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ARTICLES

RULES AND STANDARDS FOR CYBERSPACE

Edward Lee*

INTRODUCTION

The Internet has confronted courts with numerous complex issues, none perhaps more confounding than how to deal with the Internet's rapidly changing nature. The problem is that the Internet presents a constantly moving (or morphing) target. A court can never be certain that the underlying facts about the Internet upon which the court bases its decision are not changing, and changing in a material way. During the course of the Microsoft trial, Netscape was acquired by America Online, Inc. (AOL) (which, in turn, announced a merger with Time-Warner), thus potentially bolstering Netscape's position against Microsoft in the browser market. By the time the case reached the D.C. Circuit on appeal, some three years after the inception of the case and some six years after the first alleged anticompetitive conduct by Microsoft, the court of appeals had to struggle with the possibility that the marketplace had "dramatically changed" and

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* Instructor in Law, Stanford Law School. I am grateful to John Barton, Julie Cohen, Dick Craswell, Don Falk, Paul Goldstein, Bob Kim, Eric Lai, Larry Lessig, Jeanne Merino, Reggie Oh, Tamara Piety, Margaret Jane Radin, Ming Shao, Lee Thompson, and Lloyd Weinreb for their helpful comments. A special word of thanks goes to Mark Davies, who provided extensive and always insightful comments on nearly every draft of this Article. I also wish to thank the wonderful staff of the Stanford Law Library, especially Paul Lomio, Erika Wayne, and Alicia Cuellar, for their invaluable assistance. This article is dedicated to my parents, Drs. Douglas and Catalina Lee.


was still "constantly changing." During Napster's appeal, Napster agreed to start charging a subscription fee to its users in an agreement with music giant Bertelsmann. During the Name.Space case, the Internet Corporation for Assigned Names and Numbers (ICANN) was formed to consider adding more top-level domain names—the very relief sought by the plaintiff. Each development had the potential to alter, or undermine, the court's decision in the respective case. Far from being exceptional, these kind of rapid changes appear standard fare for the Internet.

To deal with the speed of cyberspace, courts often face two conflicting impulses: the first, to proceed cautiously so that they can better understand the complexities of cyberspace before subjecting it to comprehensive regulation; the second, to proceed definitively so that the law can establish order and not lag behind the technology. These conflicting impulses, though lurking in nearly every case involving cyberspace, have thus far received little attention in scholarship or elsewhere. Cases are decided for cyberspace by courts favoring one or the other impulse without much—or, at times, any—attempt to provide a principled explanation of the reasons for adopting one approach over the other. Sometimes courts take a narrow, fact-specific approach to cyberspace, perhaps out of recognition that the rapidly developing nature of the Internet warrants greater caution. Consider, for example, the Supreme Court's decision in Reno v. ACLU in which the Court invalidated two provisions of the Communications Decency Act (CDA) that attempted to regulate indecent online material. The opinion—written by Justice Stevens—is narrow and fact-specific, and allows much room for Congress (and the Court) to maneuver. So too is the D.C. Circuit's en banc opinion in Microsoft, which narrowed in several ways the broad ruling of the district court. Sometimes, however, courts take a broad, categorical approach to cyberspace. The Fourth Circuit's categorical reading of the federal immunity for Internet Service Providers (ISPs) in Zeran v. America Online, Inc. and the Second Circuit's broad interpretation of the Digital Millennium Copyright Act (DMCA) in the digital versatile disc (DVD) case

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3 United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001) (en banc).
7 See infra notes 273–84 and accompanying text.
8 See infra notes 305–13 and accompanying text.
9 129 F.3d 327 (4th Cir. 1997).
(12c) *Universal City Studios, Inc. v. Corley*\(^{10}\) provide two such examples. The opinions set forth rules that apply broadly to cyberspace and countenance few, if any, exceptions.\(^{11}\)

Although the substantive law in these cases is different, they all raise a common question about the manner in which the court decided the case. Why take a narrow, fact-specific approach in one case, but a broad, categorical approach in another case? The reason cannot depend simply on differences in the underlying statutes, for all of the cases involved statutes that contained prohibitions whose language could be read broadly. Nor can it depend on the presence of a constitutional challenge, for both *Reno* and the DVD case involved substantial constitutional challenges, including issues of first impression. But then is there any principled reason for the varying approaches to laws for cyberspace, or is it just attributable to the particular preference of each court? And if the latter is the case, should we not be more systematic in determining the manner of cyber-related decisions?

This Article attempts to answer these questions both in the context of these four cases and more generally. Too much rides on these questions to leave their resolution to ad hoc determination. The manner of decision—whether broad or narrow, definitive or tentative, categorical or open-ended—affects how well the decision fits within the existing body of law and whether it is tailored to achieve the purposes for which it was intended. The competing approaches are in some sense nothing new. They correspond with the longstanding debate between the use of rules and standards in legal decisionmaking. Standards represent the cautious approach, deciding things narrowly and one case at a time. Rules represent the definitive approach, deciding things broadly and for a wide range of cases. By drawing upon the rules/standards debate, as well as the related concepts of decisional minimalism and maximalism, I attempt to provide a framework by which courts can better evaluate whether to adopt a narrow/tentative approach or a broad/definitive approach for cases involving cyberspace.

Part I discusses the importance of developing a more systematic framework for courts to evaluate the appropriate manner of decision in cases involving cyberspace. Part II provides a brief background to the rules/standards debate and the concepts of decisional minimalism and maximalism, and incorporates both sets of concepts to describe two general approaches: (1) a narrow/tentative approach (embracing

\(^{10}\) 273 F.3d 429 (2d Cir. 2001).

\(^{11}\) See infra notes 329–42, 360–69 and accompanying text.
standards, minimalism, and case-by-case decisionmaking), and (2) a broad/definitive approach (embracing rules, maximalism, and categorical decisionmaking). Applying these concepts to cyberspace, Part III proposes a framework for courts to consider when analyzing whether a narrow/tentative approach or a broad/definitive approach is appropriate for cyberspace. Specifically, this Article proposes that courts entertain a modest presumption in favor of the narrow/tentative approach and the use of standards, minimalism, and case-by-case decisionmaking. The presumption can be rebutted by factors that indicate that rules and a broad/definitive approach are appropriate. The framework identifies five factors to assist courts in this inquiry. Part IV applies the framework to the four cases mentioned above: Reno, Microsoft, Zeran, and Corley. The framework, I argue, reveals that the courts in Reno, Microsoft, and Zeran got the manner question right, but the Corley court got it wrong. Part of the problem with the Corley decision is that it decides too much, too soon, in a way that is difficult to fit within the existing body of copyright law.

I. THE CHALLENGES POSED BY CYBERSPACE FOR COURTS

Courts continue to face numerous difficult questions about how to apply law to cyberspace. Not a day seems to go by without mention in the news of a high-profile lawsuit dealing with a complex legal issue involving cyberspace—Microsoft, A&M Records, Inc. v. Napster,12 the Yahoo! case in France,13 the list could go on. As the Internet continues to grow, we can only expect these legal questions to multiply, and to do so at a fairly dramatic clip. While these cases undoubtedly raise many different legal issues on the merits, they all share one recurring question: in what manner—broad or narrow, categorical or fact-specific—ought the court to formulate its decision?

Although this question—which I will call the “manner question”—is perhaps just as important as the substantive issues, too often courts ignore the question or “answer” it without any real discussion or consideration of the complexities that the question poses. At best, the competing approaches taken by courts can be characterized as ad hoc, if not unprincipled. In this Part, I examine why courts should be more systematic about the manner in which they apply law to cyberspace by discussing three recurring challenges presented by cyberspace.

12 239 F.3d 1004 (9th Cir. 2001).
A. Internet Speed

One of the biggest challenges that courts face in dealing with the Internet is the speed at which it is developing. Not only is the Internet a nascent technology, it is a technology and medium that changes so rapidly that a single year can make one's understanding of the Internet obsolete. While the law has lagged behind technological developments in the past, the Internet seems to present challenges of an entirely different order.\textsuperscript{14} Put simply, the Internet travels—and changes—at an amazing speed. Nearly everything about the Internet—the content, the bandwidth, the number of users, the amount of e-commerce, the business models of the dot coms (at least those that are still around), etc.—has changed dramatically in the last few years. And that change is only likely to continue, and perhaps accelerate.

The problem for the law is rather simple: keeping up. We have barely had time to think about, much less decide, how the law ought to apply to early cyberspace. Now, we are light years beyond early cyberspace, and the challenges to the law seem even greater.\textsuperscript{15} The problem is somewhat akin to the classic tortoise-and-hare race, only this time the hare has the ability to "beam" itself wherever and however far it wants. In such a race, the tortoise may never catch up, no matter how stubbornly and persistently it plods along.\textsuperscript{16}

We need not look very far or wide to find examples of this one-sided race. In the first case involving the Internet considered by the Supreme Court, \textit{Reno v. ACLU},\textsuperscript{17} the rapidly changing nature of cyberspace led Justice Scalia to muse during oral argument:

This is an area where change is enormously rapid. Is it possible that this statute is unconstitutional today, or was unconstitutional two years ago when it was examined on the basis of a record done about

\textsuperscript{14} See Richard A. Epstein, \textit{Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism,} 52 STAN. L. REV. 1003, 1004 (2000) ("Doctrinal analysis often requires us to reconcile traditional legal principle with modern technological innovation. Nowhere is this task of reconciliation more daunting than with cyberspace, where the speed and spread of information has been ratcheted up to levels that were unimaginable even a generation ago.").

\textsuperscript{15} See Lawrence Lessig, \textit{Foreword to Symposium, Cyberspace and Privacy: A New Legal Paradigm?}, 52 STAN. L. REV. 987, 989 (2000).

\textsuperscript{16} See id. ("There is an urgency now to get others to see how this ecology, this space, the life this space enables, is changing. The feeling of a race—a race run against time, against changes that are happening faster than time, and against an attitude that makes these changes invisible.").

\textsuperscript{17} 521 U.S. 844 (1997).
two years ago, but will be constitutional next week? . . . Or next year or in two years?18

Although perhaps partly tongue-in-cheek, Justice Scalia's sentiments convey the problems, not to mention the perplexity, of dealing with rapid technological change. Cyberspace would be difficult enough to understand if it presented a relatively stable target. That cyberspace constantly changes makes matters even worse.

Justice Scalia's sentiments are by no means unique. Rapid technological change confounds courts at all levels. Just listen to the Ninth Circuit bemoan,

The history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defense research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called "New Economy." Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow. . . .19

Or the Second Circuit: "Mindful of the often unforeseeable impact of rapid technological change, we are wary of making legal pronouncements based on highly fluid circumstances, which almost certainly will give way to tomorrow's new realities."20

The rapid change of the Internet figured prominently in perhaps the most important case dealing with the Internet thus far, United States v. Microsoft.21 The D.C. Circuit was acutely aware of the difficulties of rendering a decision for an area that was constantly changing. Indeed, the court of appeals reversed the district court's remedy ordering a divestiture of Microsoft for antitrust violations largely because the district court failed to hold an evidentiary hearing "to update and flesh out the available information before seriously entertaining the possibility of dramatic structural relief."22 The court of appeals described the problem posed by the Internet's rapidly changing nature as follows:

19 AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000), cert. denied, 253 F.3d 34 (D.C. Cir. 2001).
20 Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 (2d Cir. 2000); see also Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 U. CHI. LEGAL F. 207, 208 ("I don't know much about cyberspace; what I do know will be outdated in five years (if not five months!); and my predictions about the direction of change are worthless, making any effort to tailor the law to the subject futile.").
22 United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001).
What is somewhat problematic . . . is that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless). And broader structural remedies present their own set of problems, including how a court goes about restoring competition to a dramatically changed, and constantly changing, marketplace.23

The challenge faced in Microsoft is the same type of challenge faced by numerous other courts in dealing with cyberspace. While it may be too much to expect that the law will keep pace with the technology stride-for-stride, we can do a better job of making sure that the law at least remains in the race. This is one of the reasons why the manner question is so important. How broadly or narrowly a court rules affects how the law deals with changing technology.

B. Old Law, New Technology

Another basic challenge created by cyberspace is how to apply old law to new technology. By “old law,” I mean statutes or doctrines that were created before the Internet even existed and, therefore, could not possibly have anticipated application to the Internet. The advent of the Internet in 1995 made every case involving cyberspace since then potentially a case of first impression. Even though numerous laws have now been enacted to regulate different aspects of cyberspace, courts still face cases in which they must apply old law to cyberspace.24

The Microsoft case is perhaps the most famous example. The U.S. government (along with several states) brought suit against software giant Microsoft for allegedly engaging in unlawful exclusionary conduct to preserve its monopoly over Windows and to extend it to the Web browser market against Netscape.25 At the heart of the case was

23 Id.
24 Of course, over time, we should expect that this problem will dissipate with the creation of Internet-specific laws, although the Internet may keep changing to make such laws obsolete.
25 Microsoft, 84 F. Supp. 2d at 9.
the application of the Sherman Act, \(^2\) which was enacted in 1890 and developed in the days of the railroad and oil barons. \(^3\) How this century-old statute should apply to regulate conduct in the Internet age is certainly open to debate. \(^4\)

According to the government and its amici supporters, the case involved the application of "familiar and fundamental tenets of anti-trust law" \(^5\) and Microsoft's conduct was clearly unlawful under those well-established principles. \(^6\) According to Microsoft, however, its conduct could only be understood in the unique context of the computer software industry—which is characterized by "rapid technological change" and "paradigm shifts" that make the "computer industry inherently unpredictable." \(^7\) Microsoft asserted that, in light of this dynamic environment, its conduct was both pro-competitive and beneficial to consumers. \(^8\) The competing views evince a basic disagreement over how the court should apply old law to new technology. As one news report aptly summed up the case: "The government said Microsoft was an old-fashioned monopolist in high-technology clothes. Microsoft responded that computer software—a fast-changing, dynamic, fiercely competitive industry—did indeed have distinctive characteristics, and the courts should tread carefully." \(^9\) The debate over applying old law to new technology was significant enough for the D.C. Circuit to devote several paragraphs to it at the


\(^{27}\) For an early application of the Sherman Act against a large oil company, see Standard Oil Co. v. United States, 221 U.S. 1 (1911).


\(^{29}\) Brief for Appellees United States and the State Plaintiffs at 47, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (No. 00-5212) [hereinafter Appellees' Microsoft Brief]; see also Brief of Amici Curiae America Online, Inc., at 1, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (No. 00-5212) [hereinafter AOL's Microsoft Brief] ("This case involves long-standing and well-settled principles of the Sherman Act condemning monopolization and attempted monopolization.").

\(^{30}\) See Appellees' Microsoft Brief, supra note 29, at 47; see also AOL's Microsoft Brief, supra note 29, at 2–3.

\(^{31}\) Brief for Appellant Microsoft Corp. at 15, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (No. 00-5212).

\(^{32}\) Id. at 2.

outset of its opinion. In the end, the court acknowledged that "there is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects." We do not need a case of the magnitude of Microsoft to see the old law/new technology problem. My favorite example of this problem is the application of the old tort of trespass to chattel to cyberspace. The tort of trespass to chattel has had a long, if at times sketchy, development. According to Prosser, "Trespass to chattels survives today . . . largely as a little brother of conversion." However, it seems as though little brother is trying to make a name for himself. The doctrine made a recent rebirth in Thrifty-Tel v. Bezenek, in which a California court applied the trespass to chattel theory—while openly acknowledging that it had been "seldom employed as a tort theory"—to computer hacking outside of the Internet context. From there, the doctrine has taken on a life of its own—prohibiting a host of conduct on the Net, including spamming, the use of recursive search programs, and even the sending of emails that discuss issues of public concern.

One danger of the old law/new technology problem is applying old law in a way that is difficult to fit within the existing body of law. In the trespass to chattel cases, a doctrine was applied to an extreme case, but it was later extended to cases where it is not necessarily clear that the doctrine should apply. Given the low threshold of harm

34 See United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001) ("We decide this case against a backdrop of significant debate amongst academics and practitioners over the extent to which 'old economy' § 2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects.").

35 Id. at 50.


41 Richard Warner argues in favor of applying the doctrine of trespass to chattel to the Internet based on the law-and-economics view that extending property rights to cyberspace will facilitate bargaining. See Richard Warner, Border Disputes: Trespass to Chattels on the Internet, 47 VILL. L. REV. 117, 120 (2002). Warner proposes recognizing
required, the doctrine seems to have no limit: anything that is sent over the Internet that occupies any storage space on another person's server can be considered a trespass to chattel. Mark Lemley calls this process of expansion "doctrinal creep," which is as negative sounding as it should be. Courts must be careful in applying old law to new technology, so as not to stretch immoderately existing doctrines. The old law/new technology problem further complicates the challenges for courts when dealing with the rapidly changing nature of cyberspace.

C. Doctrinal Convergence

The manner question is also important in addressing doctrinal convergence. "Convergence," which today has become a buzzword among tech-types, basically means the blurring of lines between the Internet and other technologies and media, such as cable, broadcast TV, radio, wireless, and the telephone. Because of convergence, one day (maybe soon), we can expect the Internet to be our entrée

property rights "when granting the right will promote desirable license agreements." He envisions the balancing of interests making that determination. Apparently, he believes that when a website has obtained a network-effect relationship, it should be allowed to control access to the website. But when there is no network-effect relationship, the website has no claim to a property right to control access. While Warner's theory has the benefit of providing at least some limit to the currently unbounded doctrine, his theory may not work as a universal principle. It is not clear to me why the presence of a network-effect relationship should automatically tip the balance of interests in favor of a right to exclude others from access to information or a website. There may be circumstances in which the need for open access is weighty enough to justify the denial of any right to exclude others from access. That is the debate with both broadband and instant messaging, notwithstanding the potential argument by broadband or instant-messaging providers (such as AOL Time Warner) that because they have created a network-effect relationship with their customers, allowing open access to other providers would be a trespass to their chattel. See infra note 59. For further discussion of the law-and-economics position, see infra notes 180–90 and accompanying text.


into all of our communication, computing, and video/entertainment needs.

This convergence of different technologies and media is being accompanied by doctrinal convergence, meaning the intersection of different areas of law, as well as the laws of different countries, to govern cyberspace. I do not mean to suggest that doctrinal convergence is unique to cyberspace; courts confront legal issues implicating multiple laws or doctrines all the time. Indeed, any complex case is likely to involve a legal issue that implicates competing doctrines or laws. Cyberspace, however, is particularly conducive to doctrinal convergence because it brings together vast amounts of content, speech, technologies, and kinds of communication as well as numerous people and countries. Put those all together, and you get a network that implicates numerous different laws and doctrines, potentially for the same conduct.

As a point of contrast, we might consider the old-fashioned telephone. We rarely had many different areas of law colliding to regulate the telephone; most of the work was done by telecommunications law and, sometimes, antitrust law. Once in a blue moon, First Amendment issues were raised. The Internet, however, raises all of these issues, and more. Digital telephony is part of the Internet, but so are news, intellectual property, e-commerce, online auctions, video streaming, peer-to-peer file sharing, the posting of and linking to information and software, etc. The multiplicity of media and content on the Net makes even greater the potential for multiple laws to apply to the same conduct.

I would like to distinguish between two types of doctrinal convergence. The first involves different doctrines or laws within a single jurisdiction or country converging; the second involves the laws of dif-

44 I do not want to give the impression that telephony can be considered separate from the Internet. Indeed, because much of the Internet runs over telephone lines, the Internet may be seen in some sense as an outgrowth of the telephone—or, to borrow Lessig's description, a "souped-up telephone." See Lawrence Lessig, The Law of the Horse: What Cyberlaw Might Teach, 113 Harv. L. Rev. 501, 501 (1999). My comparison focuses on how the law has regulated the telephone in the past, primarily before the advent of the Internet.


47 See Sable Commun. of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (invalidating a restriction on "dial-a-porn").
ferent countries converging. In some respects, both kinds of convergence raise the same problem: competing, if not conflicting, laws to govern the same conduct. Yet, in another respect, the second type of convergence may present greater difficulties given its international dimensions—something to which courts may be less accustomed.

1. First-Order or National Doctrinal Convergence

The first type of doctrinal convergence involves the intersection of different areas of law to govern cyberspace, such as intellectual property, telecommunications, antitrust, contract, property, tort, privacy, and First Amendment law. In the United States, we are already beginning to see this kind of convergence. Different areas of law are colliding to govern cyberspace—sometimes coherently and comfortably, other times not. For example, click-wrap licensing (which purports to license software or other content on the Internet once a person has "clicked on" an icon) may raise questions about validity and enforceability under standard contract law and the (proposed) Uniform Computer Information Transaction Act (UCITA),48 as well as under the doctrine of copyright misuse49 or federal preemption.50


49 See Merges, supra note 48, at 1605-07 (arguing that the doctrines of copyright and patent misuse are properly used "to nullify intellectual property licenses that contain terms that effectively extend intellectual property rights by contract"); see also Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 521 (9th Cir. 1997), amended by 133 F.3d 1140 (9th Cir.) (copyright misuse doctrine); DSC Communis. Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996) (same); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990) (same); USM Corp. v. SPS Tech., Inc., 694 F.2d 505, 510-12 (7th Cir. 1982) (patent misuse doctrine).
Domain name disputes may raise issues under trademark law of different countries, the Anticybersquatting Consumer Protection Act in the United States, and ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP). Any restriction of content on the Net—whether under intellectual property law, indecency statutes, privacy law, etc.—may implicate the First Amendment.

Sometimes different doctrines may develop in a way that embraces a common norm or principle. For instance, facilitating interoperability is a norm or principle that now recurs in copyright law under the doctrine of fair use, the DMCA's exemption for reverse-engineering, telecommunications law for telephony, and the conditions imposed on the AOL-Time Warner merger by the Federal Trade Commission and the Federal Communications Commission.

As courts decide more and more cases involving cyberspace, we can expect doctrinal convergence to grow. Sometimes it will be easy to harmonize the converging areas of law. Other times, it will not. Unfortunately, doctrinal convergence does not imply coherence or consistency. We can have two doctrines colliding—for example, the


54 See, e.g., Epstein, supra note 14, at 1006–07 (discussing the intersection of common law with First Amendment in the issue of online privacy and attempting to develop a more systematic reconciliation of the two areas of law).

55 Mark Lemley, Address at the Association of American Law Schools Conference (Jan. 4, 2001). I am indebted to Mark Lemley for the following examples and explanation of convergence on a common norm.


58 See Lemley, supra note 28, at 1062 (noting that federal telecommunications law requires “the interconnection of telecommunications devices on reasonable terms”).

fair use doctrine and the DMCA's anti-circumvention provision—and courts will have to strike the right balance. That is why the manner question is so important: how broadly or narrowly a law is interpreted or a decision formulated affects how that law or decision fits within the existing body of law, and whether the law is tailored to achieve the purposes for which it was intended.

2. Second-Order or International Doctrinal Convergence

We are also beginning to see second-order doctrinal convergence with the intersection of laws of different countries. Because the Internet is international in scope and is, at least right now, a borderless medium, any decision involving cyberspace may implicate the laws of several (and possibly many) different countries. Take the Yahoo! case: a French court applied French law to forbid Yahoo! from making available for purchase Nazi paraphernalia in France. This ruling may end up diminishing the free speech interests of individuals in the United States and other countries if Yahoo!—as it has done—removes such material from its website, thus making it unavailable even to those outside of France.

