what would be the point of such pretend pricing? The author expresses frustration at the defendant's lack of acknowledgment of his work as much as, if not more than, he expresses frustration at not being recognized in a sense that

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*Law Requirement*, 81 S Cal L Rev 1197, 1205–06 (2008) (discussing lower court responses to the Supreme Court's *eBay* decision before conducting a comprehensive historical analysis of injunctive relief since the sixteenth century). For a more general argument regarding irreparable harm, see David McGowan, *Irreparable Harm*, 14 Lewis & Clark L Rev 577, 584–95 (2010) (arguing that infringement cases should be afforded the presumption of irreparable harm because of the unique monetary and nonmonetary aspects of intellectual property).

<sup>43</sup> See disclosure in note 7.

<sup>44</sup> See Opposition to Defendant's Motion for Partial Summary Judgment, *Jacobsen v Katzer*, No 3:06-cv-1905, \*15 (ND Cal filed Nov 13, 2009) (available on Westlaw at 2009 WL 5162171).

would enhance his reputation. Such sentiments count in any genuine utilitarian calculation even though they cannot be quantified and netted against offsetting considerations with anything approaching precision.

The hobbyist case may seem unusual because hobbyists do not presumptively maximize revenue, but I believe the hobbyist case contains important lessons that extend even to more conventional cases. These lessons argue in favor of presumptive injunctive relief for copyright infringement—precisely the position lower courts are abandoning in the wake of *eBay*.

The basic lesson is that most of the time it is costly and difficult for third parties to calculate the value of things that are not already priced by the parties themselves, as in *Jacobsen*, or, alternatively, that parties have priced only in connection with limitations that they have specified themselves, as in *Sun Microsystems*. Even seemingly straightforward technology, such as Sun's Java, may face unusual risks, such as the risk of fragmentation if competitors are allowed to produce variations of the technology. Similarly, restrictions on the field in which a technology may be used may facilitate price discrimination or shield a licensor from competition in a market segment. In either case, it may be very hard to determine what the licensor's profits would have been if the term had been enforced through injunctive relief.<sup>45</sup>

To allow those limitations to be breached on payment of expectation damages introduces judicial rate-setting in the near term and creates the risk that parties eventually will take costly measures to avoid putting themselves at the mercy of such rate-setting in the future. (No sane, much less rational, party would willingly place itself at the mercy of battling damages experts.) The shift from bargaining forced by property rules to a take-and-pay-a-judicially-set-rate regime promises increased costs and decreased accuracy in cases where payment is made and, probably, a net decrease in cases where payment is made owing to the increased costs of setting a price.

For this reason, the apparent trend away from either preliminary or permanent injunctive relief is undesirable. In a static analysis, it is undesirable if one presumes that in most cases license terms rule out behavior likely to cause harm that is either hard to measure in monetary terms

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<sup>45</sup> The easiest case for expectation damages would be one in which a field-of-use restriction reserved to the licensor a field in which it held a monopoly position. On this assumption, one might suppose that the licensor could be confident that sales made to an infringer represented lost profits to the licensor. That is a good argument, but if the entrant lowered its price below the level charged by the licensor, then one would have to estimate whether sales made at that price would have been made at the licensor's higher price.

(lost sales to competitors) or that the licensor perceives in nonmonetary terms (the respect denied a JMRI programmer or the messages or images conveyed by a copyrighted character and the social significance of that character). Even if one takes the realist view that injunctive relief is appropriate only to forestall irreparable harm (rather than simply to safeguard an exclusive right), if the modal case involves such harm, then courts are more likely to reach the right result most efficiently by presuming harm rather than requiring a plaintiff to introduce evidence of such harm.<sup>46</sup>