Second-order doctrinal convergence need not be so stark as in Yahoo!. In any intellectual property dispute over online content, the law of several, if not many, different countries may be implicated. Because material posted online reaches everywhere on the Net, it is difficult to say where material on the Net is located. The Internet's international character complicates seemingly basic questions of intellectual property, such as ownership and infringement. Is material posted on the Net "created" in the place where the person posting it is located? Or perhaps where the server on which the material is stored? But what if the server's location is purely arbitrary or unknown to the author? The same difficult questions can be posed for allegedly infringing material. Does an alleged infringer subject himself to the laws of all nations across the world where the Internet reaches by posting infringing material on the Net? Legal scholars and commentators have identified the difficulties in applying intellectual property laws that are based on a principle of territoriality to a technology that

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61 See Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisémisme, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001); infra note 241 and accompanying text.
62 See infra notes 238–44 and accompanying text.
defies territorial borders. Identifying possible solutions, however, has proved to be much more elusive.

In the future, we can only expect these challenges to multiply. International doctrinal convergence will occur in numerous areas of law—taxation, privacy, cybercrime, intellectual property, antitrust, and jurisdiction are already poised for such convergence.

There are several possible responses that we may see to international doctrinal convergence. First, we can proceed as we always have and try to accommodate the convergence of laws of different countries by resort to traditional conflict of laws and comity principles. Jack Goldsmith is a leading proponent of this view, which might be characterized as a nothing-all-that-new view of cyberspace.

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65 See generally Arthur J. Cockfield, Balancing National Interests in the Taxation of Electronic Commerce Business Profits, 74 TUL. L. REV. 133 (1999) (proposing a framework for taxation of e-commerce profits that would represent a balance between countries that are either net importers or exporters of e-commerce goods and services).


68 See supra note 64 and accompanying text.


71 See Jack L. Goldsmith, Against Cyberanarchy, 65 U. CHI. L. REV. 1199, 1201 (1998) ("Cyberspace transactions do not inherently warrant any more deference by national regulators, and are not significantly less resistant to the tools of conflict of laws, than other transnational transactions.") [hereinafter Goldsmith, Against Cyberanarchy]; Jack L. Goldsmith, The Internet and the Abiding Significance of Territorial Sovereignty, 5 IND. J. GLOBAL L. STUD. 475 (1998) (arguing that territorial regulation of the
tively, we might strive to develop a uniform, coherent body of transnational law (or, at the very least, minimum standards) to govern the Internet. Most likely this approach would require agreement among nations by international treaty. Finally, we might reject both the traditional conflict of laws approach and the transnational law approach in favor of a *sui generis* Internet law developed outside the traditional national lawmaking and law-deciding bodies. David Johnson and David Post suggested this idea early on in the Internet's development and elicited numerous responses, many of them critical. This new type of lawmaking might be described as *non-national*, as aptly suggested by Laurence Helfer and Graeme Dinwoodie.

My guess is that we may see a mixture of all three approaches to lawmaking for the Internet (and possibly more)—just think of the approaches taken in the *Yahoo!* case (conflict of laws), the European Union Data Protection Directive (multilateral agreement), and ICANN's domain name creation (non-national norm creation). But, even before we can begin to address doctrinal convergence on

Internet is as feasible and legitimate as other non-Internet transactions). Richard Epstein, Goldsmith's colleague at the University of Chicago, also shares this view of cyberspace. See Epstein, *supra* note 14, at 1004 n.2.

72 See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 206 (1999) ("Just as there was a push toward convergence on a simple set of network protocols, there will be a push toward convergence on a uniform set of rules to govern network transactions.").


76 See La Ligue Contre Le Racisme et L’antisémitisme v. La Société Yahoo! Inc., T.G.I. [App. Ct.] Paris, Nov. 20, 2000 (finding that damage occurred in France by the viewing of Nazi material on Yahoo!’s website, thus subjecting it to French law).


78 For a critical account of ICANN's role in Internet governance, see A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 DUKE L.J. 17 passim (2000). Helfer and Dinwoodie, however, provide a compelling argument of the desirability and success of the UDRP in handling domain name disputes. Helfer & Dinwoodie, *supra* note 75, at 187–88. They even con-
the international level, we need to think more about the manner question. We need to consider how, for example, a decision might affect other countries and examine the potential for excessive extraterritorial spillover. Ruling broadly and categorically may result in inconsistent obligations under the laws of different countries or threaten to give the most restrictive laws *de facto* preeminence for cyberspace. Ruling narrowly and on a case-by-case basis may reduce the possibility of excessive spillover, but it may not be able in the long run to yield doctrinal harmony or coherence. These are the possibilities; we need to be aware of them and learn how to evaluate them.

**D. Confronting the Challenges Posed by Cyberspace**

The speed of Internet development, the problem of old law/new technology, and doctrinal convergence create formidable challenges for courts. In any case involving the application of law to cyberspace, there is a good chance that one, if not several, of these challenges will be present.79

To get a glimpse of these challenges in practice and how we might respond to them, I will analyze four cases: *Reno*,80 *Microsoft*,81 *Zeran*,82 and *Corley*.83 I hope to use these cases as case studies to test how we might more critically and systematically evaluate the manner question. As a matter of substantive law, these cases share little in common. *Reno* is about the application of the First Amendment to the regulation of indecent online material;84 *Microsoft* is about the application of federal antitrust law to Microsoft’s anticompetitive conduct in the software industry;85 *Zeran* is about federal immunity for ISPs from certain tort liability;86 and *Corley* is about DVDs and the statutory protection given to copyright holders for technological mea-

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79 I make no claim that these challenges are entirely unique or devoid of any historical antecedent. As I have already acknowledged, doctrinal convergence occurs quite frequently in other contexts. The same could be said of the problem of old law/new technology.

81 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).
83 *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).
84 *Reno*, 521 U.S. at 849.
85 *Microsoft*, 253 F.3d at 45.
86 *Zeran*, 129 F.3d at 328.
sures designed to prevent copying of copyrighted works. But each of these cases confronted at least one cyber-challenge. I have selected these cases not because they all are high-profile cases and important as a matter of substantive law (which they are), but because they are representative of both the challenges raised by cyberspace and the responses to them by courts.

Our response to these challenges, particularly the manner in which we resolve them, can be either ad hoc or more systematic. In this Article, I adopt the latter approach. The basic reason that I adopt the systematic approach is that leaving the manner question to ad hoc determination or the unexamined preference of the court increases the risk of courts creating bad law or precedent. Bad, not so much because the case is wrongly decided on the merits, but bad because it is difficult to fit within the existing body of law or because it produces consequences that were never intended or desired. Without a more systematic approach, courts may not even recognize, let alone address, the complexities these challenges raise. Given all the difficulties of applying law to cyberspace, we should at least be aware of what we are up against.

II. Analyzing the Manner Question

The main challenge posed by the manner question is formulating an analytical framework that can be applied to a wide range of cases without blurring or over-simplifying distinctions in cases. On the one hand, we would gain little in our analytical enterprise if all that we could say about the manner of decision were that it depends on the case or that it should be left to the preferences of the particular judge. On the other hand, it would be just as fruitless if we analyzed cases with categories that did not match up well with reality or that grossly over-simplified a case. By the same token, there may be something to be said for simplicity: devising an elaborate taxonomy of terms to analyze decisions may prove to be too cumbersome and complicated for the value it adds to our thinking about judicial decisions. Striking the right balance requires that we identify analytical terms that can de-


88 The speed of Internet development and the old law/new technology problem were evident in Reno, Microsoft, and Corley, and doctrinal convergence played a part in Reno, Zeran, and Corley. See infra notes 273-444 and accompanying text.
scribe a welter of situations in a systematic, yet sensitive and somewhat manageable way.\textsuperscript{89}

With that in mind, I focus on two sets of concepts to analyze the manner question: rules and standards, and decisional maximalism and minimalism. Neither set of terms is new; in fact, the former has been around for some time. However, I have chosen to rely on these concepts in part because of their currency in legal scholarship and judicial decisions. Of all the possible ways we can analyze the manner in which a court decided a case, analyzing whether the decision is categorical or fact-specific, and how broad or narrow it is, seem to me to be good starting points for the analysis. In this Part, I explain these concepts and how they can help to analyze the manner of a court’s decision. Combining the two sets of concepts, I define two general approaches for judicial decisionmaking: (1) a broad/definitive approach (embodied in rules and maximalist decisions), and (2) a narrow/tentative approach (embodied in standards and minimalist decisions). These two general approaches correspond with the aspiration that rules and maximalism, and standards and minimalism, share, and they form the backbone of the analytical framework I outline in Part III.

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\textsuperscript{89} A useful model to emulate is the framework proposed in the classic article by Guido Calabresi & A. Douglas Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 HARV. L. REV. 1089 (1972). The framework they propose based on the distinction between property and liability rules has generated considerable thought and scholarship in analyzing legal issues. Yet Calabresi and Melamed were the first to concede the tradeoffs of framework-building:

Framework or model building has two shortcomings. The first is that models can be mistaken for the total view of phenomena, like legal relationships, which are too complex to be painted in any one picture. The second is that models generate boxes into which one then feels compelled to force situations which do not truly fit. There are, however, compensating advantages. Legal scholars, precisely because they have tended to eschew model building, have often proceeded in an ad hoc way, looking at cases and seeing what categories emerged. But this approach also affords only one view of the Cathedral. It may neglect some relationships among the problems involved in the cases which model building can perceive, precisely because it does generate boxes, or categories. The framework we have employed may be applied in many different areas of the law. We think its application facilitated perceiving and defining an additional resolution of the problem of pollution. As such we believe the painting to be well worth the oils.

\textit{Id.} at 1127–28.
A. Rules and Standards

The time-honored debate over rules and standards focuses on how the law can best be formulated and decided.90 Rules and standards can be viewed as a continuum on which the content of the law is specified in advance of its application either to a greater (more "rule-like") extent or to a lesser (more "standard-like") extent.91 This continuum represents how much discretion a court has in applying the


91 See Sullivan, supra note 90, at 61 (“These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.”); Sunstein, supra note 90, at 961.
law in a particular case. A rule is meant to cabin discretion, while a standard is intended to furnish discretion. The continuum also measures how broad or narrow a decision is. Rules are broad insofar as they attempt to apply the same legal decision to determine future cases. Standards, by contrast, are narrower because they rely on case-by-case decisionmaking and render a decision that is ostensibly limited to the facts of the case.\textsuperscript{92}

The Internet Tax Freedom Act\textsuperscript{93} is an example of a rule, since it attempts to specify most, if not all, of the content of the law ex ante:

No state or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act—(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and (2) multiple or discriminatory taxes on electronic commerce.\textsuperscript{94}

By contrast, the fair use doctrine is an example of a standard, since what constitutes a fair use—though broadly defined by a list of purposes and factors—depends ultimately on case-by-case analysis.\textsuperscript{95}

In deciding whether to adopt a rule or standard, courts often must interpret and apply an act of Congress.\textsuperscript{96} The statute's texture—how much of its content is specified in advance by Congress—affects the court's decision whether to adopt rules or standards. A statute that has more of its content specified in advance by Congress, such as the Internet Tax Freedom Act, channels the court to a more rule-like approach. In contrast, a statute that is more open-ended, like § 1 of the Sherman Act,\textsuperscript{97} channels the court to a more standard-like approach. This is not to say, however, that the statute itself is determinative of whether a court adopts a rule or standard. Courts can, and do, fashion rules from even the most open-ended statutes and can, and do, find exceptions to even the most rule-like statutes. Statutory interpretation affords courts their own opportunity to decide between rules and standards, somewhat apart from the choice made by Con-

\textsuperscript{92} See Sunstein, supra note 90, at 961, 965.


\textsuperscript{95} 17 U.S.C. § 107 (1994); see infra note 223 and accompanying text.

\textsuperscript{96} Courts also may be called to interpret the Constitution or existing precedent.

\textsuperscript{97} 15 U.S.C. § 1 (1994) (prohibiting "every contract, combination . . . or conspiracy, in restraint of trade or commerce"); see Scalia, supra note 90, at 1183 ("One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade, but we have not interpreted it to require a totality of circumstances approach in every case.").
gess. Whether a rule operates as a rule, or a standard as a standard, all depends on the interpretive practices of the courts.98

While some may question the usefulness of applying the "old" rules/standards debate to the new technology of the Internet, the longevity of the debate argues in its favor.99 The debate has elicited much commentary and criticisms from a variety of prominent jurists and legal scholars, and the concepts are, for better or worse, embedded in our legal culture.100 Even to doubters of the debate, the terms rules and standards should at least have the advantage of familiarity—which is an asset where our aim is to be practical and to assist courts in how they decide cases.

The choice between rules and standards is often important to the development of doctrine. For example, the rules/standards debate played out in a prominent way in Denver Area Educational Telecommunications Consortium v. FCC,101 a recent technology case decided by the Supreme Court. Eschewing rules, Justice Breyer advised taking a narrow, fact-specific approach to determining whether recent federal cable regulations violated the First Amendment: "[A]ware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick an analogy or one specific set of words now."102 Justice Souter supported this tentative approach, cautioning that "we should be shy about saying the final word today about what will be accepted as reasonable tomorrow," particularly "when we know too little to risk the finality of precision."103 Justice Breyer's narrow

98 As Sunstein has explained:
If we take a rule to be a provision that minimizes law-making power in particular cases, a lawmaker may intend to issue a rule, but the interpretive practices of the interpreting institution may turn the provision into something very different. Whether a provision is a rule or not is a function of interpretive practices. The lawmaker has only limited power over those practices.

Sunstein, supra note 90, at 960 (citation omitted).

99 See id. at 957 ("It would be hard to overstate the importance of the controversy between the two views.... In every area of regulation—the environment, occupational safety and health, energy policy, communications, control of monopoly power—it is necessary to choose between general rules and case-by-case decisions.").

100 See supra note 90.


103 Denver Area, 518 U.S. at 777–78 (Souter, J., concurring).
approach, however, drew sharp disagreement from Justices Kennedy and Thomas, who favored adopting a clear rule and extending the old categories of First Amendment law.\textsuperscript{104} The disagreement in \textit{Denver Area} is hardly an idle one. The disagreement marks a clear division over how the law should respond to developing technology.

\textbf{B. Decisional Minimalism and Decisional Maximalism}

Another useful (although more recent) way to think about legal decisionmaking is assessing how "minimalist" or "maximalist" a decision or law is. These concepts owe their development to Cass Sunstein, who in a series of recent writings has made a compelling case for the minimalist approach.\textsuperscript{105} In fact, Sunstein has suggested—and at least one federal court of appeals has agreed—\textsuperscript{106}—that minimalism should apply to the emerging technologies of the Internet and telecommunications.\textsuperscript{107}

Judicial minimalism describes when courts "say[] no more than necessary to justify an outcome, and leave[] as much as possible unde-

\textsuperscript{104} \textit{Id.} at 784-87 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); \textit{id.} at 817–19 (Thomas, J., concurring in the judgment in part and dissenting in part).


\textsuperscript{107} Sunstein, \textit{supra} note 102, at 18 (suggesting "that any decision involving the application of the First Amendment to new communication technologies, including the Internet, should be narrow, because a broad decision rendered at this time would be likely to go wrong" (citation omitted)).
According to Sunstein, it is all right, even desirable, for courts to "leave things undecided" and decide cases very narrowly. Minimalist judges "seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to decide particular cases." Minimalists tend not to view outcomes as controlled by rules or theories set forth in advance. Instead of enunciating broad theory or first principles, minimalists attempt to reach "incompletely theorized agreements"—relatively unambitious decisions that can dispose of the case. Sunstein believes that, in practice, courts tend to favor a rebuttable presumption in favor of minimalism.

By contrast, maximalist judges attempt "to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes." Sunstein believes that maximalism may be embraced when (1) courts "have considerable confidence in the merits of [the] solution," (2) the decision can significantly decrease the amount of uncertainty for litigants, courts, and others, (3) there is a particular need for advance planning, or (4) when the democratic process is not functioning well. But, particularly on divisive issues, maximalism must be supported by a societal consensus.

Like rules and standards, maximalism and minimalism can be thought to represent a continuum of choices for a court to render its decision. The range will vary depending on how broadly the court attempts to rule and how much it has to say. A single decision could contain elements of both minimalism and maximalism. For example, a court might rule broadly but without saying much, or might rule narrowly while saying a lot. And, of course, a case may involve several different issues, which complicates the analysis even further.

108 Id. at 6.
109 Id. at 14 (citation omitted).
110 See id.
111 See id. at 20.
112 See id. at 33. From the response of several prominent jurists to Sunstein's claim, it may be fairly accurate. See supra note 106.
113 Sunstein, supra note 102, at 15.
114 Id. at 30, 33.
115 See Sunstein, One Case at a Time, supra note 105, at 15–16.
117 Id. at 25 ("Decisions are not usually minimalist or nonminimalist; they are minimalist along certain dimensions." (emphasis omitted)).
C. The Two Approaches to the Manner Question: Narrow/Tentative and Broad/Definitive

Although rules and standards have yet to be considered in tandem with maximalism and minimalism in legal scholarship, the combination seems to be a natural one. Both sets of terms focus on the manner of a court’s decision and represent a continuum to explain a wide range of possible decisions (going from a more categorical approach to a more fact-specific approach, or from a deeply theorized and broad opinion to an incompletely theorized and narrow one). Combining the rules/standards debate with the concepts of minimalism and maximalism is an acknowledgement that the rules/standards debate is too limiting. Decisions may involve other dynamics that extend well beyond a simple choice between a rule or a standard. The concepts of minimalism and maximalism can add to our arsenal of terms to analyze judicial decisions.

Although Sunstein recognizes the importance of considering how minimalism and maximalism relate to the rules/standards debate, he says very little about the issue. It seems clear, however, that a minimalist would favor the application of standards because standards offer a way to avoid broad rules and abstract theories. Both standards and minimalism share a basic philosophy that more harm than good comes from applying legal regulations and deciding cases broadly. Like standards, minimalism shares a special affinity for the common-law method and proceeding by analogical reasoning rather than rule-bound judgment. It seems equally clear that a judicial maximalist would tend to favor rules. By definition, maximalism seeks to establish “broad rules for the future” with “deep theoretical justifications”—which is the quintessence of the rules position.

118 Sunstein, supra note 90, at 959 (“[T]he rules-versus-standards debate captures only a part of what is at stake, and it is important to have a fuller sense of the repertoire of available devices.”). We can have, for example, decisions that involve presumptions, a list of non-exhaustive factors, a set of guidelines, use of analogies, or general principles. See id. at 963–68.

119 Sunstein, supra note 102, at 42–43.

120 Id. at 15 (“Minimalists try to decide cases rather than to set down broad rules . . . . They decide the case at hand; they do not decide other cases too unless they are forced to do so (except to the extent that one decision necessarily bears on other cases).”).

121 Sunstein, supra note 90, at 968 (“Most of the time, an analogy will produce a standard, one that makes sense of the outcomes in the case at hand and the case that came before.”).

122 Sunstein, supra note 102, at 18.

123 See id. at 15.
The correlation between maximalism and rules, and minimalism and standards, is not perfect, however. We can have both minimalist rules (that are either narrow or incompletely theorized) and maximalist standards (that are deeply theorized). For example, the Supreme Court could strike down a statute as unconstitutional, but say very little about what test it applied, instead choosing to rely on case analogy or fact-specific analysis. In such case, the Court would be articulating a rule (the statute is unconstitutional), but the opinion itself would be minimalist. Another point of departure between the two sets of terms is that minimalism and maximalism encompass a broader range of concepts than just rules and standards. Mootness and denial of certiorari, for example, embody a minimalist approach. Likewise, dicta in opinions might be considered maximalist without necessarily articulating a rule (or a standard).

Despite the potential differences, I will group together standards and minimalism as comprising one general approach, the narrow/tentative approach, and rules and maximalism comprising another approach, the broad/definitive approach. These groupings are not meant to indicate hard-and-fast categories, but rather, tendencies or aspirations that the two sets of concepts share. Standards and minimalism share a basic tendency or aspiration to limit the scope of decisionmaking, whether by limiting the range of issues decided or limiting the decision to the facts presented in the case. Standards and minimalism can thus be characterized as embracing a narrow/tentative approach. By contrast, rules and maximalism aspire to decide issues firmly and for a broad range of cases and can thus be characterized as embracing a broad/definitive approach.

Ultimately, we can view the two general approaches—narrow/tentative and broad/definitive—along a continuum, going from minimalist standards on one end to maximalist rules on the other end. In between would fall minimalist rules and maximalist standards, as well as hybrid decisions that involve both rules and standards—the combi-

124 See id. at 43. Sunstein identifies a number of strategies that embrace minimalism that have little or nothing to do with standards:

[C]ourts should not decide issues unnecessary to the resolution of a case; courts should deny certiorari in areas that are not "ripe" for decision; courts should avoid deciding constitutional questions; courts should respect their own precedents; courts should, in certain cases, investigate the actual rather than hypothetical purpose of statutes; courts should not issue advisory opinions; courts should follow prior holdings but not necessarily prior dicta; courts should exercise the passive virtues associated with doctrines involving justiciability.

Id. at 7.
nations could be infinite. The point of examining a particular decision under this framework would not be so much to place the decision in the single right category, but rather, to analyze the manner of decision, describe the overall approach taken in terms of its narrowness/tentativeness or broadness/definitiveness, and consider the propriety of the approach taken.

D. Caveats and Concerns

The approach I take in this Article is ultimately meant to be practical. My approach departs from the previous rules/standards literature that frames the debate either in the abstract (largely divorced from cases), or in terms of an across-the-board proposition or preference (the rules camp versus the standards camp). It remains somewhat of a mystery to me why legal scholars have talked about the rules/standards debate at such a level of abstraction and with such an expectation that courts need to choose between one approach over the other for all time and all cases, even though nearly everyone acknowledges that context matters.

To deal with the problem of abstraction, I ground my discussion in cases, a maneuver that should not be too controversial given the pervasiveness of the case-study method in law schools. I believe we can test—and refine—our framework only if we apply it to actual cases and see whether it adds to our understanding of the cases. I do not profess that my framework is the only way to evaluate the manner question, merely that it is a better method that allows for further refinement.

125 We could attempt to devise an elaborate taxonomy of concepts (e.g., factors, presumptions, balancing tests) and doctrines (e.g., ripeness, nonjusticiability, constitutional doubt) within our framework. See Sunstein, supra note 90, at 960–68 (describing the different devices available to the law); id. at 961 (“There is a continuum from rules to untrammeled discretion, with factors, guidelines, and standards falling in between.”). Such an enterprise, however, seems to me too complicated for our needs. I have attempted to keep the framework simple enough to apply in practice. Combining rules/standards with minimalism/maximalism seems to serve that purpose well.

126 See, e.g., Kaplow, supra note 90, at 559–68.

127 See, e.g., Scalia, supra note 90, at 1178.

128 See, e.g., id. at 1187 (“I have not even tried to address the hardest question, which is: When is such a mode of analysis avoidable and when not?”); Sunstein, supra note 90, at 959 (“Rules cannot be favored or disfavored in the abstract; everything depends on whether, in context, rules are superior to the alternatives.”); see also Sunstein, supra note 102, at 18 (acknowledging that the choice between minimalism and maximalism depends ultimately on contextual considerations).
I recognize, however, that the rules/standards debate is not without its limitations. There is good reason to question the very notion that rules can define the content of the law ex ante.\textsuperscript{129} Given the limitations of language, rules will always have ambiguities and will always require interpretation.\textsuperscript{130} In order to interpret a rule, we must draw upon a welter of shared understandings and conventions.\textsuperscript{131} Recognizing the contingent nature of rules—their dependency on context—means that all rules, to a certain extent, must be decided at the point of application.\textsuperscript{132} Even with the most clearly defined rule, there may be an exception—say, to avoid absurd results—that presents itself when applying the rule.\textsuperscript{133} Interpretive practices, in other words, do matter.

Another important limitation to the rules/standards debate is the false perception that rules and standards are stable, or completely separable. In fact, we often find hybrids of rules and standards in a particular area of law, or doctrine that is in greater flux. Critical legal scholars contend that competing doctrines will develop both rules and standards for deciding the same legal issue, and the law will forever oscillate between the competing poles.\textsuperscript{134} In \textit{Form and Substance in Private Law Adjudication}, Duncan Kennedy attributes this tension to the ambivalence we have over the ideals of individualism and altruism.\textsuperscript{135} Given the oscillation, one may conclude that “there are no clear reasons to prefer one formal resolution [a rule or a standard] to the other.”\textsuperscript{136}

While these concerns are legitimate, I do not believe they vitiate the usefulness of the rules/standards debate. Many people (judges, lawyers, and laypeople) act as though rules guide their conduct, despite the limitations of the language through which rules are communicated. This practice may depend on social agreement and convention, but such dependence need not render the concept of rules or standards meaningless. As long as people understand rules as

\textsuperscript{129} See KELMAN, \textit{supra} note 90, at 46.

\textsuperscript{130} Sunstein, \textit{supra} note 90, at 984–91.

\textsuperscript{131} See Radin, \textit{supra} note 90, at 799–800 (arguing that rule-following is an “irreducibly social” practice, in which “rules do not cause the agreement; rather the agreement causes us to say there are rules”).

\textsuperscript{132} See \textit{id.} at 809 (“Whether an activity is seen as rule-like is contingent upon material social context and agreement.”).

\textsuperscript{133} See Sunstein, \textit{supra} note 90, at 984–85.

\textsuperscript{134} See KELMAN, \textit{supra} note 90, at 20; Kennedy, \textit{supra} note 90, at 1685–701.

\textsuperscript{135} See Kennedy, \textit{supra} note 90, at 1685. For a critique of Kennedy’s claim, see KELMAN, \textit{supra} note 90, at 54–59.

\textsuperscript{136} KELMAN, \textit{supra} note 90, at 31.
guiding their conduct, the concept of a rule retains its vitality. Ample evidence demonstrates the existence of enough agreement in our legal system about the use of the terms "rules" and "standards." Indeed, the rules/standards debate recurs in technology cases before the Supreme Court, in legal scholarship discussing cyberspace, and in other areas of law.

Moreover, recognizing a perpetual oscillation between rules and standards does not preclude one from identifying patterns that occur within that oscillation. At a particular time and place there often is a controlling regulation or decision for an area of law. Each day, courts and lawyers identify what law governs their case. Although competing doctrines may exist across, and sometimes within, jurisdictions, more often than not a predominant approach can be identified. Such regulations or decisions often (though not always) will have a more rule-like or more standard-like texture. Accordingly, it would be of huge practical importance if courts could determine what, if anything, makes a rule or standard more appropriate for that particular area of regulation.

137 See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 16-17 (1997) ("As long as rules are experienced as effective in guiding conduct—as long as those at whom rules are directed generally concur in their understandings—the central claims and aspirations of formalism remain relatively intact."); Kaplow, supra note 90, at 601 ("As long as the relevant audience took this [language] to refer to a familiar set of acts, an ex ante specification would have been made in the relevant sense."); Korobkin, supra note 90, at 30 (arguing that most decisions can be classified as either rules or standards, despite the fluidity between the terms); Sunstein, supra note 90, at 990 ("[T]he ex post substantive judgments that underlie readings of rules are often widely shared, or at least supported by good reasons even if not widely shared."). Even the proponents of Critical Legal Studies (CLS) do not dispute that "rules" may be set forth in practice. See Kelman, supra note 90, at 46.


140 See supra note 90.

141 The CLS critique of rules and standards does not deny this possibility. See Kelman, supra note 90, at 20 (suggesting that CLS adherents would acknowledge that "[d]ay-to-day practice may well vary in a predictable fashion both over time and across different actors with different political perspectives" (emphasis added)).

142 For examples of how the rules/standards debate may reveal insights for particular areas of regulation, see Al Katz & Lee E. Teitelbaum, PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law, 53 IND. L.J. 1 (1977), and William H. Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 YALE L.J. 1198 (1983).
What we need is not to jettison the rules/standards debate, but to adopt a more chastened view of it. My framework removes any expectation of an across-the-board answer or preference for the rules/standards debate. The approach is similar to what Sunstein calls an incompletely theorized agreement, moving away from high theory and over-arching principles to a more fact-specific inquiry—and, ultimately, a less ambitious answer.\footnote{See Sunstein, \textit{Incompletely Theorized}, supra note 105, at 1735–36. This is not to say that my framework abandons theory. It is important to attempt to justify (as I do below) such a framework with a coherent theoretical explanation. However, the theory is at a lower level of generality and aims at a less sweeping or absolutist position or explanation.} Although I do start out with a general presumption (in favor of standards and minimalism, as we shall soon see), the presumption is not intended to displace careful analysis of each case. Furthermore, the framework I sketch is not intended to render conclusive determinacy on the manner question, but rather, to illuminate its complexities and suggest ways for courts to evaluate the question more critically. The framework is written in the spirit of Socratic dialogue, not scientific proof, recognizing our limitations, but nevertheless asking critical questions in search of better understanding.

\section*{III. A Proposed Framework for Deciding Between Rules and Standards for Cyberspace}

In this section, I sketch out an initial framework to assist courts in deciding the manner question. My framework begins with a modest presumption in favor of a narrow/tentative approach (including standards, case-by-case decisionmaking, and minimalist decisions) for cyberspace. The presumption can be rebutted, however, by the presence of factors that demonstrate that a broad/definitive approach (including rules, categorical reasoning, and maximalist decisions) is appropriate. I include five factors for non-constitutional\footnote{I revise the factors slightly for constitutional issues. See \textit{infra} notes 251–68 and accompanying text.} issues: (1) whether the case involves Internet-specific legislation (as opposed to old law or doctrines), (2) whether the case involves a recurring problem with common elements, (3) whether the contemplated rule is a general prohibition or regulation of the Internet’s architecture (that is not tied to a regime of legal entitlements for which a balancing of interests is often necessary), (4) whether the contemplated rule causes interdoctrinal tension or extraterritorial spillover, and (5) whether the Internet is changing in a way material to the contemplated rule.
Below I explain the framework and provide reasons for adopting this approach.\footnote{145}

\textbf{A. A Modest Presumption for Standards and Minimalist Decisions for Cyberspace}

Just as the Internet was on the cusp of experiencing its unprecedented growth, Lawrence Lessig wrote \textit{The Path of Cyberlaw}, in which he advocated that lower courts leave the regulation of cyberspace to the common law and case-by-case adjudication, at least for the time being.\footnote{146} Given the complexities of understanding the new space of cyberspace, Lessig believed that it would be better to regulate cyberspace through the incremental process of the common law.\footnote{147} Although this process is slow and meandering, it is desirable as "a way to pace any process of regulation—a way to let the experience catch up with the technology."\footnote{148}

Although cyberspace has changed dramatically since the publication of Lessig's path-breaking article, the article still carries considerable force and wisdom. Lessig's article recognizes that the law must develop ways to keep pace with and understand the emerging technology and medium of cyberspace. One strategy is to rely on the common-law method, which is predicated on an incremental, fact-specific

\footnote{145 My framework has more of the feel of a standard than of a rule. While I rely on a general presumption and a set of factors, I ultimately favor close analysis of each case to determine the proper manner of decision. At the same time, however, the framework is intended to channel the inquiry for courts in a manner that is less open-ended than the typical standard of what is "reasonable" or "appropriate." See Sunstein, \textit{supra} note 90, at 965 ("Standards depart from factors in refusing to enumerate considerations that are relevant in particular applications."); \textit{id.} at 998–1003 (discussing the use of factors); \textit{cf.} Korobkin, \textit{supra} note 90, at 42 (concluding that an economic analysis of the rules/standards debate leads not to a rule that can determine the choice between rules and standards, but rather "a multi-factored standard . . . in which the relevant considerations are specified but their relative weights are left for case-by-case balancing").

I also acknowledge that my framework focuses mainly on judicial decisions as singular events. I do not discuss all the complexities raised when subsequent courts interpret a decision in a manner that may have been different from what the deciding court intended. \textit{See generally} Sunstein, \textit{supra} note 102, at 27 ("[C]ourts deciding cases will have only limited authority over the subsequent reach of their opinions."). That inquiry goes beyond the scope of this Article, but I would suggest here that my framework can help to illuminate the complexities as subsequent courts apply precedent that is broad or narrow. At the very least, the framework should sensitize the court to the manner of its and other courts' decisions.

\footnote{146} Lawrence Lessig, \textit{The Path of Cyberlaw}, 104 YALE L.J. 1743 (1995).

\footnote{147} \textit{id.} at 1744–45.

\footnote{148} \textit{id.} at 1744.
approach that leaves much room for courts in future cases. The common law is, as Lessig puts it, a process that offers "partial answers, to repeated if slightly varied questions, in a range of contexts." Accordingly, in applying the common-law method, courts "should [not] purport to decide . . . questions [about cyberspace] finally or even firmly."

Lessig's call for reliance on the common-law method marks a preference for what I call the narrow/tentative approach—relying on the use of standards and case-by-case, as opposed to categorical, determinations. Drawing upon Lessig's basic insight, I begin the pro-

149 See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 178 (1991) ("The common law appears consequently to be decision according to justification rather than decision according to rule. It abounds with rules of thumb, but avoids the use of rules in a strong and constraining sense."); Sunstein, supra note 102, at 35 ("The process of case analysis also allows judges to proceed incrementally when appropriate."); see also Carol M. Rose, CRYSTALS AND MUD IN PROPERTY LAW, 40 STAN. L. REV. 577, 604 (1988) ("We are more likely to find that judicial decisions veer toward mud rules, while it is legislatures that are more apt to join with private parties as 'rulemakers' with a tilt towards crystal."); Scalia, supra note 90, at 1177 (describing the common law system as one that attempts to decides cases "case-by-case, deliberately, incrementally, one-step-at-a-time").

This is not to suggest that rules cannot develop through the common law or that such rules lack permanence. Undoubtedly, some common-law cases "take[ ] on a canonical significance, being treated as itself a rule rather than merely the articulation of the reasons for creating one." SCHAUER, supra, at 180. But "[a]s a method, [the common law] is most associated with comparatively or completely transparent rules of thumb, seeking case-specific optimization rather than rule-based stability." Id. at 181.

150 Lessig, supra note 146, at 1745.

151 Id. at 1753.

152 Other scholars have agreed with Lessig's basic insight. Mark Lemley, for example, has concluded:

We now have hundreds of reported decisions in various aspects of "Internet law" ranging from jurisdiction to trademark law to the First Amendment. As I look at these cases, it seems to me that Lessig's intuition was right. . . . [The common law is] arguably doing a pretty good job of adapting existing law to the new and uncertain circumstances of the Net.

Mark A. Lemley, THE LAW AND ECONOMICS OF INTERNET NORMS, 73 CHI.-KENT L. REV. 1257, 1294 (1998); see also William W. Fisher III, PROPERTY AND CONTRACT ON THE INTERNET, 73 CHI.-KENT L. REV. 1203, 1219 (1998) ("I agree wholeheartedly with those commentators who urge lawmakers to be cautious and not try to impose a permanent, comprehensive regulatory regime on this protean medium."); Jerry Kang, CYBER-RACE, 113 HARV. L. REV. 1130, 1188 (2000) ("Cyberspace is too novel and dynamic a medium for anyone to be confident that she has gotten policy just right. We must therefore be careful to avoid irrevocable decisions."); Sunstein, supra note 90, at 992 ("Many observers and participants think that it is premature for Congress to design rules for this activ-
posed framework with a modest presumption (meaning one that is rebuttable and weak) in favor of the use of standards and minimalist decisions in cyberspace. All things being equal, I believe courts should err on the side of the narrow/tentative approach when deciding cases involving cyberspace.

1. Standards and Minimalist Decisions Offer Greater Flexibility To Handle Rapidly Changing Technology

The main reason for this presumption is that cyberspace is difficult for the law to keep pace with and comprehend. The speed at which the Internet is developing presents significant difficulties to the formulation of rules. Rapidly changing technology frustrates a rulemaker's ability to gather sufficient information about that technology to fashion a rule that can produce accurate results. If the technology keeps changing, there is a high probability that the rule will become obsolete or, even worse, will result in negative consequences that courts did not foresee. “Often general rules will be poorly suited to the new circumstances that will be turned up by unanticipated developments; often rulemakers cannot foresee the circumstances to which their rules will be applied.” For rules to be effective, there should not be rapid changes in the content of the law. The rapidly changing nature of the Internet, however, makes changes in the law both necessary and frequent, thereby undermining the effectiveness and desirability of rules.

\[\text{iy, and that it would be far better to rely on common law methods of case-by-case judgment and analogy.}^\text{153}\].

\[\text{153 This dynamic suggests an interesting turn on one typical conception of the rule of law, which contends that “rules are more likely than standards or other multi-variable formulae to achieve the determinacy suggested by the ideal of being ‘ruled’ by law.” Fallon, supra note 137, at 48 (footnotes omitted). Accordingly, some would argue that there is or should be a general presumption in favor of rules in our legal system. See id.; see also Kelman, supra note 90, at 20 (describing “how powerful the urge is to privilege the rule pole”); Sunstein, supra note 90, at 957 (noting the “pervasive social phenomenon” of “extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law”). In contrast, with respect to cyberspace, a reasonably good case can be made for the opposite presumption in favor of standards.}^\text{154}\]

\[\text{154 Sunstein, supra note 90, at 957.}^\text{155}\]


\[\text{156 See Ehrlich & Posner, supra note 90, at 277 (“An important cost of legal regulation by means of rules is . . . the cost of altering rules to keep pace with economic and technological change.”). We could attempt to deal with changing circumstances by recognizing only a few rules that are privately adaptable, meaning that people could}^\text{156}\]
Standards and minimalist decisions offer greater flexibility to accommodate changing circumstances.\(^{157}\) Instead of wasting time and resources on fashioning a rule based on limited information of an ever-changing technology, courts can narrow their focus to fact-specific decisions.\(^{158}\) Standards compensate for the court's lack of information by making consideration of future applications unnecessary. Just as importantly, standards allow courts to consider the state of the technology as it exists at the time each case is decided. Standards thus offer a way to deal with the problem of obsolescence, which occurs if changed circumstances undermine the validity of a rule or law,\(^{159}\) such as when a court's decision was based on factual findings that are no longer true today. With standards, the possibility of obsolescence is diminished because legal decisions are more closely tied to the particular facts of the case.

contract around them. See Sunstein, supra note 90, at 994, 1016–20. Even then, the rules may require a substantial amount of information to tailor and formulate for the Internet context.

\(^{157}\) See Richard A. Posner, Economic Analysis of Law § 20.3, at 590–95 (5th ed. 1998) (describing the benefits of standards to adapt to changing times); id. § 20.4, at 595–96 (arguing that less rigid adherence to stare decisis is more efficient where rapid changes make legal precedents erroneous or irrelevant); Schauer, supra note 149, at 140–42 (discussing the trade-off of adopting a rule and losing some ability to adapt to changing circumstances); Ehrlich & Posner, supra note 90, at 277 (stating that standards are relatively unaffected by changes over time in the circumstances in which they are applied); Hardy, supra note 73, at 995 (“[T]he rapidly changing technology of computer communication implies a need for flexible legal regulation of behavior . . . .”); Kaplow, supra note 90, at 616 (discussing how “standards are easier to keep up-to-date”); Korobkin, supra note 90, at 34 (explaining how standards are more efficient in dealing with “material temporal differences”); Sullivan, supra note 90, at 66 (“Rules tend toward obsolescence. Standards, by contrast, are flexible and permit [courts] to adapt them to changing circumstances over time.”); Sunstein, supra note 90, at 998–94 (describing how rules can be outrun by changing circumstances).

One historical example of the use of standards to deal with changing technology is the Radio Act of 1927, ch. 652, § 602(a), 48 Stat. 1102 (1927) (repealed 1934). Congress enacted an open-ended standard for licensing the airwaves in the “public interest,” which courts interpreted and applied on a case-by-case basis. See, e.g., NBC v. United States, 319 U.S. 190, 219–20 (1943) (explaining that because of what Congress had done in the past “in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding,” Congress “define[d] broad areas for regulation and . . . establish[ed] standards for judgment adequately related in their application to the problems to be solved”); FERC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (“The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . . .”). I wish to thank Mark Davies for pointing out this example.

\(^{158}\) See Lessig, supra note 146, at 1744–45; Sunstein, supra note 90, at 992.

\(^{159}\) See Sullivan, supra note 90, at 66; Sunstein, supra note 102, at 17.
2. Standards and Minimalist Decisions Can Minimize the Cost of Bad Decisions

Standards and judicial minimalism can also reduce the costs of a regulation or decision that turns out to be (perhaps in hindsight) poorly devised. The fallout from a bad rule\textsuperscript{160} can be quite large, since a rule is meant to be applied repeatedly to like cases. In contrast, standards can minimize the cost of bad regulations and decisions by limiting the reach of the decision. Because standards and minimalist decisions do not purport to decide future cases, any adverse consequences that may result from a particular decision or regulation may be localized.\textsuperscript{161} In addition, standards can reduce the number of errors in the first instance because standards take into greater account the particular facts of the case and are better suited to deal with changing circumstances.\textsuperscript{162}

The concern for bad rules should be heightened for the Internet, which still is a developing technology that affects millions of people across the world. Courts must be cautious in dealing with developing technology because an ill-conceived ruling or regulation could retard the Internet's growth. Justice Souter perhaps captured this sentiment best when he warned of the danger of adopting a broad rule for emerging technologies: "[A]s broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others."\textsuperscript{163}

\textsuperscript{160} People may disagree over what constitutes a "bad" rule or regulation. The term is value laden and can be evaluated from numerous possible vantage points, such as how well the rule serves its intended purpose, whether the rule creates negative externalities or fails to produce a net social benefit, or whether the rule infringes widely shared beliefs or goals. In this Article, I use the term "bad" generically. The central point that I make should apply irrespective of one's conception of what constitutes "bad."

\textsuperscript{161} This is not to say that bad standards will never have substantial costs. A high profile case whose resolution carries industry-wide implications could have substantial costs regardless of whether it is decided by rule or standard. Yet, a standard can minimize the extent to which the decision is repeated in future cases.

\textsuperscript{162} See Sunstein, \textit{supra} note 102, at 18 ("A more evolutionary approach, involving the accretion of case-by-case judgments, could produce fewer mistakes on balance, because each decision would be appropriately informed by an understanding of particular facts.").

In the end, Justice Souter was resigned to accept the "rule" (the Hippocratic Oath) of "do[ing] no harm."\textsuperscript{164}

Justice Souter's adopted maxim is a good example of the minimalist approach. Where changing technology is involved, a court is to proceed cautiously and narrowly. Avoiding broad rules and maximalist decisions may be one way to avoid "doing harm" to the developing technology. Although some may question the appropriateness of adopting the Hippocratic Oath for law, the principle does perhaps capture the kind of restraint that is necessary to deal with the complexities and challenges posed by cyberspace. It would be a tragic mistake if the Internet's rapid development and open nature were stifled by ill-conceived decisions. By favoring standards and narrow decisions, courts may guard against unforeseen and deleterious consequences that could result from broad decisions.

Doing no harm is a credo that could also apply to the development of doctrine. A presumption for narrow, fact-specific decisions may alleviate the pressures caused by doctrinal convergence. A court could, for example, avoid ruling definitively about how two doctrines intersect by taking a narrower way out of the case (assuming one is available). That way the law can buy more time to understand the doctrinal convergence before attempting to reconcile competing doctrines. Similarly, a court could attempt to avoid a broad decision if it may result in excessive extraterritorial spillover. Although spillover might result from a minimalist decision, the likelihood for spillover is much greater with a decision that expressly attempts to apply to future cases.

Thus, a presumption for the use of standards and minimalist decisions in cyberspace is founded on a healthy dose of circumspection about a court's ability to keep pace with a nascent and fast-developing technology. Courts should err on the side of standards and minimalist decisions if they are uncertain how cyberspace should be regulated. A broad decision or rule has the potential to do far more damage to the development of cyberspace (and of doctrine) than a narrow decision or standard has.

\textsuperscript{164} \textit{Id.} at 778 (Souter, J., concurring); see also Lawrence Lessig, \textit{Copyrights Rule}, Industry Standard, Oct. 9, 2000, at 51, 51 ("[C]ourts from the Supreme Court down have demanded that the state first show that its regulation will 'do no harm' to cyberspace."); FCC Chairman William E. Kennard, The Unregulation of the Internet: Laying a Competitive Course for the Future, Remarks Before the Federal Communications Bar Northern California Chapter (July 20, 1999), at http://www.fcc.gov/Speeches/Kennard/spwek924.html ("In a market developing at these speeds, the FCC must follow a piece of advice as old as Western Civilization itself: first, do no harm. Call it a high-tech Hippocratic Oath.").
3. Standards and Minimalist Decisions Can Promote Greater Democratic Accountability

Finally, reliance on case-by-case and minimalist decisionmaking may help to shunt broader issues about the Internet—that implicate a diversity of views and values and that may affect the millions of people who use the Internet each day—from courts to democratically accountable institutions. By proceeding narrowly, courts can leave the primary responsibility of deciding how best, if at all, to regulate cyberspace to the legislature. If the democratic process is well-functioning,\textsuperscript{165} the courts’ deferral of important Internet issues to Congress can help to foster greater debate and accountability on how the Internet is regulated.\textsuperscript{166} While courts can also play an important part in facilitating public debate about contentious issues, courts are less equipped as an institution to conduct the kind of public debate necessary to resolve more divisive issues, particularly in high-profile cases that galvanize competing camps.

B. The Need for Rules for Cyberspace

A world governed by standards has tradeoffs, however.\textsuperscript{167} It would be foolish to think that our legal system could or should operate without rules or any decisions that adopt the broad/definitive approach. A legal regime composed of standards comes at a steep price: legal doctrine is subject to instability; widely shared values may be left unprotected; individuals may not be able to plan efficiently; and the costs of judicial decisionmaking are increased. As in other areas of law, there must be a place for at least some rules in cyberspace.\textsuperscript{168}

\textsuperscript{165} Of course, this assumption needs to be tested. There may be occasions (perhaps many) where Congress caters purely to special interests or enacts legislation that can only be seen as rent seeking by a well-connected group. \textit{See infra} notes 200–02 and accompanying text.

\textsuperscript{166} \textit{See generally} Sunstein, \textit{supra} note 102, at 19 (arguing that one of the major advantages of minimalism is that it grants a certain latitude to other branches of government).

\textsuperscript{167} \textit{See} Schauer, \textit{supra} note 149, at 143–44.