If I am wrong about the modal case, of course, then this point cuts the other way. But there is reason to believe that some degree of immeasurable or nonmonetizable harm is quite common. I have made this point in the context of transformative uses of iconic works, which can disrupt meanings valuable to some consumers and interfere with the ability of some consumers to express aspects of their personalities through association with a distinct character (or, for that matter, trademark).<sup>47</sup> Marginal reductions in commercial value would be hard to measure, and for individual consumers many works are not about money anyway.<sup>48</sup>

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<sup>46</sup> In this respect, copyright mirrors the situation with regard to trespass to chattels, another doctrine that has received extensive academic criticism unjustified by the cases or by complete analysis. The defendant in the leading case, *Intel Corp v Hamidi*, 71 P3d 296 (Cal 2003) (holding that injunctive relief is unavailable for a trespass to chattels claim unless a likelihood of irreparable harm is shown), was a former Intel employee who sent bulk unsolicited emails to current Intel employees that criticized “Intel’s employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies,” and recommended that employees visit Kourosh Hamidi’s anti-Intel website. *Id.* at 301. Many employees asked the company to block the messages, and it is easy to imagine that Intel incurred real losses in productivity as employees discussed Hamidi’s claims and tried to determine whether they were true. Any effort to quantify such losses across over thirty thousand employees seems to call for a great degree of speculation, but the losses are intuitive and almost certainly real nonetheless. For fuller discussion of these points, see Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J L, Econ, & Pol 147, 151 (2005) (arguing that Intel’s losses were not trivial and that the availability of self-help and the inability to define damages precisely should not preclude an injunctive remedy); David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J L, Econ, & Pol 109, 122–25 (2005) (analyzing the language used in *Intel* to determine that the court used an erroneous analogy of the Internet to physical land, which led the court to an unnecessarily restrained holding).

<sup>47</sup> See David McGowan, *Paradoxically Speaking* \*15–16 (San Diego Legal Studies Paper No 08-077, Oct 2008), online at <http://ssrn.com/abstract=1266835> (visited Oct 17, 2010); David McGowan, *Some Realism about the Free-Speech Critique of Copyright*, 74 Fordham L Rev 435, 452–53 (2005).

<sup>48</sup> See Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 Geo Mason L Rev 605, 619–28 (2007) (arguing that consumers’ intangible benefit, obtained through psychological enjoyment of possession or gained status, is one of three factors that determine the demand, sales, and price of goods). It may be that gains achieved

Regardless of whether one accepts my empirical conjecture, a dynamic analysis also counsels in favor of the presumption of injunctive relief more generally. Injunctive relief against violations of license terms lowers the cost to an author of achieving the result the terms are designed to achieve. It therefore lessens the author's incentive to take costly measures in each case (access restrictions, letters of credit, price increases, liquidated damage provisions) to guard against the risk of an adverse result in a particular case.<sup>49</sup> Such measures may be unlikely in the open-source context, but they are not out of the question. It is easy to envision a project unable to secure injunctive relief resorting to technical measures designed to block downloading by a particular infringer while allowing comparatively free use of code by (the majority of) users who comply with license terms.

### III. WHY (RELATIVE) CENTRALIZATION OF CONTROL MAY INCREASE BOTH THE PRODUCTION AND DIVERSITY OF EXPRESSION

The “Tory anarchism” in this Article’s title refers to a phrase George Orwell used to describe his pre-socialist self,<sup>50</sup> and which he later used to describe Jonathan Swift, whose literary example Orwell tried to follow. According to Orwell, “[p]olitically, Swift was one of those people who are driven into a sort of perverse Toryism by the follies of the progressive party of the moment.”<sup>51</sup> Thus, Swift was “a Tory anarchist, despising authority while disbelieving in liberty, and preserving the aristocratic outlook while seeing clearly that the existing aristocracy is degenerate and contemptible.”<sup>52</sup> Orwell faulted Swift for partial blindness: “He couldn’t see what the simplest person sees, that life is worth living and human beings, even if they’re dirty and ridiculous, are

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through transformation outweigh losses, so it seems plausible both to recognize that irreparable harm is common and to oppose liability findings of any kind in such cases. I do not want to rehash that debate yet again here; my point is only that some harm tolerated under such a regime likely would count as irreparable harm for purposes of injunctive relief if that harm were considered on its own.