\textsuperscript{168} I do not include one of the common defenses of rules, namely, their ability to reduce arbitrariness and to promote fairness in treating like cases alike. Although the defense is often cited by proponents of rules, it remains a highly contested proposition. Instead of treating like cases alike, rules may end up treating relevantly different cases similarly. \textit{See id.} at 136–37. And, if the latter, rules have the same potential for arbitrariness as commonly thought of standards. \textit{See id.} at 137 ("Insofar as factors screened from consideration by a rule might in a particular case turn out to be those necessary to reach a just result, rules stand in the way of justice in those cases and impede optimal justice in the long term.").
1. Rules Reduce the Cost of Decisionmaking

For starters, constant changes in the law or complete reliance on case-by-case decisionmaking may prove to be extremely taxing on courts and our system of stare decisis. There would be a tremendous waste of resources if courts treated every case and every legal issue as if they were proceeding *tabula rasa*. And our notion of stare decisis would become impoverished if every case were so minimalist as to preclude divining a legal precedent that might apply to other cases.\(^{169}\)

Rules help to reduce the cost of decisionmaking by obviating the need to reconsider a recurring issue over again. Although rules cost more to formulate and promulgate, they can be offset by a substantial savings in costs of applying the law, particularly for recurring fact scenarios.\(^{170}\) For example, courts confronted with the recurring question of what kind of Internet contacts are sufficient to establish personal jurisdiction over a defendant have developed a "sliding scale" test to help analyze the issue.\(^{171}\) The test operates in some respects as a rule and saves courts from expending judicial resources on determining what the governing law is. Over time, with each application of the test, we can expect the savings in decisional costs to be quite substantial. In some cases, the issue of personal jurisdiction will not even be litigated, given the clarity of result under the test.

2. Rules Promote Stability

Also, rules help to promote stability. Stability in the law helps to safeguard our most widely shared values, interests, or goals. For example, we interpret the First Amendment to prohibit all or nearly all

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\(^{169}\) See Sunstein, *supra* note 102, at 27 ("[A] strong theory of stare decisis is part of a range of devices designed to create good incentives for democracy by providing a clear background for Congress.").

\(^{170}\) See Kaplow, *supra* note 90, at 621; Korobkin, *supra* note 90, at 31–32; see also Schauer, *supra* note 149, at 147 ("A rule-based system is . . . able to process more cases, operate with less expenditure of human resources, and, insofar as rule-based simplicity fosters greater predictability as well, keep a larger number of events from being formally adjudicated at all.").

\(^{171}\) On one end of the scale, personal jurisdiction exists if the defendant transacts business in that jurisdiction over the Internet. On the other end of the scale, personal jurisdiction cannot be exercised over a defendant whose only contact to the jurisdiction is that he has posted information or an advertisement on the Internet without any further communication with potential customers in the forum state. In the middle are the more difficult cases in which the defendant operates an interactive website that allows the defendant to communicate with potential customers in foreign jurisdictions regarding defendant's goods or services. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997).
viewpoint-based discrimination of speech by the government. Such a rule has a stabilizing force for our society and deters the chilling of free speech that would result if the law were less certain and encouraged people to engage in self-censorship out of fear of violating the law. Likewise, we take a fairly categorical approach to the Double Jeopardy bar (prohibiting multiple prosecutions and punishment of a defendant for the same offense), even to the point of recognizing that some who are guilty may escape conviction, because we fear what might happen if we permit repeat prosecutions under a more open-ended standard. Although open-ended standards may also instantiate some of our most widely shared values, a rule is often better able to safeguard precisely what we hold dear. Thus, the Due Process Clause captures a welter of fairness and justice concerns, both procedural and substantive. But the real bite of the open-ended notion of "due process" often comes in the form of particular rules, say for instance, requiring notice and comment before the deprivation of certain entitlements by the government.

Although standards are more flexible, the price of flexibility is fixity. It may be that we want the "rigidity" of a rule to help shape the way the Internet develops, or even to slow down rapid changes of the Internet in a way that is consistent with widely shared beliefs. Rules can serve a useful purpose in establishing stability and basic "ground rules" for the Internet. If a certain practice or use of the Internet is harmful to others or the development of the Internet, then we should consider adopting rules to prohibit such practices. Conversely, if a certain practice is socially desirable and can facilitate the use or opera-

173 See, e.g., Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."); see also, e.g., United States v. Ursery, 518 U.S. 267 (1996) (holding that civil in rem forfeitures do not constitute "punishment" for purposes of Double Jeopardy bar).
174 See, e.g., Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding that due process "as a general rule" requires that before a student is suspended from public schools, the "student be given oral or written notice of the charges against him and, if he denies the charges, an explanation of the evidence the authorities have and an opportunity to present his side of the story"); Goldberg v. Kelley, 397 U.S. 254 (1970) (holding that welfare recipients have a due process right to a hearing before termination of their benefits).
175 See Joel R. Reidenberg, Lex Informatica: The Formulation of Information Policy Rules Through Technology, 76 Tex. L. Rev. 553, 553-54 (1998) ("[D]efault ground rules are just as essential for participants in the Information Society as Lex Mercatoria was to merchants a hundred years ago.").
tion of the Internet, then adopting rules to protect such a practice may be desirable.

3. Rules Facilitate Predictability and Private Planning

Rules are also important in facilitating predictability and private planning. Because rules allow people to predict the content of the law ahead of time, rules can encourage greater private planning and ordering. To the proponents of rules, even a bad rule may be more desirable than having no rule at all, given the predictability that it can achieve. Defining rights more clearly (such as who is the true owner of rights, and how those rights will be enforced) may reduce transaction costs for people who wish to contract those rights. Standards and minimalist decisions make planning more difficult, however, because people cannot know in advance what the law is. The loss in private planning by use of standards may be particularly costly for the Internet, an area that so heavily involves commercial transactions and decentralized administration.

The most ardent defense of private planning comes from the law-and-economics school, which contends that entitlements should be clear so that parties can engage in bargaining over those entitlements. Richard Epstein argues, for example, that in our complex world we should adopt a few simple rules of property ownership and reject the vagaries of case-by-case adjudication. Likewise, Judge Frank Easterbrook contends that property rules need to be made clearer for cyberspace so that “in a Coasean world the affected parties will by their actions establish what is best.” Easterbrook believes

176 See Schauer, supra note 149, at 137–45; Sullivan, supra note 90, at 62–63.
177 See Schauer, supra note 149, at 138.
178 See, e.g., Scalia, supra note 90, at 1179.
179 Sunstein acknowledges that “[w]hen planning is necessary, minimalism may be a large mistake.” Sunstein, supra note 102, at 29.
181 See Richard Epstein, Simple Rules for a Complex World 53–54 (1995); id. at 65 (“What has to be avoided above all is a case-by-case adjudication of a set of complex claims which will leave even the winners (to say nothing of the innocent losers) of particular suits hobbled by nightmarish legal uncertainty when they wish to deal with their reacquired property.”).
182 Easterbrook, supra note 20, at 210; see id. at 209–13; Trotter Hardy, Property (and Copyright) in Cyberspace, 1996 U. CHI. LEGAL F. 217, 236; Robert P. Merges, Of Property Rules, Coase, and Intellectual Property, 94 COLUM. L. REV. 2655 (1994). Easter-
that we need to have more property rules for cyberspace, to enable more bargaining and efficiency.\textsuperscript{183}

While I agree that there is much virtue in devising rules to facilitate bargaining, I stop short of an across-the-board embracement of rules and property rights for cyberspace. To be sure, facilitating private bargaining is an important goal for cyberspace. But so are a host of other considerations (e.g., protecting the free flow of information, encouraging technological innovation, developing a public commons for the exchange of ideas). There is a danger that an emphasis on clear property rights may obscure the complexities that cyberspace poses.

Consider, for example, \textit{Intel v. Hamidi}, a case involving the creation of a clear property right in cyberspace.\textsuperscript{184} Over the course of roughly three years, Ron Hamidi, a former employee of Intel, sent a total of six emails to Intel’s employees (some thirty thousand in number). In the emails, Hamidi described what he claimed were demeaning and discriminatory employment practices by Intel. Dismayed by the content of the emails, Intel went to court to stop Hamidi from sending any more emails to its employees (even though Intel’s policy permitted employees to receive personal emails at work).\textsuperscript{185} In granting a preliminary injunction against Hamidi, the trial court concluded that Hamidi had trespassed on Intel’s chattel—namely, its email servers—by sending emails to Intel’s employees.\textsuperscript{186}

The court’s recognition of a strong property right for Intel assumes that boundaries of ownership of the Net can be clearly defined. But that assumption ignores all the complexities of the Net, which in

\textbf{brook echoes a standard law-and-economics position, developed from Ronald Coase, that private bargaining over an entitlement is more likely to be efficient if the entitlement is clearly defined ex ante. See Coase, supra note 180, at 8, 19.}

\textbf{183 See Easterbrook, supra note 20, at 212; see also Hardy, supra note 182, at 236–58 (arguing for greater recognition of property rights in cyberspace). For thoughtful articles disputing the efficiency of using rules, see Burk, supra note 139, in which the author argues that it may be more efficient to have “muddy” entitlements—which he likens to standards—for intellectual property in cyberspace because transaction costs may be high for certain transactions related to cyberspace, id. at 145–79, and Jason Scott Johnston, Bargaining Under Rules Versus Standards, 11 J.L. ECON. \\& ORG. 256 (1995), in which the author argues that “bargaining may be more efficient under a blurry balancing test than under a certain rule” when the parties have incomplete information and the legal balancing test is imperfect in measuring harm versus value. Id. at 257.}


\textbf{185 Id. at *1.}

\textbf{186 Id. at *1–*2.}
many respects is not "owned" by anyone.\textsuperscript{187} Even were we able to define neatly ownership of different aspects of the Net, I am not sure that establishing clear property rights would necessarily facilitate bargaining as Judge Easterbrook desires. In \textit{Intel}, it seems to me that the result will be barring, not bargaining with, Hamidi. The byproduct is that unpopular speech is squelched. Perhaps a better property analogy—if we must draw one at all—is to treat Intel's email system like real property and the connection to the Internet like a sidewalk.\textsuperscript{188} Hamidi can use the sidewalk (email), at least for the purposes for which it was set up (to send messages within reasonable limitations).\textsuperscript{189} Such a property right is less clear or categorical, but at least it avoids closing off speech on the Net.\textsuperscript{190}

The key point to recognize is that private planning is important, but not necessarily the paramount concern, at least not for all cases. Sometimes, perhaps often, adopting a rule simply for the sake of facilitating private planning may mask other considerations that deserve our attention.

\textbf{C. Five Factors That Support the Use of Rules and the Broad/Definitive Approach}

From the foregoing discussion, we should expect the need for both rules and standards in dealing with cyberspace. My suggested presumption for the narrow/tentative approach is therefore a modest one. The presumption can help to decide close cases in which the


\textsuperscript{188} I am grateful to Larry Lessig for suggesting this analogy, although in a different context.


\textsuperscript{190} Another analogy would be to liken email to a telephone call: a person should be allowed to make personal, non-commercial calls (emails) to other people as long as not harassing or prank calls (emails).
choice between rules and standards is uncertain, but it should not be viewed to tip the scales in favor of standards or minimalist decisions as a matter of course. The more crucial inquiry is provided by a close analysis of the factors that militate in favor of the development of rules and the broad/definitive approach. I offer a set of five factors to assist courts in that inquiry. Although other factors could be added to the list, I believe the five factors provide a good starting point for the analysis.

1. Waiting for Internet-Specific Legislation

   The first factor examines whether the court is applying “old law” created before the Internet existed or new legislation created specifically for application to the Internet. I will refer to this new legislation as Internet-specific legislation. If the case involves “old law,” courts need to be more careful before adopting a broad rule or categorical approach. On the other hand, if the case involves Internet-specific legislation, courts should feel more comfortable in crafting rules from a statute that is amenable to such an approach.191

   This first factor rests on the belief that we should prefer Congress to make the first attempt at formulating a rule for cyberspace with legislation that specifically targets the Internet.192 The Internet-specific legislation does not necessarily have to create *sui generis* regulation for cyberspace. Legislators may incorporate regulations of cyberspace within existing bodies of law, or may develop approaches that parallel other areas of regulation. The key point is that Congress

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191 Of course, judgment calls will sometimes have to be made on what constitutes Internet-specific legislation and how strongly the factor weighs. A new statute that expressly applies to the Internet—for example, the Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681, 2719 (provided at 47 U.S.C. § 151 n.1 (Supp. V 1999))—presents the strongest case under this factor. An amendment to an existing statute to extend its application to the Internet should also count as Internet-specific legislation, although the factor perhaps should weigh less strongly if the amendment made little or no effort to describe how the statute should apply to the Internet (e.g., an amendment that simply said that “this law now applies to the Internet”). A more difficult case is presented by a new statute that is silent on whether or how it applies to the Internet. If the language of the statute is ambiguous, perhaps the legislative history could shed greater light on the issue. If doubt still remains, this factor should not weigh in favor of the broad/definitive approach.

192 Congress itself must consider a threshold question of whether legislation is to be preferred over self-regulation. From its inception, the Internet has developed with a certain ethos that it should be allowed to develop free of intrusive government regulation. At the same time, however, Congress has enacted numerous pieces of legislation that relate to the Internet. See Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1205–32 (2000).
enacts legislation that specifically contemplates application to cyberspace and that either sets forth a rule or provides a statutory scheme in which courts or administrative agencies can develop a rule.

Congress should take the lead in developing rules for cyberspace for several reasons. First, Congress has greater capacity for gathering information and for developing expertise and institutional memory to deal with the Internet and technology issues. No decisionmaker should underestimate the complexity of these issues. The Internet is fast developing and continues to outpace the law. In "Internet time," technological changes tend to be both rapid and dramatic. To deal with such complexity, decisionmakers must be able to gather a large amount of information and develop institutional memory for understanding the Internet and technology-related issues. In this regard, Congress is much better suited to deal with cyberspace than courts are. Congress has the authority to commission studies, hold hearings, and elicit comment from the public. Congressional committees and staffers may be able to develop expertise by working primarily or even exclusively on technology issues. Moreover, industry leaders can (and no doubt do) more readily provide their views to members of Congress. Given its information-gathering capacity, Congress may be better able to develop more comprehensive and efficacious rules to regulate behavior.

By contrast, courts are limited to the evidence presented in a specific case. Although the evidence may at times be extensive, courts can consider only what the parties offer. Unlike Congress, courts do not have wide latitude to search for information on their own. Moreover, except for patent appeals, which are heard exclusively by the Federal Circuit, courts typically do not develop expertise or institutional memory to handle technology cases. Judges must handle a wide variety of cases, and they cannot be reasonably expected to keep abreast of all the technological changes occurring today. Nor do courts have staff suited to developing technological expertise and institutional memory about technology issues. Law clerks typically work for finite periods of time (generally a year) and do not have the same opportunity to develop technological expertise as congressional staffers.

Another reason to prefer that Congress take the lead in developing rules for cyberspace is that Congress is a democratic body that can facilitate public debate about proposed regulations of the Internet.

193 See Kaplow, supra note 90, at 608 ("Legislatures may be better equipped to draw upon technical expertise than courts. Also, through the use of committees and staffs, legislatures may develop more expertise of their own.").

194 See Ehrlich & Posner, supra note 90, at 264.
These debates are often political and subject to varied, and at times quite divided, opinion. Courts are ill-equipped to entertain, much less decide, such debates, particularly if the issues are divisive or political. Because the Internet affects millions of people here and abroad, major questions about its regulation are better left to democratically (and perhaps internationally) accountable institutions. For Congress to assume the responsibility of formulating rules for cyberspace may further the goals of transparency and accountability in government action.\(^{195}\)

Finally, significant doctrinal benefits may result if courts refrain from adopting rules for cyberspace until Internet-specific legislation is enacted. In such case, courts are less likely to stretch existing doctrines that developed in contexts wholly unrelated to cyberspace. Although applying traditional doctrines to cyberspace may sometimes be appropriate, there is a danger when courts stretch existing doctrine to fit cyberspace. For example, before Congress enacted the Anti-cybersquatting Consumer Protection Act,\(^{196}\) courts attempted to deal with cybersquatting by applying federal anti-dilution law.\(^{197}\) But this has greatly expanded the scope of anti-dilution law, in ways that may not be desirable. Subsequent courts recognized that the Panavision International, L.P. v. Toeppen\(^ {198}\) decision threatened to make every dispute over a domain name between a trademark holder and a domain

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\(^{195}\) See Sunstein, supra note 90, at 976–77; cf. AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000) (refusing to consider what national policy should be with respect to open access on the Internet). Notably, the Court stated in Diamond v. Chakrabarty, 447 U.S. 303 (1980):

The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.

_\text{Id.}_ at 317. Of course, there is always a danger that Congress could enact laws that mask a particular policy or that are so poorly drafted that courts will have the real burden of figuring out the statutory scheme.


\(^{197}\) In Panavision International, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), the Ninth Circuit held that a cybersquatter had committed trademark dilution because it had registered domain names containing the trademark of the plaintiff, which reduced the capacity to identify and distinguish the trademark holder’s goods and services on the Internet. _\text{Id.}_ at 1324–27.

\(^{198}\) Toeppen, 141 F.3d 1316.
name registrant a case of trademark dilution in favor of the trademark holder. 199

I do not mean to suggest, however, that courts should never adopt rules for cyberspace on their own. Some areas of law will involve judge-made law—personal jurisdiction is a good example—for which courts have the primary responsibility of deciding the law. For these areas, courts can develop rules, but they still must consider whether rules are appropriate. Even in an area where Congress has not yet enacted a regulation for cyberspace, courts can play an important part in exposing gaps in the law and areas that are more suitable for a legislative response. And, sometimes when there clearly has been a failure in the democratic process, courts may be the last resort for the establishment of a rule.

Nor do I wish to suggest that whatever Congress enacts will necessarily be more efficacious or desirable than court-made rules. As it has proven in the past, Congress is open to all sorts of undesirable activities, including capture, rent seeking, and catering purely to special interest groups. 200 Modern public choice theory would cast doubt on the notion that consideration of the public good animates Congress when enacting legislation. 201 However, I believe Congress does have at least the capacity, if not the inclination, to consider legislation beyond special interests for a larger, public good. 202 And, at least from


200 See Lessig, supra note 72, at 219; Sunstein, supra note 102, at 29–30.

201 Public choice theory disputes the notion that members of Congress act beyond self-interest and interest group politics. See generally DANIEL A. FARBER & PHILIP P. FRICKER, LAW AND PUBLIC CHOICE 36–37, 72 (1991) (stating that the most fundamental concern about interest group politics is that it corrodes the political system); Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371 (1983) (describing how the government corrects market failures by favoring the politically powerful); Ehrlich & Posner, supra note 90, at 264 (stating that the nature of the legislative process is such that ordinarily only substantial interest groups can invoke it); Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985) (stating that much of the dissatisfaction with the American scheme of government has its root in the existence of interest groups and their influence over the political process).

202 See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 3–20 (1993) (elaborating on the constitutional theory based on civic republicanism and the ideal of a deliberative democracy); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539,
an institutional perspective, Congress is better situated to gather the kind of information and develop the level of expertise necessary to devise rules.

2. Addressing Recurring Problems with Identifiable Common Elements

The second factor examines whether the proposed rule addresses a recurring problem that has identifiable common elements. Rules are particularly useful to address problems that can be expected to occur with some frequency and that are not so heterogeneous as to escape categorization. The more frequent the problem and the more the problem manifests common traits, the greater likelihood that a rule can be designed to address the problem. On the other hand, if the problem is only sporadic or an isolated incident, it may be better to wait before adopting a rule. Courts may benefit from more concrete examples of the problem, and a rule may prove to be unnecessary. Similarly, if the problem is recurring but contains diverse elements that defy categorization, an open-ended standard or more minimalist decision may be better suited to address the problem.

The importance of this second factor cannot be overstated. In his economic analysis of rules and standards, Louis Kaplow described how rules may reduce both transaction and decisional costs if the rules address recurring fact scenarios that can be expected to occur with some frequency. In such cases, the use of rules can reduce the costs for private parties to determine and comply with the law and the costs of enforcement for courts to give content to the law. But where the problem is either sporadic or diverse, the use of rules may be costly and inefficient.

The second factor helps to ensure that rules are narrowly tailored to address a specific problem. The result should be better decision-making. Poorly designed rules are often ones that do not address a recurring problem with identifiable common elements. Instead, the

1548–51 (1988) (describing those aspects of republicanism that have the strongest claim to contemporary support). Congress may not always (or even often) think broadly in terms of a national interest, but it has enacted laws, such as anti-discrimination laws, that serve an important national goal.

203 Ehrlich & Posner, supra note 90, at 273 (“At first a problem area may seem immensely complex and various, but over time elements of commonality will emerge.”).

204 Kaplow, supra note 90, at 577.

205 See id. at 596.

206 See id. at 581–82, 621–22.

207 Id. at 582–83.
rules are vague or overbroad. Such rules can have many unforeseen adverse consequences, such as chilling, overdeterrence, and reduction of socially desirable conduct. By requiring courts to identify recurring circumstances that underlie a perceived problem, the second factor forces courts to pinpoint what needs to be addressed. The more precise the rule, the greater the probability that the rule will deter only that conduct which the rule was intended to prohibit. A more precise rule may also decrease the number of legal disputes and increase the prospects of settlement, given the likelihood that people can determine the law and how it applies ex ante.

3. Applying General Prohibitions and Regulations of the Internet's Architecture

The third factor examines the form that the contemplated rule is to take. Rules may be easier to formulate for cyberspace as either (1) general prohibitions or (2) regulations of the Internet's code or architecture that are not tied to a regime of entitlements for which a balancing of interests is often necessary.

General prohibitions tend to be more amenable to rules because prohibitions typically target conduct that is recurring and that is specific and identifiable. Because general prohibitions apply across-the-board to all individuals, they are well-suited to the formulation of rules of general applicability. For example, the proscription against computer hacking targets certain kinds of unauthorized entry of computer systems. Computer hacking is a recurring problem, and, although there are different kinds of hacking, we can—as the federal statute does—identify recurring traits based on such factors as whether the conduct was unauthorized and caused damage to the net-

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208 We will see two such examples in Reno and Corley. See infra notes 273-93, 360-96 and accompanying text.

209 Ehrlich & Posner, supra note 90, at 264. A precise rule, however, may have a greater problem of under-inclusion and may permit the Holmesian “bad man” to evade the law more so than a vague rule. See Sunstein, supra note 90, at 995. The problem should be relatively small if most people are risk-averse.

210 Ehrlich & Posner, supra note 90, at 264-65; see also Korobkin, supra note 90, at 47 (describing how the “self-serving bias” may cause people to litigate more where there are standards or unclear rules).

211 This is not to say that all prohibitions are rules. Some prohibitions contain standards that do not specify the content of the law in advance—the Fourth Amendment’s prohibition against “unreasonable” searches and seizures, U.S. Const. amend. IV; the Eighth Amendment’s prohibition against “excessive fines,” U.S. Const. amend. VIII; and the Federal Trade Commission Act’s prohibition against “unfair and deceptive” acts or practices, 15 U.S.C. § 45(a) (1994), are but a few examples.

work. I believe it is much easier for courts to give such a prohibition a categorical sweep,\textsuperscript{213} than laws that are framed more in terms of entitlements or an affirmative grant of rights, particularly those that require some balancing of interests. It is often easier to tell people what they are \textit{not} entitled to do than to tell them what they are entitled to do.

In addition to prohibitions, regulations of code may also be well-suited to the development of rules. Lessig has demonstrated how the code or architecture of cyberspace—meaning all the hardware and software that comprise the Net and make it run—establish, in essence, a law of its own.\textsuperscript{214} "Code is law," as Lessig puts it,\textsuperscript{215} and the law of code may have just as a rule-like effect—perhaps more so than—as ordinary law. And a law that requires a specific code may operate as a rule. The reason is that the choice of a specific code or technical make-up to cyberspace is likely to have a broad reach, given the pressures of interoperability, standardization, and network effects on the Net.\textsuperscript{216} If, for example, we require digital telephony to facilitate wiretapping for law enforcement, that technical standard must be implemented for the entire network (at least in the United States).\textsuperscript{217} Because code itself has a broad reach, regulations of code may extend just

\begin{itemize}
  \item[213] See, e.g., United States v. Morris, 928 F.2d 504, 506–09 (2d Cir. 1991) (holding that the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A) did not require proof of an intent to cause damage by computer hacker). True, criminal law presents a special case in which the Constitution seems to compel the use of rules, or at least greater ex ante specification of the content of the law. The Due Process Clause prohibits the enforcement of criminal laws that are "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966)).
  \item[214] Lessig, supra note 72, at 43; see also Joel R. Reidenberg, Governing Networks and Rule-Making in Cyberspace, 45 Emory L.J. 911, 929 (1996) (stating that the overlap of interests between the physical world and the virtual world suggests a governance model that contains distinct rules for the separation of powers); Reidenberg, supra note 175, at 579–81 (describing how Lex Informatica will allow the creation of customized rules that are more easily enforced).
  \item[215] See Lessig, supra note 72, at 3. This is not to suggest that Lessig advocates the use of regulations of code as a general strategy. Nor do I. My basic point is that code regulations are often rule-like in effect. However, as I explain below, some regulations of code may be closely tied to a regime of entitlements for which it is necessary to engage in a balancing of interests. In such cases, imposing a code regulation with a strong rule-like effect may not be appropriate.
  \item[216] See Lemley, supra note 28, at 1041–53.
  \item[217] Lessig, supra note 72, at 44–46.
\end{itemize}
as far. Once in place, a regulation of the Internet's architecture essentially codifies the "rules" into the code that constitutes the Internet.\textsuperscript{218}

General prohibitions and regulations of code should be distinguished from statutory entitlement regimes—such as intellectual property—\textsuperscript{219} for which some kind of balancing of goals or interests is necessary or desirable. The position that I wish to advance here is twofold: (1) before cyberspace existed, many key aspects of intellectual property law had been decided not by rules, but by fact-specific standards; and (2) cyberspace makes the use of standards and fact-specific decisionmaking in this area all the more necessary. Crucial to both cyberspace and intellectual property is a need to balance the competing interests—including the public interest—that are at stake. Balancing of interests is the stock-and-trade of standards.\textsuperscript{220}

First, copyright, patent, and trademark law all rely heavily on fact-specific standards to balance competing interests or goals. The Copy-
right and Patent Clause grants Congress the authority to enact copyright and patent systems that serve two goals: first, to provide an economic incentive for authors and inventors to create; second, and more importantly, to serve the public interest in receiving a wide dissemination of works and inventions. But deciding how best to achieve these goals, which are at times competing, is far from easy. The Copyright and Patent Clause seems to call for something less than an ironclad exclusive right. Beyond blatant cases of copying, judgment calls will inevitably have to be made over whether an infringement has occurred and how far the exclusive rights extend.

Accordingly, both patent and copyright law rely on standards to strike a better balance. In copyright law, the fair use doctrine, the instrumental defense of copyright has often been grounded on unproved premises or abstract theories than on fact, and there has been a steady undercurrent of dissent from the conclusion that such an incentive is needed or that its overall effect is salutary.

For all of its exposure, our understanding of fair use has not progressed much beyond Justice Story's observation [that the fair use doctrine] was "one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."

Lloyd L. Weinreb, Fair Use, 67 FORDHAM L. REV. 1291, 1291 (1999) [hereinafter Weinreb, Fair Use]. Part of the reason that the fair use doctrine may have developed in such an unrule-like manner is that copyright holders "typically asked for an injunction, an equitable remedy that directed the court's attention to the particularities of the case rather than formulation of a general rule." Id. at 1296 & n.41.
test of infringement,\textsuperscript{224} and the idea/expression distinction\textsuperscript{225} all require case-by-case determination. In patent law, the test of infringement,\textsuperscript{226} requirement of nonobviousness,\textsuperscript{227} and a number of the statutory bars\textsuperscript{228} also operate as fact-specific standards. The preva-

\textsuperscript{224} See Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946) (Frank, J.) (setting forth the test of infringement based on proof of copying, such as establishing a substantial similarity between the works, and unlawful appropriation determined from the perspective of the lay audience); Jessica Litman, \textit{The Public Domain}, 39 EMORY L.J. 965, 1005 (1990) ("The determination of substantial similarity is largely subjective, thus permitting the finder of fact to give effect to its intuitive judgment of the perceived equities in a case.").

\textsuperscript{225} See Baker v. Selden, 101 U.S. 99, 103–05 (1879); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) ("The critical distinction between 'idea' and 'expression' is difficult to draw. . . . The guiding consideration in drawing the line is the preservation of the balance between competition and protection reflected in the patent and copyright laws."); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.) ("[N]o principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore be inevitably ad hoc.").

\textsuperscript{226} See Graver Tank v. Linde Air Prod. Co., 339 U.S. 605, 607 (1950) ("What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum.").


What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties . . . are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development.

\textit{Id.} at 18.

\textsuperscript{228} See 35 U.S.C. § 102 (1994 & Supp. V 1999); Micro Chem., Inc. v. Great Plains Chem. Co., 103 F.3d 1538, 1544 (Fed. Cir. 1997) (holding that for "on sale" bar, "all of the circumstances surrounding the sale or offer to sell . . . must be considered and weighed against the policies underlying section 102(b)"); Lough v. Brunswick Corp., 86 F.3d 1113, 1119 (Fed. Cir. 1996) (stating that "public use" bar "depends on 'how the totality of circumstances of the case comports with the policies underlying the public use bar'" (quoting Tone Bros. v. Sysco Corp., 28 F.3d 1192, 1198 (Fed. Cir. 1994)); Scott v. Finney, 54 F.3d 1058, 1061–62 (Fed. Cir. 1994) (holding that whether invention has been "reduced to practice" to satisfy § 102(g) depends on a "reasonableness standard" applied to the "particular facts of each case"); Griffith v. Kanamaru, 816 F.2d 624, 626 (Fed. Cir. 1987) (holding that whether junior party exercised "reasonable diligence" in reducing invention to practice under § 102(g) is determined under standard of reasonableness, balancing the public interest in earliest possible disclosure of invention and the interest in rewarding the inventor); \textit{In re Hall}, 781 F.2d 897, 899 (Fed. Cir. 1986) (holding that the "printed publication" bar depends on "underlying fact issues, and therefore must be approached on a case-by-case basis"); Paulik v. Rizkalla, 760 F.2d 1270, 1280 (Fed. Cir. 1985) (Rich, J., concurring) (hold-
lence of standards in copyright and patent law means that, in most cases, we cannot know ex ante whether the copyright or patent holder's exclusive rights have been violated.\textsuperscript{229} Save cases of blatant copying, there will always be some uncertainty to the scope of intellectual property rights. A similar use of standards can be found in trademark law—an area that has been the source of numerous disputes involving domain names that contain or are similar to existing trademarks. Like copyright and patent law, trademark law confers a right that is subject to a balancing of the public interest.\textsuperscript{230}

My sense is that cyberspace will require the same, or perhaps even greater, reliance on standards to adjudicate disputes over intellectual property. First, as a doctrinal matter, it would be somewhat anomalous to interpose categorical rules for cyberspace in doctrinal areas that have traditionally been decided by standards. If our intellectual property law relies heavily on standards, particularly where it is necessary to balance competing interests or goals, then we should not ex-

\begin{footnotesize}
\footnote{Interestingly, Easterbrook agrees that our current intellectual property systems fail to create clear property rights. Easterbrook, \textit{supra} note 20, at 208–10. And he even acknowledges that "we cannot issue prescriptions for applications [of intellectual property law] to computer networks" until we resolve the unanswered questions that we have about the goals and effectiveness of our intellectual property systems. \textit{Id.} at 208. As I explain below, I am not sure why we should expect that we will be able to answer these questions \textit{ex ante} and in a categorical manner now if we have not been able to do so for hundreds of years.}

\footnote{As Chief Judge Posner has described it:}

\begin{quote}
The aim is to strike a balance between, on the one hand, the interest of the seller of the new product, and of the consuming public, in an arresting, attractive, and informative name that will enable the new product to compete effectively against existing ones, and, on the other hand, the interest of existing sellers, and again of the consuming public, in consumers' being able to know exactly what they are buying without having to incur substantial costs of investigation or inquiry.
\end{quote}

\end{footnotesize}
pect that such standards can be discarded or replaced by rules simply because the activity occurs in cyberspace. The same need for balancing of interests to determine intellectual property rights persists when applying those doctrines to cyberspace.231

Indeed, standards may become even more necessary for cyberspace as a way to balance competing interests. Because the Internet is international in scope, it intensifies the need for consideration of the public interest. Any decision that regulates the content of material on the Net may have not only national but also international consequences that can affect the millions of people who use the Internet each day. International conflicts over intellectual property rights make rule-bound determinations less practicable. The Internet's border-transcending nature presents vexing problems for choice of law. The simple question of deciding what law governs the claim of rights presents stumbling blocks to categorical determinations. Modern choice of law analysis has eschewed bright-line rules in favor of the malleable "interest" analysis. For international intellectual property disputes, choice of law is even less developed and more uncertain.232

The upshot of this brief digression on intellectual property law is that courts must be careful in creating broad rules for intellectual property rights in cyberspace. The fact-specific standards that underlie our intellectual property law have developed for a reason: to strike a better balance of the competing goals and interests. That goal is no less true in cyberspace.

4. Determining That Doctrinal Convergence Does Not Create Interdoctrinal Tension or Extraterritorial Spillover

The fourth factor examines whether the case involves doctrinal convergence. If it does not, then courts should consider the other factors in determining whether a rule is appropriate. However, if there is doctrinal convergence, courts must examine whether the contemplated rule is difficult to fit within the existing doctrines or laws. Greater caution should be exercised before creating a rule that is in tension with or that may substantially alter or undermine established doctrines. If courts ignore this problem, the result will likely be what I call interdoctrinal tension: a new doctrine cutting into or diminishing existing doctrines without analysis of the impact such a curtailment will have. Courts should proceed cautiously before rendering a deci-

231 See Aoki, supra note 189, at 27; Jessica Litman, Revising Copyright Law for the Information Age, 75 Or. L. Rev. 19, 32-35 (1996); Rose, supra note 187, at 155.
232 See supra note 64 and accompanying text.
sion for cyberspace that threatens to undermine existing doctrines in other contexts.

For international cases, courts must also be wary of extraterritorial spillover. If possible, courts should avoid broad decisions that extend far beyond the court’s jurisdiction. This approach finds support in the presumption that courts in the United States recognize against extraterritorial application of U.S. law, as well as in principles of international law and comity.

The Yahoo! case in France provides a good example of the problem of extraterritorial spillover. The Superior Court of Paris ruled that Yahoo! violated French law by allowing Internet users in France to access Yahoo!’s online auction, which contained the sale of Nazi memorabilia. The French court ordered Yahoo! to “render impossible” within three months the ability of Internet users in France to access the sale of such material. If Yahoo! failed to block such auctions from French users, it would have had to pay a contempt fine of $13,300 per day. The French court’s decision has elicited numerous reactions, both supportive and critical. Yahoo! itself took an


234 See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296–97 (3d Cir. 1979) (recognizing that principles of international law and comity may counsel against exercise of jurisdiction in case of extraterritorial application of U.S. law); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1977) (same); see also Hartford Fire Ins. v. California, 509 U.S. 764, 798 (1993) (assuming without deciding that comity and international law principles could factor against extraterritorial application of U.S. law even if supported by a clear intent of Congress for extraterritorial application).


237 Id.

238 Id.

239 In Yahoo and Democracy on the Internet, 42 Jurimetrics J. (forthcoming 2002), Joel Reidenberg offers the most comprehensive defense of the French court’s decision. Reidenberg contends that “[t]he positive normative impact of the Yahoo! decision is that the Internet actors will have to recognize varying public values across national borders.” Id. While I agree with the overall goal of accommodating different public values on the Internet, I do not believe that such a goal should be understood to allow national courts to apply their own domestic laws without regard for the amount of extraterritorial spillover that their decisions might create. Reidenberg is certainly right that Yahoo! came within the prescriptive authority of the French authorities based on its conduct in France. Id. He is also right in concluding that the
ambivalent approach: it brought a lawsuit in the United States to seek a ruling that the French court decision was not enforceable in the United States for jurisdictional and First Amendment reasons; at the same time, Yahoo! announced that it would start barring the sale of Nazi paraphernalia on its website and begin policing its site more closely.\textsuperscript{241} The District Court for the Northern District of California ruled in favor of Yahoo!, holding that the French court’s order was unenforceable because it was overbroad, vague, and ultimately inconsistent with the First Amendment under the U.S. Constitution.\textsuperscript{242}

Although I do not think that the French court was necessarily wrong in its application of French law, I believe the court should have considered more the extraterritorial effects of its ruling and principles of comity.\textsuperscript{243} It would have been better if the court had attempted to narrow the decision, given the spillover that would have resulted if the court’s decision had ended up banning all Nazi memorabilia on Yahoo!’s website, not just in France. Instead of ordering Yahoo! to “render impossible” the access to Nazi material on its website, the remedy ordered by the French court presented the more “interesting question.” \textit{Id.} But I disagree with his interpretation of the French court’s order as allowing merely a “reasonable level of compliance with French law.” \textit{Id.} The order is quite strict and does not speak in terms of reasonable compliance: “We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.” \textit{Yahoo!,} 169 F. Supp. 2d at 1185 (quoting a certified translation of the French court’s order). At the very least, if reasonableness was the standard, the French court could have expressly stated so in no uncertain terms, to avoid any confusion in how other courts and the parties themselves interpreted the order.


\textsuperscript{241} \textit{Id.}

\textsuperscript{242} \textit{Yahoo!,} 169 F. Supp. 2d at 1190–91.

\textsuperscript{243} My criticism of the French court’s ruling should not be read to be an endorsement of the U.S. district court’s decision. To declare a foreign judgment unconstitutional and unenforceable in this country is a strong remedy that perhaps is best reserved as a remedy of last resort, given the concerns for comity and respecting the individual sovereignty of each country. And it is just as bad for a U.S. court to impose U.S. First Amendment law on foreign countries as it is for foreign countries to impose their laws on the United States. Perhaps the U.S. district court should have waited for the French court’s decision on the appeal of the French lower court’s decision before issuing its own ruling. Also, if there was any doubt about the feasibility of implementing the French court’s order without having to remove all Nazi paraphernalia from Yahoo!’s website even outside of France, the U.S. district court could have declined to grant summary judgment and instead could have chosen to conduct an evidentiary hearing or trial on the issue.
court could have, for example, ruled that Yahoo! was in violation of French law, but only to the extent that it did not make its best efforts, given the state of the technology, to make unavailable any Nazi paraphernalia to French Yahoo! users. This more fact-specific ruling—that relies on an open-ended standard—tries to accommodate the interests of users outside of France and is more sensitive to the limitations of the technology.244 This ruling would have put pressure on Yahoo! to implement the best possible filtering software but would not have completely shut down the sale of Nazi material around the world.

This is not to suggest that any extraterritorial spillover should force courts to abdicate applying their country’s laws. Certainly, France has an important interest in enforcing its laws against Nazi paraphernalia. But the case becomes more difficult if it ends up regulating a substantial amount of conduct outside of France. If courts simply ignore the possibility of extraterritorial spillover, then we may end up with a race to the bottom of sorts: the most restrictive deci-

244 The French court could have drawn guidance from the CompuServe case in Germany, in which a German appellate court eventually reversed the conviction of Felix Somm, a CompuServe official. See Mark Konkel, Comment, Internet Indecency, International Censorship, and Service Providers’ Liability, 19 N.Y.L. Sch. J. Int’l & Comp. L. 453, 454–55 (2000). Somm was convicted for making available to German residents child pornography and violent computer games in newsgroups on the Internet. Id. at 453. The offending materials were accessed through CompuServe’s service. Id. Although the court dealt with German law, the Yahoo! case raises very similar issues. Because the technology at the time did not allow CompuServe to restrict only German users from accessing these discussion groups, CompuServe blocked access to all CompuServe users not only in Germany but also elsewhere for a short period of time. Id. at 454; see also Nathaniel Nash, Holding CompuServe Responsible, N.Y. Times, Jan. 15, 1996, at D4. Because of a public backlash to the blocking, CompuServe restored full access to the Internet, but made available filtering software for its users that would enable them to block their own access. See Konkel, supra, at 455–59. German prosecutors eventually indicted and convicted Somm for the alleged offense, even though during the middle of the proceedings the prosecutors agreed with Somm that he did not have the technological capability to screen the offending material and therefore should be acquitted. See id. at 463–64; Edmund L. Andrews, Germany’s Efforts To Police Web Are Upsetting Business, N.Y. Times, June 6, 1997, at A1. Two years later, however, an appellate court overturned the conviction and acquitted Somm of the charges. See Ex-Head of CompuServe-Germany Acquitted in Illegal Content Case, Tech Eur., Dec. 3, 1999, available at 1999 WL 10292203. Invoking a recently enacted German law that provided a safe harbor for ISPs from liability, the German appeals court held “that Somm did as much as he possibly could have to prevent the dissemination of such materials, and that he could not be held responsible.” John F. Delaney & M. Lorrane Ford, The Law of the Internet: A Summary of U.S. Caselaw and Legal Developments, in Representing the New Media Company 2001, at 31, 293–34 (PLI Intellectual Prop. Course, Handbook Series No. G-631, 2001).
sions in any country would, in essence, rule the Internet. The fourth factor is meant to reduce the possibility of such doctrinal tension by indicating a need for greater caution if a ruling results in extraterritorial spillover.

5. Determining That the Internet Is Not Changing in a Way That Is Material to the Contemplated Rule

The fifth factor examines whether the rapidly changing nature of the Internet thwarts or frustrates the formulation or efficacy of a rule. This factor is a final reminder to courts that cyberspace is fast developing and that their ability to keep pace with all of the changes may be limited.\textsuperscript{245} However, general fears about rapidly developing technology should not prevent the formulation of rules as a matter of course. Technological change should not be a bar to adopting a rule if there is no sign that such change is imminent or likely, or if there is no evidence that such change (even if imminent or likely) will affect a material aspect of the case. In each case, courts must consider evidence of material changes.

If the evidence indicates that change is imminent and will affect a material aspect of the case, the fifth factor militates strongly against the adoption of rules. For example, in Name.Space, Inc. v. Network Solutions, Inc.,\textsuperscript{246} the very relief that the plaintiff sought—the addition of top-level domain names to the Domain Name System (DNS)—was the subject of ongoing policy changes by the Clinton administration.\textsuperscript{247} During the course of the Name.Space case, the Commerce Department recommended that an internationally representative body assume oversight of the DNS and of the role of deciding what changes, if any, should be made to the top-level domain names.\textsuperscript{248} Such a body was formed and was named ICANN. With the issue of domain names still before ICANN, the Second Circuit took a narrow/tentative approach in upholding the denial of plaintiff's claims. Recognizing that "the lightning speed development of the Internet poses challenges for the common-law adjudicative process," the court fashioned a highly fact-specific ruling that expressly stated the issues that it was not decid-

\textsuperscript{245} See supra notes 14–23 and accompanying text.
\textsuperscript{246} 202 F.3d 573 (2d Cir. 2000).
\textsuperscript{247} See id. at 578–79.
\textsuperscript{248} Id.
This minimalist approach makes a lot of sense given the amount of change that was likely to occur.\footnote{249} 

There is no special formula for deciding how the factors should be weighed. That will depend on the circumstances of each case. However, some general observations can be made to assist courts in that inquiry. First, courts should have less trouble with cases where all five factors point in one direction, either all for or all against rules. In cases where the factors are mixed, however, courts will have to evaluate each factor in the particular case. I would suggest, however, that the first two factors should carry special importance in the final analysis. Internet-specific legislation and identification of recurring elements help to ensure that the court has the necessary information to formulate a rule that is narrowly tailored. The third, fourth, and fifth factors, in themselves, almost never will provide a sufficient reason to adopt a rule. However, these factors assume greater importance if they militate against a rule, such as if the court is dealing with an entitlement regime, an area of interdoctrinal tension or extraterritorial spillover, or rapidly changing facts. Chart A summarizes the framework for non-constitutional issues.

Chart A. Framework for Non-constitutional Doctrine

<table>
<thead>
<tr>
<th>Modest presumption in favor of standards and minimalist decisions (the narrow/tentative approach)</th>
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<tr>
<td>Factors militating in favor of rules (the broad/definitive approach):</td>
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<tr>
<td>1. Existence of Internet-specific legislation, as opposed to &quot;old law.&quot;</td>
</tr>
<tr>
<td>2. Contemplated rule targets a recurring problem with identifiable common elements, as opposed to a sporadic problem or problem with diverse elements.</td>
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<tr>
<td>3. Contemplated rule can be formulated as a general prohibition or a regulation of the Internet’s architecture and does not involve a statutory entitlement regime for which a balance of competing interests or goals is often necessary.</td>
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<tr>
<td>4. Contemplated rule does not cause interdoctrinal tension or extraterritorial spillover.</td>
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<tr>
<td>5. The Internet is not changing in a way material to the contemplated rule.</td>
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\footnote{249} Id. at 584–87. 

C. Constitutional Cases

Deciding constitutional issues presents a special category of cases. The decision involving a constitutional issue is likely to have several components that do not fall neatly within a single rule/standard determination. For starters, we more than likely will find a holding that the state action (whether statute or other conduct) is unconstitutional or not. Such a holding has a rule-like effect: it tells us the statute or conduct is valid or not valid for the case before the court and other cases. But how broad that rule is depends on the case. For statutes, facial challenges are broader than as-applied challenges. For conduct, challenges can target conduct that is fairly idiosyncratic or that covers a broad range of cases.

In addition to the ultimate decision on the constitutionality of the state action, we may examine the applicable constitutional doctrine or test for how rule-like or standard-like it is. Some tests are more open-ended (e.g., the International Shoe test of minimum contacts), while others are generally categorical and outcome determinative (e.g., the First Amendment’s proscription against viewpoint discrimination). Also, we could examine the rationale and tenor of the opinion to see whether it suggests a broader application that would determine the outcome of other cases beyond the issue presented for review. Finally, we could examine the number of constitutional issues decided. Some cases may decide a host of colorable challenges (possibly under several constitutional provisions), while others may decide just one.

All of this is to say that constitutional issues are complex. When we evaluate the manner question, we may be talking about several different things. I believe the manner question is less interesting with respect to the basic decision on constitutionality (we will always have something close to a rule), and more interesting with respect to the issues of the applicable test or doctrine, the rationale and tenor of the opinion, and the number of constitutional issues decided. Examining

251 The choice between rules and standards in constitutional cases occurs on at least three levels:

[F]irst, whether the Court’s own constitutional precedents ought to be construed as rules or standards; second, whether the Constitution’s provisions should be interpreted as rules or standards; and third, whether the Court, in fashioning the operative doctrines (that is, tests and levels of scrutiny that will guide the lower courts and the Court itself in future cases), ought to formulate rules or standards.

Sullivan, supra note 90, at 69.


this latter group of issues in terms of how tentative and narrow, or broad and definitive, seems to me to be where the real fight is.

Our framework must therefore be adapted for constitutional issues. Before I propose such an adaptation, I should be explicit that my framework is not intended to articulate a theory of constitutional interpretation for cyberspace. That more ambitious enterprise—about which several prominent scholars have already written—goes well beyond the goal of this Article. Although my framework touches upon interpretive issues, it focuses on a much more limited inquiry than a theory of interpretation.