<sup>49</sup> This is just a particular example of the general argument that legal prohibitions on force or fraud economize on self-help measures. See McGowan, 14 *Lewis & Clark L Rev* at 588 (cited in note 42) (comparing the relative efficiencies of injunctions and damages remedies).

<sup>50</sup> See Bernard Crick, *George Orwell: A Life* 174 (Penguin 1980).

<sup>51</sup> George Orwell, *Politics vs. Literature: An Examination of Gulliver’s Travels*, in Sonia Orwell and Ian Angus, eds, 4 *The Collected Essays, Journalism, and Letters of George Orwell: In Front of Your Nose* 205, 207 (Secker & Warburg 1968).

<sup>52</sup> *Id.* at 216.

mostly decent.”<sup>53</sup> It is this aspect of Orwell’s thinking I mean to invoke by referring to Tory anarchism: a thread of optimism running through a realistic and therefore often pessimistic fabric.

With respect to modern copyright debates, I use the term Tory anarchism to point out that giving authors power to maintain control of a work can increase, rather than diminish, both the variety and volume of work available to the public, at least in relation to alternative legal regimes. The justification for this claim rests not on an abstract devotion to “property” but on the observation that people seem to like to order their affairs themselves and do so in a wide variety of ways. This is no less true of people who coordinate to produce expression than of people who coordinate in any other way.

F/OSS licensing practices provide useful—if anecdotal—proof of this claim. Even slight experience with F/OSS programming confirms that people of widely varying dispositions and interests value the ability to create expressive communities by using the right to exclude as a basis of organization. The part-time hobbyists of JMRI and many more developers like them (to say nothing of those who utilize the analogous methods of Creative Commons licensing for text) enhance diversity of consumer choice and of methods of production, and they do so without compensation or serious prospect of receiving compensation. They use licenses for the purpose Karl Llewellyn identified as the most important element of contracts (though the point may be extended to conditional permissions, if one favors that view):

[T]he real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as to what is to be expected and what “is done.”<sup>54</sup>

Llewellyn’s point is that social interactions rest on understandings and expectations that both shape and are shaped by the law. Authors who discover that the law will not presumptively, much less automatically, respect the conditions under which they provide access to their works will take that legal fact into account in deciding whether and how to construct their creations of expression. Those who find

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<sup>53</sup> George Orwell, *Jonathan Swift, An Imaginary Interview*, in W.J. West, ed, *Orwell: The War Broadcasts* 112, 116 (Duckworth/BBC 1985).

<sup>54</sup> Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 *Yale L J* 704, 725 n 47 (1931).

legal indifference to their wishes depressing, as Howard Penny did,<sup>55</sup> are likely to stop production or shift to methods, such as restricted access, more likely to give effect to their wishes. This example shows that even if one despises the authorial authority embedded in property rules and presumptive injunctive relief, it is naïve to believe that cutting back on such authority invariably yields net gains in anything. It certainly does not produce inevitable net gains in “freedom” or “liberty,” because the freedom to take and use comes at the expense of a freedom to structure production and distribution as one wishes.

In more mundane terms, the F/OSS example highlights the costs of tinkering with doctrines such as presumptions of irreparable harm. It is costly to gather facts and present them in a form courts will accept. Declarations may be gathered for purposes of temporary restraining orders, but even that takes time and some expense. And for permanent and even preliminary injunctive relief, depositions will be taken—and someone has to pay for them. Scholars decry such costs when they envision downstream users bearing them,<sup>56</sup> but the point has no valence. Individual authors bear costs too. For all the attention paid to the appellate opinion in *Jacobsen*, when it came time to pay for the discovery that ultimately led to a liability finding, the costs were borne by an individual (indeed, a part-time) author.<sup>57</sup>

Giving authors substantial control over their works may produce great variety in both expression and in the mode of producing it. That point has been largely lost in academic commentary over the past fifteen or twenty years. That commentary tends to romanticize liability rules (or the no-liability rule of fair use) by juxtaposing archetypal individual “dissenters” with corporate producers of mainstream

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<sup>55</sup> See note 44 and accompanying text.