I begin with a presumption for the narrow/tentative approach. This presumption reflects a basic recognition that constitutional decisions are more serious on the hierarchy of issues and are more difficult to undo. As Ehrlich and Judge Posner have pointed out, "the costs of changing constitutional rules are very high." Accordingly, our federal system has several features that attempt to temper the frequency with which constitutional precedent is established. The Supreme Court has discretionary review and accepts only a modest number of cases each Term. For statutory construction, a well-accepted canon is to interpret statutes so as to avoid raising constitutional difficulties. Like these features, a presumption for minimalism and the narrow/tentative approach will help to give courts more time before "constitutionalizing" an issue. The same reasons that justify the presumption for a narrow/tentative approach for

254 See, e.g., Lessig, supra note 72, at 111-21 (describing theory of "translation"—of reading the Constitution to preserve its original meaning, but in a way that is translated to account for changing circumstances); Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Address at the First Conference on Computers, Freedom, and Privacy (Mar. 26, 1991), in THE HUMANIST, Sept.–Oct., 1991, at 15, 20–21 (advocating that constitutional interpretation should be "technologically neutral" and should attempt to preserve original meaning across changing technologies).

255 Ehrlich & Posner, supra note 90, at 280.

256 See Sunstein, supra note 102, at 21 ("Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles."); id. at 50 (discussing the passive virtues of refraining from assuming jurisdiction).

257 Mark Tushnet, Foreword—The Supreme Court, 1998 Term: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 HARV. L. REV. 29, 68 (1999) ("At its peak, the Court heard argument in about 170 cases per Term, whereas during the past five years it has heard argument in fewer than one hundred cases each year.").

non-constitutional issues—dealing with Internet speed, reducing the risk of decisional error, and preserving contentious issues for democratic debate—also apply, perhaps even more so, when interpreting the Constitution.

The factors to rebut the presumption are slightly different for constitutional issues. I believe the first and third factors for non-constitutional issues—waiting for Internet-specific legislation, and relying on general prohibitions and regulations of code—become less relevant for constitutional issues. Instead, the decision will depend primarily on the particular constitutional provision at stake as well as the body of case law that has developed. Therefore, our constitutional framework should focus more on doctrinal concerns. While one could imagine a more elaborate framework, I propose three factors for courts to consider when dealing with constitutional issues. (These factors are substantially the same as the second, fourth, and fifth factors in our original framework.)

First, we must consider the constitutional provision at stake and the body of case law interpreting the provision. The basic approach is to facilitate the development of law to govern cyberspace in a way that can be harmonized with existing case law. Ideally, the contemplated doctrine for cyberspace should fit comfortably within existing doctrine. If courts have interpreted the constitutional provision categorically or by use of rules, a court should feel more comfortable in applying or adopting a similar rule in the Internet context. However, if the existing doctrine tends to favor standards or some sort of balancing test, then a court should proceed with greater caution before attempting to fashion a categorical rule for cyberspace. This approach safeguards against creating constitutional doctrine for cyberspace that is in tension or at odds with existing doctrine (i.e., interdoctrinal tension).

Also, if there is very little case law that has even considered the constitutional provision (or the intersection of different provisions), either in the context of cyberspace or more generally, courts should be more cautious before ruling broadly or perhaps ruling at all. Particularly where the case law provides little guidance, courts should consider adopting a minimalist approach and attempt to leave novel constitutional issues undecided. Far better for courts to gain some time to understand the complexity of the issue than to decide it on the first go-around with little, if any, guidance.

259 See, e.g., Sunstein, supra note 102, at 50–51 (discussing how the maximalist opinion in Brown v. Board of Education, 347 U.S. 483 (1954), was preceded by a long line of cases testing the constitutionality of the separate-but-equal principle, whereas
Second, courts must consider whether the contemplated rule addresses a recurring problem with common elements. Courts should refrain from establishing a broad constitutional rule if the problem is not recurring or is too diverse to treat by simple categorization. For example, the district court in *American Libraries Ass'n v. Pataki* held that the dormant commerce clause prohibits states from imposing any regulation on the Internet. The case involved a New York state statute that attempted to regulate online indecent material—much like the federal statute in *Reno v. ACLU*. Instead of ruling on First Amendment grounds (as it could have), the district court in *Pataki* ruled broadly under the dormant commerce clause with three separate holdings. In its broadest holding, the court ruled that "the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require." Subsequent courts have struggled to determine the scope of this maximalist rule. The rule appears to be quite sweeping in scope. But it is questionable whether it should apply to all state regulations (e.g., tax, anti-fraud, anti-gambling, anti-indecency, and consumer protection), particularly those that do not impose inconsistent or unworkable obligations. Moreover, future technologies could facilitate greater geo-

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261 Id. at 183–84.
262 Id. at 161.
264 *Pataki*, 969 F. Supp. at 169.
266 *See Ford Motor*, 106 F. Supp. 2d at 909 ("Although the [I]nternet is a mighty powerful tool, it is not so potent as to demolish every state's regulatory schemes as they apply to the sale of goods and services."). Jack Goldsmith and Alan Sykes provide a compelling argument for rejecting the broad reading of *Pataki* and for recognizing that the dormant commerce clause allows at least some state regulation of the Internet. *See generally* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785 (2001).
graphical filtering or differentiation among individual states to satisfy any dormant commerce clause concerns. The Pataki court might have delivered a better decision if it had adopted a minimalist approach and rested its decision on the two narrower holdings of the case, or, perhaps better yet, on First Amendment grounds.

Finally, courts should consider whether the rapidly developing nature of the Internet militates against the use of a rule or a maximalist approach. Because constitutional rules take more to undo, we should be wary of establishing a rule that relates to a technology that is changing. The classic example is electronic surveillance devices, the use of which the Supreme Court first held did not constitute a search under the Fourth Amendment but overruled that holding some forty years later. Instead of deciding one way or the other, the Court could have left the issue undecided until it (and other courts) had more time to mull over how the Fourth Amendment should be applied to the developing technology. One might reasonably conjecture that it would have taken the Court less than forty years to reach the same result, that electronic eavesdropping is a search, had it not decided the first case so early. Chart B summarizes the framework for constitutional doctrine.

Chart B. Framework for Constitutional Doctrine

| Modest presumption in favor of standards and minimalist decisions (the narrow/tentative approach) |
| Factors militating in favor of rules (the broad/definitive approach): |
| 1. Existence of case law favoring rule-like or categorical treatment for cases involving the constitutional provision at stake |
|   a. as opposed to standard-like, fact-specific treatment, or |
|   b. dearth of case law/doctrinal test regarding the constitutional provision. |
| 2. The contemplated constitutional rule addresses a recurring problem that has common elements. |
| 3. The Internet is not changing in a way material to the contemplated rule. |

267 The court held that the New York state statute violated the dormant commerce clause because (1) it regulated conduct wholly outside the state, and (2) it imposed an undue burden on interstate commerce. Pataki, 969 F. Supp. at 173–74, 177.

IV. Application of the Framework

To illustrate how the framework works in practice, I apply it to four cases: Reno v. ACLU,269 United States v. Microsoft Corp.,270 Zeran v. America Online, Inc.,271 and Universal City Studios, Inc. v. Corley.272 I believe the analysis shows that the courts in Reno and Microsoft were right to adopt a fact-specific approach, while the court in Zeran was right to adopt a categorical approach. But I believe that the court in Corley was wrong to adopt a categorical approach when most factors mitigated in favor of caution.

A. Reno v. ACLU

We should begin our discussion with Reno v. ACLU,273 which provides one of the narrow/tentative approach for constitutional doctrine in the cyberspace context. At issue was the constitutionality of two provisions of the CDA,274 which Congress enacted amidst much furor (some of it overblown) about the amount of pornographic material online.275 One provision criminalized the knowing transmission over the Internet of obscene or "indecent" material to any recipient under eighteen years of age, while the other provision criminalized the knowing sending or displaying to a person under eighteen years of age any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."276 The Supreme Court affirmed the lower court's decision277 and declared the two challenged provisions unconstitutional.278

270 253 F.3d 34 (D.C. Cir. 2001) (en banc).
271 129 F.3d 327 (4th Cir. 1997).
272 273 F.3d 429 (2d Cir. 2001).
277 In the lower court, a three-judge panel concluded that the challenged provisions of the CDA were unconstitutional on their face as violative of the First Amendment. ACLU v. Reno, 929 F. Supp. 824, 828 (E.D. Pa. 1996). The decision was supported by three separate opinions, each falling at slightly different places on the rules/standards continuum. Compare id. at 856 (Sloviter, C.J.) (adopting a narrow, fact-specific approach), and id. at 859 (Buckwalter, J.) (same), with id. at 881 (Dalzell, J.) (arguing for a First Amendment rule to prohibit any government regulation of indecent material on the Internet).
278 Reno, 521 U.S. at 885.
The Court's opinion, which was written by Justice Stevens, is a hybrid of rules and standards, but it ultimately strikes a cautious tenor that is consistent with the minimalist approach.\textsuperscript{279} The decision articulates two rules: (1) the challenged provisions of the CDA are unconstitutional, and (2) strict scrutiny applies to regulations of indecent speech on the Internet.\textsuperscript{280} Yet these rules do not fall too far on the rules end of the spectrum, for they do not tell us much about the constitutionality of future indecency statutes. The opinion is fact specific and at least holds out the possibility that a more narrowly tailored statute could survive constitutional scrutiny.\textsuperscript{281} The Court's fact-specific approach makes considerable sense when considered under our framework.

1. Guidance from and Fit with Other Cases

First, the Court's decision fits comfortably within First Amendment doctrine, yet leaves much room to maneuver. Holding that content-based regulations of the Internet are subject to strict scrutiny essentially treats the Internet the same as the vast majority of cases in First Amendment law.\textsuperscript{282} And, although strict scrutiny does carry a rule-like bite, the opinion leaves room for further attempts from the government to regulate indecent online material. The Court chose not to consider whether the First Amendment prohibits Congress from regulating protected speech on the Internet at all\textsuperscript{283} and limited its decision to the CDA and the state of technology for the Internet as found by the district court.\textsuperscript{284} Strikingly absent from the Court's and Justice O'Connor's opinions is any suggestion that regulations of online indecent speech are presumptively unconstitutional. Since the case was the first in which the Court applied the First Amendment to

\textsuperscript{279} See Sunstein, \textit{supra} note 102, at 25.
\textsuperscript{280} \textit{Reno}, 521 U.S. at 868-70, 885.
\textsuperscript{281} \textit{Id.} at 879. The Court noted the possible alternatives to the CDA, such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial websites—differently than others, such as chat rooms.
\textsuperscript{282} \textit{Id.} at 870 (stating that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").
\textsuperscript{283} See \textit{id.} at 863 n.30.
\textsuperscript{284} See \textit{id.} at 876-79.
the Internet, the first factor in our framework cuts against a broad ruling.

2. Not a Recurring Problem with Common Elements

Second, Reno was a poor case for the Court to rule broadly because the case failed to present a recurring problem with common elements. Indeed, part of the problem of the CDA was that it was overbroad and swept in vast amounts of speech that should be permitted. As the Court noted, the CDA's sweeping and undefined proscription against "indecent" material could possibly apply to serious discussion about "prison rape or safe sexual practices, artistic images that contain nude subjects, and arguably the card catalogue of the Carnegie Library." Moreover, the availability of sexually indecent material on the Internet is a problem that varies with age. While the government certainly has a legitimate interest in regulating the amount of indecent material available to children, the strength of that interest diminishes as the child (or adolescent) gets closer to maturity. It was sufficiently clear from the legislative history that Congress failed to do its homework in identifying precisely what the problem was. As the Court concluded, "Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."

Because the CDA was so poorly drafted, it presented a poor case for the Court to rule broadly. The Court did not have chance to consider whether a more narrowly drawn statute might survive constitu-

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285 See id. at 874.
286 Id. at 878; see also id. at 867 ("The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet.").
287 See id. at 878.
288 See id. As the Court concluded:
   It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing a 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term.

Id.
289 Id. at 857–59 (describing how the CDA provisions "were either added in executive committee after hearings were concluded or as amendments offered during floor debate" on legislation (the Telecommunications Act of 1996) that "had nothing to do with the Internet").
290 Id. at 879.
tional scrutiny. By ruling narrowly, the Court’s opinion in essence says that the CDA is a problem but other statutes may not be. A year later, Congress did in fact attempt to remedy the constitutional defects of the CDA by enacting the Child Online Protection Act (COPA), a much more carefully drafted statute. Although the constitutionality of COPA is still in doubt, the Court’s decision in Reno prudently allows (and perhaps invites) further efforts by Congress to regulate indecent online material.

3. Rapid Changes Possible

Finally, the rapidly changing nature of the Internet militated in favor of caution. Indeed, perhaps the most perplexing cyber-challenge in Reno was the rapidly changing nature of age-verification technology. The CDA contained a safe-harbor provision, which shielded from prosecution anyone who restricted online access based on an age-verification system. If an age-verification system were technologically and economically feasible, the government’s contention that the CDA was narrowly tailored would stand on much stronger footing.

Part of the problem for the Court was that the state of age verification technology had changed—and improved—since the time the

291 47 U.S.C. § 231 (Supp. V 1999). COPA contains two major changes from the CDA to address the Court’s concerns. First, COPA only targets commercial websites or websites “engaged in the business” of making communications that fall within the purview of COPA. Id. § 231(e)(2)(A). Second, COPA only targets material that is “harmful to minors,” which the statute carefully defines based on the obscenity definition in Miller v. California, 413 U.S. 15, 23–25 (1973). 47 U.S.C. § 231(e)(6).


293 Lawrence Lessig and Paul Resnick have proposed an interesting alternative to COPA, which they contend is less restrictive and thus “constitutionally preferred.” See Lawrence Lessig & Paul Resnick, Zoning Speech on the Internet: A Legal and Technical Model, 98 Mich. L. Rev. 395, 416–22 (1999). Instead of requiring (as under COPA) that senders of indecent material block transmission of such material except to those who identified themselves as adults, Lessig and Resnick propose regulation that would “require senders to block only self-identifying kids” who could be identified if parents voluntarily choose a “kids-mode-browser” that would identify to the server that the user is a minor. Id. at 416.


295 Even had the government shown that an adult-verification system was feasible, it is not clear that the statute would have been upheld. The Court also took issue with the reliability of an age-verification system and made much of the fact that the government had “failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults.” Reno, 521 U.S. at 882.
lower court had made its factual findings. As Stuart Benjamin points out, several of the key factual findings on which the Court relied were arguably stale (or, at the very least, in the process of change) by the time the Court rendered its decision. As Stuart Benjamin points out, several of the key factual findings on which the Court relied were arguably stale (or, at the very least, in the process of change) by the time the Court rendered its decision.296 First, chatrooms, listservs, and newsgroups had become available on the Web, thereby making age verification—contrary to the Court’s conclusion—technologically possible for these modes of communication.297 Second, there was at least some indication that the market for age-verification technology had changed in a way to make age verification much more available even to noncommercial websites: providers of age-verification services had begun paying websites to provide them with age-verification services.298 This development makes less tenable the Court’s conclusion that age verification was cost-prohibitive on the Net.299

The Court responded to these rapid changes by limiting its decision. In the majority opinion, Justice Stevens took care to describe the

296 Stuart Minor Benjamin, Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process, 78 Tex. L. Rev. 269, 290–96 (1999); see also Lawrence Lessig, What Things Regulate Speech: CDA 2.0 vs. Filtering, 38 Jurimetrics J. 629, 648 n.51 (1998) (discussing how several of the findings of fact in Reno did not accurately describe the state of the technology as it had developed).

297 Benjamin, supra note 296, at 291.

298 Id. at 292.

299 Two years after Reno was decided, the cost of an adult-verification system came up again in considering the constitutionality of COPA, Congress’s second attempt to regulate indecent online material. ACLU v. Reno, 31 F. Supp. 2d 473, 482 (E.D. Pa. 1999), aff’d, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 532 U.S. 1037 (2001). What is interesting to note is that the argument that an adult-verification system was cost prohibitive appears to have been all but abandoned. The plaintiffs’ own expert witness testified “that the out-of-pocket costs associated with complying with COPA did not constitute the real economic burden on content providers, but rather it was the economic harm that would result from loss of traffic to the site that constituted the problem.” Id. at 491. The plaintiffs’ main argument was that an adult-verification system would result in loss of anonymity to customers or more cumbersome registration requirements, which in turn would deter customers from accessing the website. Id. at 479. The government argued, with some force, that the economic costs of complying with COPA’s statutory defense and adopting an adult verification system were not substantial or unreasonable for website operators. Id. at 494. The government offered the testimony of the CEO of Adult Check, a company that provides free adult-verification services to websites. Id. at 489. The costs of Adult Check’s verification service are imposed not on the website, but on the Internet user, who must pay $16.95 per year to obtain an adult verification number. Id. at 490. The district court, although stopping short of making a finding on the issue, noted the possibility that “most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they [the sites] add credit card or adult verification screens.” Id. at 494–95. And, in the end, the court did not mention implementation costs as one of the burdens imposed by COPA. Id. at 492, 494–95.
Internet as it "presently" existed—presumably as it existed at the time of the Court's (or the district court's) decision.\textsuperscript{300} Justice Stevens conceded, however, that the Internet is "constantly evolving and difficult to categorize precisely."\textsuperscript{301} Likewise, Justice O'Connor in her separate opinion recognized that "gateway technology" was making age verification feasible for chat rooms and USENET newsgroups and was becoming more available on the Internet.\textsuperscript{302} Justice O'Connor found that such technology—although "promising" as a possible way to zone the Internet—was not yet available throughout the Internet as it existed then in 1997.\textsuperscript{303}

All told, the factors in our constitutional framework support the Court's narrow, fact-specific approach. Nearly all of the factors in our framework, particularly the evidence of technological change, signaled the need for caution. For being the very first Supreme Court decision involving the Internet, the opinion seems to get the manner question just right. \textit{Reno} forced Congress to deliberate about the issue harder, and, within a short amount of time, Congress was able to enact legislation (COPA) that was much more carefully drafted. Even if COPA does not survive constitutional scrutiny, the minimalist approach taken in \textit{Reno} has fostered greater deliberation and more considered judgment about an important issue of public concern.

\textsuperscript{300} See \textit{Reno}, 521 U.S. at 850–51 (describing the Internet as "presently constituted"); \textit{id.} at 856 n.22 ("For that reason, \textit{at the time of trial}, credit card verification was 'effectively unavailable to a substantial number of Internet content providers.'" (emphasis added)); \textit{id.} at 876–77 ("The District Court found that \textit{at the time of trial existing technology} did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." (emphasis added)).

\textsuperscript{301} \textit{Id.} at 851. Justice Stevens drew upon the district court's findings of fact. See ACLU v. Reno, 929 F. Supp. 824, 828 (E.D. Pa. 1996) ("Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network. These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely."). This finding was reiterated in the subsequent case involving the challenge to COPA. See ACLU v. Reno, 31 F. Supp. 2d at 482 ("These many methods of communication and information retrieval [on the Internet] are constantly evolving and are therefore difficult to categorize concisely.").

\textsuperscript{302} See \textit{Reno}, 521 U.S. at 891 (O'Connor, J., dissenting in part and concurring in part).

\textsuperscript{303} See \textit{id.} ("Until gateway technology is available throughout cyberspace, and \textit{it is not in 1997}, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an 'adult zone.'" (emphasis added)).
B. United States v. Microsoft Corp.

The D.C. Circuit's decision in United States v. Microsoft Corp. provides perhaps the best example of the narrow approach in the statutory context. Although the opinion is partially maximalist in its theorizing about the complexities of the issues it faced, the key holdings of the case are minimalist. They focus much more on reviewing factual findings and evidence than on articulating broad rules to govern future cases. For example, the court of appeals's (partial) affirmance of the finding of § 2 liability under the Sherman Act for Microsoft's unlawful maintenance of a monopoly is based on a deferential review of the lower court's findings of fact. In addition, the reversal of the district court's finding of attempted monopolization is based on a very fact-specific review. And the D.C. Circuit's reversal of the lower court's remedy is based in part on the lower court's failure to hold an evidentiary hearing. Given the rapidly changing nature of the computer software market, the court of appeals found it highly problematic that the trial court would order a divestiture of Microsoft without obtaining more current evidence.

The D.C. Circuit’s most explicit use of the narrow/tentative approach can be found in its reversal of Judge Jackson’s determination of unlawful tying under § 1 of the Sherman Act based on Microsoft’s bundling of its Internet browser, Internet Explorer, with its popular operating system software, Windows. The court of appeals held that the fact-specific rule of reason—and not the per se analysis under the “separate products” test applied by the lower court—should apply to determine the legality of tying arrangements involving platform software. The court emphasized at the end of its opinion just how narrow it was, cautioning that “[w]hile our reasoning may at times appear to have broader force, we do not have confidence to speak to facts outside the record, which contains scant discussion of software

304 See 253 F.3d 34 (D.C. Cir. 2001) (en banc).
305 See id. at 48–51.
306 See id. at 50–80.
307 See id. at 80 (“The determination whether a dangerous probability of success exists is a particularly fact-intensive inquiry.”).
308 See id. at 101.
309 See id. at 49.
310 See id. at 84.
312 Microsoft, 253 F.3d. at 84.
integration generally." I would like to focus here because it is the most interesting part of the opinion for our purposes. When analyzed under our framework, the D.C. Circuit's ruling on tying makes considerable sense.

1. Old Law

As mentioned before, the statute at issue in the Microsoft case is an old law (the Sherman Act of 1890\(^{314}\)) that developed in the days of the oil barons and railroads. At the outset of its opinion, the D.C. Circuit noted the contentious debate "over the extent to which 'old economy' monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects."\(^ {315}\) Under our framework, the fact that the Sherman Act was written over a hundred years before the advent of the Internet cuts against a broad ruling applied to the Internet context.

2. Lack of Information To Identify a Recurring Problem with Common Elements

The factor that militates most strongly against the broad/definitive approach is the lack of information the court possessed to identify a recurring problem with common elements. The D.C. Circuit was acutely aware of the Supreme Court's admonition that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations."\(^ {316}\) The court of appeals had little trouble in concluding that the Microsoft case presented "entire, novel categories of dealings" and that it was the "first up-close look at the technological integration of added functionality into software that serves as a platform for third-party applications."\(^ {317}\) After canvassing the prior antitrust cases that might speak to the issue, the D.C. Circuit concluded that (1) "the sort of tying arrangement attacked here is unlike any the Supreme Court has considered,"\(^ {318}\) and (2) only four lower court cases involved antitrust claims of alleged tying arrangements involving software, but none of those cases dealt with the issue in any depth.\(^ {319}\) Given the "paucity of cases examining software bun-

\(^{313}\) Id. at 95.
\(^{315}\) Microsoft, 253 F.3d at 49.
\(^{316}\) Id. at 84 (quoting United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972)) (emphasis omitted).
\(^{317}\) Id.
\(^{318}\) Id. at 90.
\(^{319}\) Id. at 91–92.
dling," the D.C. Circuit concluded that there is "a high risk that per se analysis may produce inaccurate results," even to the extent of "stunt[ing] valuable innovation." 320

The D.C. Circuit's opinion provides a model for how courts should analyze this second factor. The court's awareness of its own limitations deserves special recognition, particularly in the following passage:

We cannot comfortably say that bundling in platform software markets has so little "redeeming virtue," and that there would be so "very little loss to society" from its ban, that "an inquiry into its costs in the individual case [can be] considered [ ] unnecessary." We do not have enough empirical evidence regarding the effect of Microsoft's practice on the amount of consumer surplus created or consumer choice foreclosed by the integration of added functionality into platform software to exercise sensible judgment regarding that entire class of behavior. (For some issues we have no data.) "We need to know more than we do about the actual impact of these arrangement on competition to decide whether they . . . should be classified as per se violations of the Sherman Act." 321

The court's analysis correctly focuses on whether it had sufficient information to identify a recurring problem to fashion a per se rule for software bundling. Because the court concluded that it did not, it was correct in rejecting a per se rule and adopting a more narrow, fact-specific ruling. The risk of error was too high. 322

3. General Prohibition with Some Need for Balancing

The third factor also militates against the broad/definitive approach. Although a per se rule against tying might be considered a general prohibition, that rule applies only to situations where courts have had considerable experience in identifying tying arrangements that have so little redeeming value. In a wide range of cases, the fact-specific rule of reason applies because of the need for balancing the

320 Id. at 92.
321 Id. at 94 (internal citations omitted).
322 The D.C. Circuit was also right to suggest that the risk of error in adopting a per se rule could harm innovation by precluding beneficial or productive integration of software. Id. at 92–93.
potential benefits of the tying arrangements. As the D.C. Circuit aptly stated, "Not all ties are bad."

4. Interdoctrinal Tension

The fourth factor also cuts against a broad ruling. The court's decision on tying fits more comfortably within the body of antitrust case law, in which most tying arrangements are analyzed under the rule of reason. As the D.C. Circuit repeatedly mentioned, the per se "separate products" test is reserved for those cases in which courts have gained "considerable experience" in analyzing the alleged tying arrangement. It would be surprising if a court could gain such experience in the very first case in which it considered the issue.

5. Material Changes to the Internet and Technologically Dynamic Markets

Finally, the D.C. Circuit was right to proceed cautiously in light of the rapid changes to the Internet browser and platform software markets. Throughout its analysis, the court was sensitive to the fact that it was dealing with a technologically dynamic area, "where programs change very rapidly," and "where product development is especially unlikely to follow an easily foreseen linear pattern." Indeed, at the outset of its opinion, the D.C. Circuit conceded the difficulty of dealing with rapidly changing technology. This factor alone may well have justified the court's narrow ruling.

C. Zeran v. AOL

The Fourth Circuit's decision in Zeran v. America Online, Inc. provides a good contrast to the narrow/tentative approach in Reno and Microsoft. The decision embraces the broad/definitive approach and establishes a categorical rule protecting Internet Service Providers from tort liability.

323 Id. at 94 ("That rule more freely permits consideration of the benefits of bundling in software markets, particularly those for OSs [operating systems], and a balancing of these benefits against the costs to consumers whose ability to make direct price/quality tradeoffs in the tied market may have been impaired.").
324 Id. at 87.
325 See id. at 93–94.
326 Id. at 93.
327 Id. at 94.
328 See id. at 49.
329 129 F.3d 327 (4th Cir. 1997).
In the case, Ken Zeran sued America Online (AOL), his ISP, for failing to take steps to retract several allegedly defamatory messages that someone posted on AOL's interactive service about him. The message falsely purported to be from "Ken" (with Zeran's phone number) and offered for sale T-shirts with offensive slogans about the bombing of the Oklahoma federal building shortly after the incident. Zeran received numerous phone calls and even death threats from people offended by the messages.

In response to Zeran's lawsuit, AOL asserted a defense of immunity based on 47 U.S.C. § 230. Section 230 states, "No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." In a somewhat roundabout way, this provision gives ISPs immunity from liability for defamatory comments made by third-party users of their Internet service. However, the scope of the immunity conferred by § 230 is not altogether clear. One ambiguity is whether ISPs can be treated as "distributors" of information and, thus, be held liable for defamation if they knew or had reason to know of the allegedly defamatory content.

That issue was decided by the Fourth Circuit in Zeran. Chief Judge Wilkinson wrote an opinion that is emblematic of judicial maximalism and a strong rules position. First, the court held that the "plain language" of § 230 resolved the issue—even though § 230 nowhere mentions "distributors" or states that it is impermissible to treat ISPs as "distributors." Perhaps recognizing this ambiguity, the court attempted to bolster its interpretation by relying on general principles of tort law. According to the court, distributor liability is a subset of publisher liability because "every repetition of a defamatory
statement is considered a publication," including repetitions made by a distributor.339

Chief Judge Wilkinson did not stop there. In another maximalist move, the court enunciated two broad purposes of § 230 to justify its interpretation. Put simply, Zeran’s lawsuit was anathema to the purposes of § 230—which the court divined from the legislative findings in the statute—to avoid excessive government regulation of the Internet and to promote self-regulation by industry and private individuals.340

The Fourth Circuit’s holding has all the hallmarks of a maximalist rule. The holding is categorical and is grounded in a grand theory of Internet regulation. When faced with the choice between adopting a clear rule of immunity and a rule subject to a more complex, fact-specific exception, the court opted for the clear, categorical rule. Under § 230, ISPs are immune from all tort liability based on defamatory content on the Internet originating from a third party.341 There is no exception.342

The Fourth Circuit’s categorical decision is supported by consideration of our framework (for non-constitutional doctrine).

339 Zeran, 129 F.3d at 332 (citing PROSSER AND KEETON, supra note 36, § 113, at 810).
340 See id. at 331–33.
341 Because the perpetrator of the online prank was not identified, Zeran was left with no legal remedy for the injuries he suffered. He lost his case against an Oklahoma radio station that broadcast contents of the false message that resulted in numerous death threats against him. See Carl S. Kaplan, Another Legal Defeat for Victim of Online Hoax, N.Y. Times on the Web, Feb. 4, 2000, at http://www.nytimes.com/library/tech/00/02/cyber/cyberlaw/04law.html.
342 Subsequent cases have only strengthened the broad sweep of immunity recognized by Zeran. See Blumenthal v. Drudge, 992 F. Supp. 44, 53 (D.D.C. 1998) (holding that, under § 230, AOL was immune from suit brought by Sydney Blumenthal for allegedly defamatory material published in Drudge Report, for which AOL had contracted and paid Matt Drudge to provide online); Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 776–80 (Ct. App. 2001) (holding that the city was immune under § 230 from suit by parent who alleged that her son downloaded sexually explicit photographs from the Internet using the public library’s computers); Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637, at *4–*5 (Cal. App. Dep’t Super. Ct. Nov. 1, 2000) (holding that under § 230 eBay was immune from state claim based on sale of “bootleg copies” of sound recordings on its auction); Doe v. Am. Online, Inc., 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998) (holding that under § 230 AOL was immune from suit brought by mother of minor whose address was obtained on the Internet by pedophile, who made a videotape of himself with the minor).
1. Internet-Specific Legislation

First, the case involved Internet-specific legislation. Congress enacted § 230 in response to several court decisions that appeared to create inconsistent standards for determining defamation liability against ISPs. Zeran is not a case in which the court was facing the old law/new technology problem. The statutory provision is directed to specific conduct that applies solely to the Internet. Thus, to the extent that the court was creating new doctrine, it would be fairly cabined to the Internet context and ISPs.

2. Recurring Problem with Common Elements

Second, the case involved a recurring problem with common elements: whether ISPs can be held liable for defamation based on content posted by third-party users of their services. The prospect of liability raised several practical problems for ISPs. Part of the problem is that it is exceedingly difficult for ISPs to monitor all of the stray comments that the many users of their services might post on the Internet. If ISPs could be held liable based on how much knowledge they had of the offending material, then they might have a disincentive to monitor or screen for offensive materials on their own. The Zeran court had the benefit of two conflicting lines of cases that had dealt with the problem of ISP liability already as well as Congress’s response to those cases. And, given the increasing number of Internet users, one could reasonably anticipate that the number of defamation lawsuits against ISPs would only grow if they did not have federal immunity.

Interpreting § 230 to allow distributor liability, as Zeran had sought, probably would have only compounded this monitoring prob-

343 Compare Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 142 (S.D.N.Y. 1991) (holding that, in a suit for defamation based on content posted on the Internet by a third party, the ISP should be treated as a “distributor” and thus be subject to liability only if it knew or had reason to know of the defamatory content), with Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (holding that an ISP which exercised sufficient “editorial control” over information posted through its services should be treated as a “publisher” of information and thus be liable for defamation without proof of knowledge of the defamatory content).

344 If limited to defamation liability, the problem is fairly well-defined. ISP liability in other areas of law has to be examined in context. See, e.g., 17 U.S.C. § 512(c) (Supp. V 1999) (providing a safe-harbor provision for ISPs under copyright law); Alfred C. Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L.J. 1833 (2000) (examining ISP liability and the DMCA’s safe harbor).
lem. In essence, an exception to § 230 would have swallowed the rule of immunity and would have given ISPs every incentive to remove any material that anyone claimed was defamatory. The Fourth Circuit was correct in concluding that ISPs "would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not"—a result that would likely chill the freedom of speech on the Net.

3. General Prohibition

Third, § 230 is a general prohibition written in fairly broad terms. The Fourth Circuit was not dealing with intellectual property or a regime of entitlements for which a balancing of interests is typically necessary. Section 230 applies across the board to anyone who sues an ISP for tort liability based on the content posted by a third party. On its face, the section does not contain exceptions or qualifications to its basic prohibition. Although Congress could have written the provision in a more straightforward manner, the Zeran court's interpretation gives it that quality.

4. No Interdoctrinal Tension or Extraterritorial Spillover

Moreover, the legal issue presented in Zeran was fairly discrete. This was not a case in which the court's interpretation of a statute would be difficult to fit within the existing body of law. To the extent that § 230's immunity takes away a cause of action under state tort law, it does so only in a limited instance (and one in which it was not at all clear that such a cause of action existed in the Internet context). I think it is safe to assume that defamation doctrine will suffer no major damage from the Zeran court's ruling. Nor is there any sign that the decision will result in excessive extraterritorial spillover.

5. No Material Changes to the Technology

Finally, there was no evidence that future technology would alter the nature of the problem. Zeran did not contend, for example, that the burdens imposed on ISPs by distributor liability might diminish in the future with new technology. If anything, the problem of ISP liability would persist (and perhaps worsen) in the future as the number of Internet users continued to grow. The basic problem is that people can say a lot of different things, some of them nasty and malicious. The Net may in fact embolden people (who are so inclined) to say

345 Zeran, 129 F.3d at 333.
malicious things about others, given the level of anonymity and indirectness of contact that cyberspace can offer.\textsuperscript{347}

Putting the factors together presents a fairly strong case in favor of the Fourth Circuit's categorical approach. This is one case in which the factors align largely in favor of the broad/definitive approach. Although the plain language of § 230 may not be as plain as the court suggested, the court's interpretation is a reasonable one. The court ruled broadly, but sensibly, given all the information it had.

I should acknowledge, however, that contrary views of \textit{Zeran} do exist. Susan Freiwald provides the most thorough and trenchant critique of \textit{Zeran}.\textsuperscript{348} Adopting an approach based on comparative institutional analysis,\textsuperscript{349} Freiwald criticizes both Congress's enactment of § 230 and the Fourth Circuit's broad interpretation of the provision in \textit{Zeran}. Based on the overall assumption that the social policy goal should be cost-effective defamation reduction, Freiwald concludes that (1) courts are better suited to achieving that goal, (2) the statute enacted by Congress was therefore less desirable from the standpoint of comparative institutional analysis and was also "one-sided" (in failing to recognize the needs of victims of online defamation), and (3) to achieve the social policy goal of cost-effective defamation reduction, the \textit{Zeran} court should have taken a more activist approach to statutory interpretation by recognizing that § 230 does not immunize ISPs from distributor liability.\textsuperscript{350}

While Freiwald presents a worthy goal of more critically analyzing and comparing different institutions and the roles they play in crafting the law, I disagree with her particular model and her critique of

\begin{footnotes}
\item[347] See Lessig, \textit{supra} note 146, at 1750 ("The ability to appear invisibly on a network and slander, or harass or assault, certainly will increase the incidence of those on the network who slander, or harass or assault.").

\begin{quote}
[T]he comparative institutional analyst first chooses the social policy goal to be promoted. Then, the analyst determines which groups would be most affected by a legal change and considers how the costs of participation inherent in each institution compare with the expected benefits of using the institution. Under the participation-centered approach, actors' collective willingness to participate in a given institution determines that institution's competence.
\end{quote}

Freiwald, \textit{supra} note 348, at 577.
\item[350] Freiwald, \textit{supra} note 348, at 572-73.
\end{footnotes}
Zeran. None of my response to Freiwald's article should be read, however, as a rejection of the enterprise of comparing institutions. That enterprise is laudable, and I will be the first to concede that my framework does not go far enough in describing the interrelationships among the courts, Congress, the Executive, and administrative agencies in establishing law for the Internet. Freiwald's contribution is significant in calling to attention this need.

My major objection to Freiwald's comparative institutional approach is that it is based on an assumption about the "social policy goal at the outset." By assuming the social policy goal at the outset, Freiwald's approach seems to slant the analysis. If one assumes a social policy goal that is different from the one actually adopted in a law or statute, one will more than likely be critical of the particular enactment by Congress and its interpretation by the courts. Freiwald's analysis of § 230's immunity provides a telling example. Freiwald assumes that the social policy goal is—or should be—"cost-effective defamation reduction." But that clearly was not the goal of Congress in enacting § 230, at least not its overriding goal. The statute itself lists five findings and five policies, none of which speaks to cost-effective defamation reduction. Instead, most of the concerns relate to promoting the development of the Internet, minimizing the amount of governmental regulation of the Internet, and removing disincentives for ISPs to develop and use filtering technologies. If those are in fact the goals, then one may view § 230 in a dramatically different and more positive light.

351 Id. at 575.
352 Id. at 597.
354 Even if the goal is cost-effective defamation reduction, I believe the analysis should take into account also the availability of defamation liability against the author of the alleged defamatory message—something that Freiwald does not focus on. See Freiwald, supra note 348, at 585. A systemic problem may exist if there were a significant number of individuals like Zeran who did not know the identity of the tortfeasor and were left essentially without remedy. But if the number of such cases is small, then one might question whether any problem with cost-effective reduction of defamation exists. One should also take into account alternative remedies. If there is a significant problem with anonymous defamers escaping detection on the Internet, one could target the problem that allows such anonymous defamation to escape detection, such as by requiring verified identification as a condition for use of an ISP's service, creating uniform disclosure rules to allow access to the identity of an Internet user responsible for alleged defamation, and perhaps even the availability of punitive damages or other stiff sanctions for online defamation that is proven to have occurred with an attempt by the publisher of the defamatory content to remain anonymous and escape detection. Arguably, any of these measures might help to achieve cost-effective defamation reduction for Internet communications, and each could be
Moreover, Freiwald gives little explanation for the process by which one settles on the assumed social policy goal. Though she acknowledges that the choice of a social policy goal "may not be straightforward ... because many public policy questions involve pursuit of several social policy goals, and selection of a single social policy goal may be deeply contested," Freiwald nevertheless espouses a simplified analysis "by assuming the goal rather than providing a detailed proof."

And once the assumed social policy goal is settled upon, the analysis is just as problematic. After determining the assumed social policy goal, the analyst is apparently supposed to determine which institution would better facilitate the participation of all affected or interested parties in the attainment of that social policy goal. But this, in the end, is based on pure intuitions, as Freiwald concedes, rather than any concrete evidence or data.

Freiwald's approach neither asks nor answers whether one institution is better equipped to make the initial selection of a social policy goal. This is somewhat surprising because the aim of her article is to have decisionmakers concentrate more on institutional comparisons. If that is the aim, then it seems appropriate to analyze whether one institution or another is better able to handle the selection of what social policy goal to embrace. For if one institution is, on average, better at deciding social policy goals, then it may be more suitable for other institutions to refrain from second-guessing those decisions or substituting their own decisions, particularly if they are inherently political or contestable. My framework is premised on the view that Congress is more appropriate for policymaking than the courts, in terms of both institutional competence and furthering political debate.

I adopted along with § 230’s immunity for ISPs—if anonymous defamers in fact present a huge problem for the Internet.

355 Id. at 596.
356 Id. at 597.
357 Id. at 612.
358 Even Freiwald acknowledges the difficulty of settling upon a social policy goal. Id. at 581 (“Not surprisingly, people cannot agree about what a new law should say when they cannot agree about what the law should achieve for society.”). Given the potential for divisiveness and the lack of discernible standards for resolving such issues, it strikes me as far preferable to have political bodies decide such issues. My approach may perhaps lead to the kind of “single institutionalism” that Freiwald criticizes. See id. at 609. But perhaps not. Even if the courts leave to Congress the primary responsibility of selecting social policy goals, that does not mean that the courts have no role to play in shaping the contours of the law. The courts played a significant part in the development of the law of liability for ISPs before and after the enactment of § 230.
disagree with Freiwald's suggestion that all institutions should be rapidly responding to rapid changes in cyberspace. We should not encourage judicial activism in cyberspace cases if the courts lack sufficient expertise and information to address the rapidly changing circumstances. In such cases, I believe that courts should favor narrow responses. My view of Zeran, however, is that the Fourth Circuit had enough information of the nature of the problem to adopt a rule-like interpretation of § 230, particularly given that Congress had crafted Internet-specific legislation for a recurring problem.

D. Universal City Studios, Inc. v. Corley

We should round out our discussion by analyzing a case that got the manner question wrong, Universal City Studios, Inc. v. Corley. Both the district court's decision and the Second Circuit's affirmance give a broad reading to the DMCA that lies in considerable tension with existing copyright law. Although the Second Circuit's opinion is narrower than the district court's, neither opinion adequately considers the scope of its ruling, on either statutory or constitutional grounds.

Corley involves one of the first applications of the anti-circumvention provision of the DMCA. The provision gives copyright holders legal protection—backed by rather stiff civil and criminal penalties—for technological measures designed to keep others from accessing or copying their copyrighted works. In Corley, the motion picture industry claimed that the defendants Eric Corley and his magazine violated the DMCA by making available on the Internet a software program called "DeCSS" that could decrypt—and thus circumvent—the encryption system (the Content Scramble System) on DVDs that prevents DVDs from being copied. Corley, whose pen name is Emmanuel Goldstein, is a journalist and the publisher of the magazine, 2600: The Hacker Quarterly. Corley did not develop

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359 Id. at 628.
360 273 F.3d 429 (2d Cir. 2001).
362 Id. §§ 1203, 1204(a).
363 Reimerdes, 111 F. Supp. 2d at 306–08. On appeal, the case name changed from Universal City Studios, Inc. v. Reimerdes to Universal City Studios, Inc. v. Corley after Reimerdes and another defendant settled, leaving Eric Corley and his magazine 2600: The Hacker Quarterly as the remaining defendants.
364 Id. at 308. Perhaps appropriately, Corley picked the pen name from the character who was the leader of the underground in George Orwell's 1984. Id.
365 Id.
DeCSS himself, but instead posted it on his website and provided links to other websites with DeCSS (as well as criticisms of the anti-circumvention provision and the movie industry’s lawsuit)—all of which Corley claimed was protected by the First Amendment and the doctrine of fair use.

After a six-day trial, the district court ruled in favor of the motion picture studios and granted a permanent injunction to enjoin the defendants from posting or linking to DeCSS on the Internet. In its ruling, the district court adopted a categorical or maximalist approach on nearly all of the statutory and constitutional issues raised. The court’s opinion (some fifty pages in length) is striking in just how much it decides. By interpreting the anti-circumvention provision in a strong rule-like manner, the court opened a virtual Pandora’s box of constitutional issues. Indeed, the district court probably took the course that required resolving the most constitutional issues possible in the case. When analyzed under our framework, however, the district court’s decision appears far too broad and definitive. Even the Second Circuit’s affirmance does not go as far as the district court’s opinion. Although the Second Circuit affirmed the district court’s decision, the court of appeals expressed at least some concern about the scope of the district court’s ruling and the desirability of “narrow” decisions in dealing with cyberspace. Ultimately, however, neither court narrowed its ruling adequately in light of the factors in our framework. I will first analyze the district court’s ruling, followed by the Second Circuit’s decision.

1. Constitutional Doctrine

The district court’s broad reading of the anti-circumvention provision raised numerous constitutional issues under the First Amendment and the Copyright Clause. First, the court held that the fair

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366 In September 1999, a Norwegian teenager, Jon Johansen, reverse-engineered CSS and wrote a software program to decrypt CSS, a program he called “DeCSS.” Id. at 311. Johansen posted DeCSS on his website and told members on an Internet mailing list about his program. Id. Johansen claimed that he developed DeCSS so that he could play DVDs on his Linux operating system. Id. Once CSS was decrypted, a person with at least some computer savvy could make digital copies of DVD movies. Id. Soon, DeCSS began to be posted on numerous websites across the Internet, including the defendants’, while other websites provided links to websites where DeCSS could be found. Id. at 311–12. Johansen was called as a witness at trial by the defense, but was not a defendant himself. Id. at 311.

367 Id. at 321, 325.

368 Id. at 346.

use doctrine and the doctrine of contributory infringement established by *Sony Corp. v. Universal City Studios, Inc.*\(^{370}\) did not apply to the anti-circumvention provision and that the abrogation of these doctrines by the DMCA was constitutional.\(^{371}\) Even further, the court held that application of the anti-circumvention provision to the posting of computer code was a valid, content-neutral regulation that was consistent with the First Amendment.\(^{372}\) In so ruling, the court was forced to deal with a number of other novel First Amendment issues, including the level of scrutiny for applications of the DMCA to computer code,\(^{373}\) the recognition of a category of "functional" speech,\(^{374}\) and the requirement of proof for obtaining an injunction against linking to websites on the Internet.\(^{375}\)

a. Too Many Constitutional Issues Decided; Lack of Case Law

The first factor cuts sharply against the court's maximalist decision. The court decided a number of constitutional issues. But most, if not all, of these issues could—and probably should—have been avoided. A well-accepted canon of construction is for courts to avoid interpreting statutes in a way that raises constitutional difficulties.\(^{376}\) Here, that canon seems eminently sensible. The court could have decided the case on statutory grounds, such as by ruling that defendants' conduct was protected by the fair use doctrine or that defendants' conduct did not violate the anti-circumvention provision absent a showing that defendants intended DeCSS to be used for copyright infringement.\(^{377}\) Alternatively, the court could have held that the defendants did not prove that they engaged in fair use, while assuming without deciding that the fair use doctrine applies to circumventing devices.\(^{378}\)


\(^{372}\) See id. at 325–41.

\(^{373}\) See id. at 327–29.

\(^{374}\) See id. at 329.

\(^{375}\) See id. at 341.


\(^{377}\) This interpretation is by no means foreclosed by the language of the statute. See 17 U.S.C. § 1201(c)(1), (2) (Supp. V 1999).

\(^{378}\) This factual finding is very close to what the district court found. See *Reimerdes*, 111 F. Supp. 2d at 338 & n.246 ("[T]he evidence as to the impact of the anti-trafficking provision of the DMCA on prospective fair users is scanty and fails adequately to address the issues.").
The dearth of case law that speaks to these issues militates strongly against the court's maximalist decision. Courts have barely considered (and, in some instances, not at all) the limitations imposed on Congress by the Copyright Clause, the proper First Amendment analysis of computer code, the intersection of the First Amendment and the Copyright Clause, and the constitutional underpinnings of the fair use and Sony doctrines. Courts have been able to skirt many of these issues based on the assumption that judicial doctrines, such as fair use and the idea/expression dichotomy, keep copyright law from abridging the freedom of speech. This assumption underlies the Supreme Court's decision in Harper & Row, Publishers, Inc. v. Nation Enterprises, which rejected an expansion of the fair use doctrine (or a First Amendment exception) to permit unauthorized publication of a copyrighted work on matters of public concern.379 A similar assumption underlies the Court's analysis of the limitations imposed on Congress by the Copyright Clause. The Court has developed judicial doctrines, such as the Sony doctrine, to ensure that copyright law stays clear of constitutional difficulties—such as may arise if Congress removed from the public domain devices that are capable of substantial noninfringing uses.380

The district court's decision runs roughshod over these carefully calibrated balances in our copyright system and raises a host of troubling constitutional questions. First, defendants and amici presented substantial arguments that the DMCA is unconstitutional to the extent it denies any fair use.381 As the court itself acknowledged, fair use acts "as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First

379 471 U.S. 539, 560 (1985). As the Court explained:

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.