<sup>56</sup> Thus Larry Lessig’s comment that fair use is no more than the right to hire a lawyer. See Lawrence Lessig, *Re-crafting a Public Domain*, 18 *Yale J L & Humanities* 56, 60 (2006). So is copyright.

<sup>57</sup> In many cases, using the presumption of irreparable harm is likely both to economize on discovery costs in the near term (at the preliminary injunction stage) and to provide interim relief that facilitates rapid settlement and thus the avoidance of ordinary discovery later in the case. Consider Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy against Patent Threats*, 23 *Santa Clara Computer & High Tech L J* 159, 207–09 (2006) (arguing that *eBay* will lower the costs of litigation faced by patent infringers because parties asserting patent rights will not be able to obtain injunctions as frequently). For individual authors who may not have the money to fund litigation in federal court, these savings may represent the difference between enforcement of their rights and misappropriation of their work that they are effectively powerless to stop. The importance of the presumption of irreparable harm extends beyond considerations of judicial efficiency, though those are important.



works.<sup>58</sup> Though some use F/OSS licensing to maximize profits from complementary services, many projects simply invert the typical academic framing of the issue. This inversion is one of the valuable annoyances of F/OSS licenses, and it deserves more academic attention than it has received.

Lest Swift's point be forgotten in this example, the point is not that copyright plaintiffs have greater interests in freedom or liberty than copyright defendants. The point is that there is no logical valence between plaintiffs and defendants in copyright cases with respect to whatever content one wishes to give those capacious phrases. It is a mistake to think otherwise. It is common, however, for authors to use copyright to structure the creation and distribution of expression in ways that suit their aims and temperaments. That is as true of "mainstream," "corporate" authors as it is of others. Property rules give authors confidence necessary to create robust social structures of production; those structures are more important than the rules but without the rules those structures may be fragile and easily toppled. F/OSS licensing makes this point relatively easy to see, but it is not limited to F/OSS cases. Thus the Tory anarchist may feel keenly how crude and blunt it can be to base the law of creative expression on property rules without believing that some mixture of liability rules or legal immunities will produce "better" results, regardless how those results are measured.

Orwell's critique of Swift should not be forgotten either. Both property rules and liability rules present hard cases and often seem crude in their operation. That is just life, not cause for despair. Even the no-liability rule of fair use has not impoverished the production of expression, and most scholars write as if just the opposite is obviously true. Just as importantly, however, and less well acknowledged, property rules have not impoverished such production either. And they seem to me to have a systematic advantage in enabling a variety of social arrangements aimed at producing expression. Just as a hobbyist project leader knows better than a judge the temperament of project members, the stereotypical soulless minions of large corporate producers of expression know better than judges what makes their structures work or fail and how their expression affects their users. Empowering

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<sup>58</sup> There are too many pieces in this vein to provide a comprehensive list. For a representative sample of works attacking property rules as "Lochnerism," see Cohen, 97 Mich L Rev at 463–67 (cited in note 2). For an example of works embracing the trend away from preliminary injunctive relief and the seemingly inexhaustible supply of articles arguing for free speech limitations on copyright law, see Samuelson and Bebenek, 6 I/S: J L & Pol Info Socy at 67–70 (cited in note 30). For a representative citation, see Neil Weinstock Netanel, *Copyright's Paradox* 10–11 (Oxford 2008).

authors to experiment with a variety of arrangements is, in my view, much more likely to enrich our expressive culture than to impoverish it. The example of F/OSS licensing supports, though admittedly it does not prove conclusively, that point.