Id.


381 See Defendants' Post-Trial Memorandum of Law at 6–10, Reimerdes, 111 F. Supp. 2d at 294 (No. 00 Civ. 0277 (LAK)); Brief of Professor Charles R. Nesson as Amicus Curiae in Support of Defendants Eric Corley, a/k/a "Emmanuel Goldstein," and 2600 Enterprises at 2–5, Reimerdes (No. 00 Civ. 0277 (LAK)); Brief Submitted by Professor Yochai Benkler in Support of Defendants' Cross-Motion To Vacate the Preliminary Injunction at 2, 7–9, Reimerdes (No. 00 Civ. 0277 (LAK)).
Amendment." But to reject fair use as a defense to the anti-circumvention provision jeopardizes that safety valve and threatens to give copyright holders complete dominion over their works (including fair uses and uses after first sale)—a result that seems anathema to the goals of both the Copyright Clause and the First Amendment.

Also troubling is the court's rejection of the defendants' argument that, under the Sony doctrine, the use of DeCSS should be permitted because it has a substantial, noninfringing use, namely, to enable DVDs to be viewed on a Linux operating system. To reach that result, the court not only distinguished Sony but also declared

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382 Reimerdes, 111 F. Supp. 2d at 322; see also Paul Goldstein, Copyright's Highway 21 (1994) (arguing that fair use "and other safety valves have buffered copyright from charges that it violates the First Amendment's guarantees of free speech and press"). In its ruling at the preliminary injunction stage, the court acknowledged there may be a "tension between free speech and protection of copyright," but concluded that this tension has been accommodated in the past "by traditional fair use doctrine." Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000). What the court appeared to ignore is that all of this changes if the anti-circumvention provision is interpreted, as the court did, to contain no exemption for fair use. In effect, the safety valve has been shut off by the court's interpretation.

383 In seminal articles published in 1970, Paul Goldstein and Melville Nimmer identified the need to balance copyright law with First Amendment concerns. See Paul Goldstein, Copyright and the First Amendment, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970). While both authors recognized that copyright law can serve important First Amendment goals by increasing the amount of expression, they also contended that the First Amendment may place further restrictions on copyright law. See Goldstein, supra, at 990–91, 1001; Nimmer, supra, at 1189–93, 1193–200. Made over thirty years ago, the basic argument of Goldstein and Nimmer—that the First Amendment may impose limitations on copyright law—continues to have considerable force. See, e.g., Benkler, Public Domain, supra note 189; Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147 (1998); Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 STAN. L. REV. 1 (2001); Alfred C. Yen, A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel", 38 EMORY L.J. 393 (1989).

By rejecting fair use as a doctrine for the DMCA, the district court's opinion raises significant First Amendment concerns. While the decision in Harper & Row does not embrace either Nimmer's or Goldstein's suggestion for recognition of a First Amendment constraint on copyright regarding matters of "public interest," see Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558–59 (1985), the Court's decision is based on the assumption that copyright law has built-in First Amendment protections in the idea/expression and fair use doctrines. Id. at 560. Harper & Row thus presumes a First Amendment element to the fair use doctrine—something which the district court unnecessarily diminishes.

that the Supreme Court's decision in *Sony* is overruled to the extent that it conflicts with the DMCA. Although Congress can "overrule" Supreme Court precedent to the extent that it is not constitutionally based, the district court seemed to ignore the possibility that the *Sony* doctrine has constitutional moorings. And, in any event, an "overruling" of Supreme Court precedent by Congress is strong medicine, which should not be imputed to Congress lightly.

Unfortunately, what appears to animate much of the district court's opinion is the view that "the First Amendment interests served by the dissemination of DeCSS on the merits are minimal." However, I am not sure that we want courts evaluating the First Amendment value of computer code or content on the Net. Such a determination seems too susceptible to personal taste rather than to principled doctrine.

385 *Id.*
387 The *Sony* opinion begins with a long exposition of the constitutional requirement imposed by the Copyright Clause to consider the public interest when granting monopoly privileges in copyright and patents. *Sony*, 464 U.S. at 428–29. That same concern animates the Court's recognition that an article of commerce that has substantial noninfringing uses may not be deemed to fall within the monopoly granted to a copyright holder. *Id.* at 440–41 ("When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated.").
388 Reimerdes, 111 F. Supp. 2d at 335.
389 The Supreme Court has long recognized the danger of permitting courts to evaluate the constitutional or social worth of expression. As Justice Holmes famously admonished in an early copyright case:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.


> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.
Perhaps the most troubling use of maximalism in the district court's opinion is the repeated use of negative imagery and analogies to reject the defendants' arguments. The court invoked the following imagery: (1) “the assassination of a political figure,”390 (2) “a suicide pact,”391 (3) “the publication of a bank vault combination in a national newspaper,”392 (4) a propagated outbreak epidemic of a contagious disease,393 and (5) piracy.394 Judge Kaplan made no bones about wanting to send a message to others beyond the defendants, stating in his opinion:

Indeed, the likelihood is that this decision will serve notice on others that “the strong right arm of equity” may be brought to bear against them absent a change in their conduct and thus contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.395

b. Diverse Problem

Also, the district court did not have sufficient information (or evidence) to identify a recurring problem that had common elements. Indeed, the district court acknowledged as much, conceding that it did not “have a complete view of whether the interests of the absent third parties upon whom defendants rely really are substantial and, in consequence, whether the DMCA as applied here would materially affect their ability to make fair use of plaintiffs' copyrighted works.”396 Yet, despite the absence of such information, the court fashioned a broad rule that may have a substantial impact on fair uses of copyrighted works.

c. Rapid Change Possible

The possibility of technological change also militates in favor of caution. We do not know how future technologies—either to protect access to copyrighted works or to circumvent those measures—will affect the copyright system and the availability of copyrighted works. The day of the copyright management system is near but not yet here.

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390 Reimerdes, 111 F. Supp. 2d at 304.
391 Id. at 305.
392 Id. at 315.
393 Id. at 331-33.
394 Id. at 335.
395 Id. at 344-45.
396 Id. at 337.
As the court was forced to acknowledge, future access-restricting technology could alter the balance of the copyright system. It would be good to know just how far that balance might be altered before giving our constitutional blessing to the anti-circumvention provision.

2. Statutory Doctrine

The court's decision is just as troubling when considered as a matter of statutory doctrine. The district court gave a broad, rule-like sweep to the anti-circumvention provision, ruling that the defendants' posting of DeCSS and linking to other websites with DeCSS violated the anti-circumvention provision, that none of the statutory exemptions applied to their conduct, and that the fair use and Sony doctrines were abrogated (or not recognized) by the DMCA. When analyzed under our framework, the court's interpretation is far too broad and categorical.

a. Internet-Specific Legislation

Perhaps the only thing that can be said in favor of rules is that the DVD case involves Internet-specific legislation. Congress enacted the DMCA specifically with the Internet in mind.

This factor probably should not weigh strongly in favor of the broad/definitive approach, however. As in Reno, the amount of study Congress devoted to the problems to be addressed by the legislation was cursory at best. Congress did not commission any studies or have

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397 See id. at 322 n.159, 330 n.206. See generally Goldstein, supra note 382, at 28–32, 197–236 (analyzing the benefits and tradeoffs in extending copyright protection to facilitate a "cestial jukebox" that can give people immediate access to a plethora of works, including movies, songs, computer programs, and information for a fee).


399 Id. at 319–24.
prior judicial decisions that indicated that circumvention was a pervasive problem. Although hearings were held, they were short on concrete examples of circumvention or circumventing technologies. The paradigmatic example discussed was the “black box,” the descrambling device that is used to obtain cable television without authorization and that is already prohibited by federal law. But the anti-circumvention targets much more than black boxes; it targets all technologies, now and in the future.

The statute itself provides indications that Congress acted without adequate study. The provision delays the effective date of the basic circumvention provision for two years to allow the Librarian of Congress to conduct rulemaking to examine, among other things, “the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research.” This provision was added to allay the concerns of librarians and educators who feared that the anti-circumvention provision would foreclose fair uses of copyrighted works. Even though Congress was aware that the provision could negatively affect the availability of copyrighted works for legitimate uses, it enacted the provision anyway, without close examination of the issue. For legislation of such magnitude, it seems a bit disturbing that Congress delegated the responsibility of studying the harmful effects of the legislation. By contrast, the last major revision to the Copyright Act in 1976 was preceded by years of study.

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401 See The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommuns., Trade, and Consumer Prot. of the House Comm. on Commerce, 105th Cong. (1998); H.R. REP. No. 105-551, pt. 2, at 38 (1998) (“The Committee believes it is very important to emphasize that Section [1201](a)(2) is aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work.”); H.R. REP. No. 105-551, pt. 1, at 18 (1998); S. REP. No. 105-190, at 2 (1998).


404 See Samuelson, supra note 400, at 559.

405 One commentator has argued that the DMCA is unconstitutional because delegation to a legislative officer, the Librarian of Congress, violates the doctrine of separation of powers. See JeanAne Marie Jiles, Comment, Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act To Prevent Constitutional Challenges, 52 ADMIN. L. REV. 443 (2000).

406 See HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON
Some might argue that the two-year moratorium takes care of the problem: because Congress delayed the effective date of the circumvention ban for a two-year period of study, it is the same as if Congress had conducted a study prior to enacting the legislation. Not quite. Perhaps even more troubling is that the anti-circumvention provision does not delay the effective date of the two anti-device bans. These bans—which are the true meat of the anti-circumvention provision—go into effect right away without any apparatus for the Librarian of Congress to override or create exemptions to them. The statute expressly states that the Librarian's determinations may not be used as a defense to any claim brought under the anti-device bans.

In sum, although the first factor weighs slightly in favor of a rule, the amount of attention Congress devoted to addressing the problems of the DMCA provide at least some reason for pause.

b. Does Not Target a Recurring Problem with Common Elements

Neither the anti-circumvention provision nor the district court's ruling targets a recurring problem with identifiable common elements. As an initial matter, one might question whether there is a real problem of circumventing technologies, given how little evidence of circumvention Congress considered. The sheer complexity of the provision—with its three prohibitions, two of which contain complicated subparts and all of which are riddled with a maze of exemptions—provides tell-tale signs that the provision may be addressing too many problems (some of which may have been only imagined) at once.

The anti-circumvention provision is, as one scholar aptly put it, "fiendishly complicated." In fact, the provision contains not one, but three anti-circumvention prohibitions: a basic provision that targets the act of circumvention, and two anti-device provisions that target technologies that enable circumvention. Adding to the complexity are seven statutory exemptions, some of which apply only to the basic provision, others of which apply to the basic provision and

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407 17 U.S.C. § 1201(a)(2), (b)(1); see infra notes 410-11 and accompanying text.
408 Id. § 1201(a)(1)(E).
411 See id. § 1201(a)(2), (b).
one of the anti-device bans, and still others of which apply to all three bans.\textsuperscript{412} The anti-circumvention provision is further complicated by several paragraphs that provide that the anti-circumvention provision does not affect the fair use defense or enlarge or diminish vicarious or contributory liability for copyright infringement or free speech rights.\textsuperscript{413} Given the breadth and complexity of the anti-circumvention provision, the court should have been leery of adopting a categorical approach without more evidence of the precise problem.

Even if we limit the inquiry to the "problem" of DeCSS,\textsuperscript{414} the district court's opinion concedes that the nature of the problem is diverse—indeed, in the court's own words, "remarkably varied"\textsuperscript{415}—and may raise different issues depending on the user,\textsuperscript{416} the type of use,\textsuperscript{417} and the type of copyright-control technology.\textsuperscript{418} The district court even acknowledged that future technology may change the analysis and create additional problems, such as if technology were used to control access to copyrighted works whose terms of copyright have expired.\textsuperscript{419} The district court's admitted difficulty in handling the heterogeneous nature of the problem should have given it clear warning signs that a categorical approach might not have been appropriate. But the court ignored these warning signs and all but conceded

\begin{itemize}
  \item \textsuperscript{412} See id. § 1201(d), (e), (f), (g), (h), (i), (j).
  \item \textsuperscript{413} See id. § 1201(c).
  \item \textsuperscript{414} There was scant evidence in Corley that DeCSS actually facilitated rampant copying of DVDs. The motion picture studios provided less than a dozen incidents. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 314–15 (S.D.N.Y. 2000), aff'd sub nom. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). Perhaps this is due to the fact that compressing a copied DVD into a manageable form for a typical computer is time-consuming, complex, and requires the use of another program—all perhaps beyond the ken of the average computer user. See id. at 313.
  \item \textsuperscript{415} Id. at 338.
  \item \textsuperscript{416} See id. (acknowledging that "the anti-trafficking provision of the DMCA may prevent technologically unsophisticated persons who wish to copy portions of DVD movies for fair use from obtaining the means of doing so").
  \item \textsuperscript{417} The district court acknowledged the many different fair uses that could be affected:

\begin{quote}
Many of the possible fair uses may be made without circumventing CSS while others, i.e., those requiring copying, may not. Hence, the question whether Section 1201(a)(2) as applied here substantially affects rights, much less constitutionally protected rights, of members of the 'fair use community' cannot be decided \textit{in bloc}, without consideration of the circumstances of each member or similarly situated groups of members.
\end{quote}

Id.
  \item \textsuperscript{418} See id. at 322 n.159.
  \item \textsuperscript{419} See id. at 338 & n.245.
\end{itemize}
that it had no idea how its categorical reading of the anti-circumvention provision would affect other third parties.\textsuperscript{420}

c. Implicates Copyright Law, a Regime of Entitlements Requiring a Balance of Competing Goals and Interests

Although the court fashioned a prohibition (and architectural regulation) against the posting of and linking to DeCSS on the Internet, the decision is tied to a regime of individual entitlements—the copyright system—for which a balancing of interests is often necessary. As the complexity of the anti-circumvention provision attests, it is not easy to draft a flat prohibition in the area of copyright. Given the need for balancing of goals and interests under copyright law, greater caution should be exercised before erecting a categorical prohibition against circumvention in a way that forecloses any balancing of interests as contemplated by copyright law. The anti-circumvention provision should serve the goals of our copyright system, not the other way around.\textsuperscript{421}

d. Causes Interdoctrinal Tension

The court's decision also causes great tension with the fair use and Sony doctrines—potentially allowing copyright holders to "end run" the requirements of both doctrines by installing copyright control technology on their works under the auspices of the DMCA. The prospects of this "end run" to obtain supra-copyright protection are great, given the proliferation of digital works and the development of quite sophisticated copyright-control technologies. The Corley decision gives too little thought to how its broad reading of the anti-circumvention provision fits within these important copyright doctrines. The statute itself calls for harmonizing the DMCA with existing copyright law, stating: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."\textsuperscript{422} One way to read this clause is to recognize that the anti-circumvention provision must be read in harmony with the fair use doctrine—meaning in a way that

\textsuperscript{420} See id. at 337.

\textsuperscript{421} The district court appeared to get the proper order backwards. See id. at 335 ("The interest served by prohibiting means that facilitate such piracy—the protection of the monopoly granted to copyright owners by the Copyright Act—is of constitutional dimension."). The Copyright Clause is aimed ultimately to serve the public’s interest in a wide dissemination of works and inventions, not the copyright holder's interest in a grant of monopoly. See supra note 222 and accompanying text.

\textsuperscript{422} 17 U.S.C. § 1201(c) (Supp. V 1999).
does not alter the rights afforded by the fair use doctrine. A basic right of the fair use doctrine is that "[a]ny individual may reproduce a copyrighted work for a 'fair use.'" But to deny a fair use defense to the anti-circumvention provision would appear to do precisely what this section denies: it would "affect" fair use by impairing the ability of the public to use copyrighted works for fair use if those works are equipped with access control measures. The statute also contains similar "harmonizing" provisions disclaiming any effect on free speech rights or the doctrine of contributory infringement (of which the Sony doctrine is a part). These provisions should have signaled to the district court the need to take into greater account whether its decision would result in excessive doctrinal tension with existing copyright law. We should be especially cautious before embracing a position that may undermine copyright doctrines that have existed for many years.

e. Rapid Change Possible

Finally, as discussed above, the possibility of changing technology militates against a broad rule. The anti-circumvention provision applies to all technologies, now and in the future, and to all copyrighted works. Yet it is not clear that such strong protection is necessary for every kind of copyrighted work or every kind of access control technology. Given the technological change on the horizon and the likelihood of even stronger copyright control technologies, courts should tread lightly before embracing doctrines that may end up dramatically shifting the balance of copyright law. Adding such strong statutory protection on top of technological protections for copyright holders may lead precisely to the parade of horribles that Congress

423 See Samuelson, supra note 400, at 538–39, 546–47.
426 See id. § 1201(c)(2).
hoped to avoid: a pay-per-view society, where every bit of information is under lock and key and comes at a price. 428

To be sure, the district court's categorical reading of the anti-circumvention prohibition is not an unreasonable interpretation of the statute. Indeed, many may agree with the district court that the statute is "crystal clear" 429 in not recognizing a fair use defense, that foreclosing a defense of fair use presents no constitutional problem, that the DMCA overrules the Sony decision to the extent the two are in conflict, and that barring DeCSS from dissemination does not violate the First Amendment. However, there is always a chance that the district court got it wrong—in one or several respects. That is why we should be worried.

Although the Second Circuit affirmed the district court's opinion, the court of appeals's decision is narrower than the lower court's maximalist opinion in at least a few respects. First, even though the Second Circuit quoted extensively from Judge Kaplan's decision, 430 noticeably absent from the Second Circuit's opinion is all the negative imagery invoked by the lower court against the defendants. The appellate decision makes no reference (on its own) to political assassinations, suicide pacts, contagious disease, or piracy. 431 Unlike the trial court, the court of appeals acknowledged that "hackers" can include legitimate computer users, including "serious computer-science scholars conducting research on protection techniques." 432

The Second Circuit's decision is also more self-conscious about the scope of its ruling. In considering the defendants' First Amendment challenges, the court explicitly recognized the need to proceed cautiously in dealing with cyberspace, stating:

Last year, in one of our Court's first forays into First Amendment law in the digital age, we took an "evolutionary" approach to the task of tailoring familiar constitutional rules to novel technological circumstances, favoring "narrow" holdings that would permit the law to mature on a "case-by-case" basis. See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 n.11 (2d Cir. 2000). In that

428 See 144 Cong. Rec. H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley) ("If left unqualified, this new right ... could well prove to be the legal foundation for a society in which information becomes available only on a 'pay-per-use' basis.").
431 The court draws one analogy to the protection from thieves and burglars afforded by security devices. See id. at 452.
432 Id. at 435.
spirit, we proceed, with appropriate caution, to consider the Appellants' First Amendment challenges . . . .

Invoking that same principle, the court declined "to determine whether a test as rigorous as Judge Kaplan's is required to respond to First Amendment objections to the linking provision of the injunction he issued." Ultimately, however, the Second Circuit's decision is broader and more maximalist than it should have been. First, the court of appeals rejected the application of the doctrine of constitutional doubt, concluding that the defendants' argument based on the statutory language, "[n]othing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title," was not plausible and was clearly rejected by legislative history. But the court's rejection of the doctrine of constitutional doubt is, at the very least, open to question. The statute itself does not expressly reject the fair use doctrine. To the contrary, the statute expressly states that the anti-circumvention provision does not affect the fair use defense. One plausible reading of this clause is that an individual is entitled to the same scope of fair use after the enactment of the DMCA as it was before it, so as not to "affect" the fair use rights. As long as this reading is "fairly possible," the doctrine of constitutional doubt should apply.

What appears to underlie the Second Circuit's rejection of the doctrine of constitutional doubt is its underestimation of the strength of the defendants' constitutional challenge. Although purporting not to decide whether the fair use doctrine is constitutionally required (and thus immune from abridgement by Congress), the Second Circuit nevertheless made fairly clear how little regard it had for the defendants' constitutional argument, which it disparaged as "extravagant." The court noted "that the Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement." The Second Circuit then asserted that "[w]e know of no

433 Id. at 445.
434 Id. at 457.
435 Id. at 443.
437 See Corley, 273 F.3d at 458-59.
438 Id. at 458.
439 Id.; see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'").
authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. Accordingly, the court held that it would not be an unconstitutional limitation on fair use for the DMCA to forbid fair uses in digital or another preferred format.

So much for proceeding cautiously. Even though the court mentioned two procedural bases to decline to consider the constitutional question, and even though it purported not to decide the issue, the Second Circuit's opinion goes on at length to reject the constitutional argument that Congress cannot abridge the fair use doctrine. If, as the court concluded, the record was too scanty to even consider the issue, the court should have ended its discussion there. But the opinion goes on to conclude that Congress can take away an individual's right to choose the format of fair use. Ultimately, the court's decision is based merely on the absence of any authority holding to the contrary of its decision. But such silence is hardly surprising in a case of first impression: no court before Corley has ever had occasion to consider a federal statute that has been interpreted to diminish what kinds of fair uses can be made. The fair use doctrine was first created by courts as an equitable rule of reason; its codification into the Copyright Act has always been seen to allow courts "to adapt the doctrine to particular situations on a case-by-case basis." It is dubious for the court to transform the absence of case law on an issue of first impression into an affirmative basis for its decision. If anything, the fact that Congress has never before in the two-hundred odd years that we have had copyright laws enacted a provision that has been interpreted to abridge the fair use doctrine should give a court reason for pause before embracing such an interpretation.

Courts have scarcely examined the numerous constitutional issues raised by Corley in the context of the Internet or computer software. And we know appallingly little about how the anti-circumvention provision affects access to copyrighted works because a good deal of access-control technology is on the horizon. With so little case law and information to guide us, and with the stakes to the copyright

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440 Corley, 273 F.3d at 459.
441 See id.
442 See id. at 458–59.
443 See id. ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").
system and the availability of copyrighted works so high, a minimalist, fact-specific approach seems to me far preferable to a maximalist, rule-like approach. By leaving most, if not all, of the constitutional issues undecided, we gain valuable time to learn more about the effect of the DMCA and access-control technologies on the availability of copyrighted works. Should Congress later enact an amendment to the DMCA clearly stating that fair use is no defense to the anti-circumvention provision, we will likely be in much better position to judge the constitutionality of the act then rather than now.

CONCLUSION

By identifying circumstances that make the application of rules or standards more appropriate for cyberspace, this Article has attempted to sketch out a preliminary framework to assist courts in deciding whether to take a narrow/tentative or broad/definitive approach for cyberspace. The framework is meant to illuminate the many issues that relate to the manner of a court’s decision. By focusing on these issues in the cyberspace context, the framework is designed to help courts handle the difficulties of applying law to the rapidly changing technology of the Internet. The framework is based on an underlying belief that courts need to evaluate more critically the manner in which they decide cases involving cyberspace. My analysis indicates that that there is much to applaud in the respective approaches taken in Reno, Microsoft, and Zeran but much to criticize in the broad/definitive approach taken in Corley. The suggested framework should not be mistaken, however, for a complete, definitive list of factors or the final word on the merits of a particular case. As the number of cases dealing with cyberspace continues to grow at a swift pace, we can expect the need for refinements, qualifications, or other modifications to the framework. And, in the end, the ultimate decision in a case will always implicate a host of considerations that go well beyond the ambit of the suggested framework. The framework, in other words, can be only the beginning, but not the end, of the discussion.