

# WRAPS AND COPYRIGHTS

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Copyright law has been entangled with the proliferation of wrap contracts from the beginning. The first wrap contracts were specifically designed to circumvent, in digital media, copyright doctrines that protect the public domain in analog media. The subsequent evolution of wrap doctrine has immersed all Internet users in a complex web of legal entanglements that substantially impact copyright law specifically and access to information in general. Professor Kim's book offers a nicely nuanced approach to such contracts in the digital environment. She proposes a dynamic, practical approach that, if implemented, could help to rectify not only the imbalance of power between wrap drafters and their customers, but also the related imbalance between copyright owners and the users of informational works.

In the first part of this essay, I briefly outline the impact that contemporaneous developments in wrap doctrine, copyright law, and electronic technologies have had on information access. Wrap doctrine has damaged not only basic precepts of contract law, but also the balance of copyright law, adversely impacting users' access to information as well as their control over the creative content and personal data they generate. I then address Professor Kim's proposals, drawing parallels to related issues in copyright law, particularly with respect to the demise of the first sale doctrine. My comments suggest a few specific adjustments to the proposals, but primarily concern one overarching issue: once the courts have taken us "there" – down the rabbit hole of judicially constructed wrap doctrine into Wonderland – how can we get "back again" to principles and practices consonant with the traditional goals of contract and copyright law? (With apologies for superimposing a reference to another children's classic, *The Hobbit*.)

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## I. HOW WE GOT THERE

Historically, contract and copyright enjoyed a symbiotic relationship.<sup>1</sup> Contracts provide the private mechanism by which copyright owners assign or license their rights in order to profit from them. Copyright, however, is federal statutory law<sup>2</sup> founded in the Constitution, which gives Congress the power to create and protect copyright monopolies only for a purpose: “to promote the Progress of Science and useful Arts.”<sup>3</sup> Congress must not only incentivize creators, but must also protect the public domain – a difficult balance. Consequently, copyright doctrine encompasses not only complex rules for establishing rights and punishing infringements, but also a series of exceptions and limitations designed to protect the public domain from overreaching by copyright owners. Among the most important for purposes of wrap doctrine, are the doctrines of first sale and fair use. Wrap contracts were initially designed to nullify the former, and then expanded to take large bites from the latter.<sup>4</sup>

The first sale doctrine provides that the owner of a lawful copy of a copyrighted work is entitled to sell or otherwise dispose of that copy without permission of the copyright owner.<sup>5</sup> Once the copyright owner makes his profit on a particular copy, his right to distribute that copy is “exhausted” in favor of the right of the copy owner to freely transfer it. First sale benefits the public domain by allowing multiple uses of copies through gifts, sharing, secondary markets for used works, and lending through libraries or rental businesses.

Courts were as ill prepared to interpret copyright law in digital contexts as they were to interpret contract law. Traditional (analog) copyright law assumed that copies were physical and expensive; as a corollary, it developed almost entirely in the context of disputes between competing businesses. In the digital universe, however, the cost of copying essentially disappears while infringers are as likely to be individual users as business competitors. Software developers created wrap contracts for protection in this environment. Their first objective was the destruction of the first sale doctrine, since, in the digital world, users could both keep and share copies

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1. This statement also applies to other intellectual property regimes, of course, as do a number of my other comments, but I focus here on copyright because wrap doctrine targeted it earlier and more comprehensively.

2. Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

3. U.S. CONST. art. I, § 8, cl. 8.

4. Both doctrines were judicially created but are now codified as 17 U.S.C. § 107 (fair use), and 17 U.S.C. § 109 (first sale).

5. 17 U.S.C. § 109(a). The Supreme Court first created the doctrine in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908).

at minimal cost, with anticipated damage to software markets. Software developers devised wrap terms specifying that software transactions were licenses, not sales, and buyers were merely licensees, not owners – hence buyers were not protected by first sale and had no right to transfer copies.

First sale provides a defense only to the copyright owner's right to distribute lawful copies. It provides no defense, however, against infringement of the copyright owner's right to make those copies. In the digital environment, reproduction and distribution occur simultaneously. Courts in a fairly consistent line of cases held that any instantiation of a work in a computer's random access memory (RAM) produced a copy for purposes of infringement – the so-called RAM copy doctrine.<sup>6</sup> The RAM copy doctrine, combined with the wrap license, gave copyright owners for the first time control over any situation in which a user accesses a digital work, including situations where first sale would once have protected multiple uses of the same copy of work, such as sharing and library lending. Consequently, *ProCD, Inc. v. Zeidenberg*,<sup>7</sup> the case that affirmed the validity of wraps, had as significant an impact on copyright as on contract law.

Professor Kim points out that Judge Easterbrook's opinion in *ProCD* distorted the law of contracts to find assent and a binding contract in order to protect a new business model against an obvious freerider.<sup>8</sup> It also intentionally used contract law to avoid the consequences of the Supreme Court's holding in *Feist Publications, Inc. v. Rural Telephone Service, Inc.*,<sup>9</sup> which made clear that the data *ProCD* sought to protect was not protectable under copyright law. *Feist* held that telephone listings were mere facts not protectable by copyright, and belonged in the public domain where they are available for anyone to use. Judge Easterbrook acknowledged that *Feist* precluded copyright protection for the data Zeidenberg appropriated, but rejected the argument that copyright preempted the enforcement of the contract, opining that the shrinkwrap in question was merely a private ordering between parties, which did not create rights equivalent to those of copyright or interfere with copyright's protection of public domain information.<sup>10</sup> After *ProCD*, wrap contracts

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6. The doctrine originated in *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993), and has been consistently followed by courts, with the recent proviso that the RAM copy must be of more than transitory duration. *See, e.g., CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004).

7. 86 F.3d 1447 (7th Cir. 1996).

8. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 140-41 (2013).

9. 499 U.S. 340, 361 (1991).

10. *ProCD, Inc.*, 86 F.3d at 1453-55.

became the preferred means by which private content owners asserted control over access to both copyrighted works and public domain information, particularly in highly concentrated markets where the wraps essentially imposed private legislation on the entire market.

While Judge Easterbrook specifically avoided the “license versus sale” issue with its ramifications for the first sale doctrine, *ProCD*’s affirmation of the enforceability of wrap terms limiting use effectively eliminated the first sale doctrine in electronic media.<sup>11</sup> The E-book downloaded from Amazon cannot legally be read and then shared as a hard copy can. Nor can it be resold.<sup>12</sup> Wrap drafters quickly adopted other terms nullifying copyright limitations. For example, courts approved wrap agreements precluding reverse engineering, which was an established form of fair use.<sup>13</sup> *ProCD* and its progeny do not merely distort traditional contract doctrine, they also provide the foundation for wrap doctrine used as a sword to cut away copyright limitations designed to protect the public domain.

To the contractual constraints permitted by wrap doctrine, and the vast expansion of copyright scope accomplished by the RAM copy doctrine, one must add the new tracking technologies that make it possible to monitor, and often control, not merely the use of information, but many other user activities on the Internet. As a result of the convergence of wrap doctrine, RAM copy doctrine, and technological tracking, copyright law with respect to digital works has become just as unbalanced and coercive as contract law, granting preferential treatment to corporate copyright owners to the detriment of the public, particularly in the context of mass online consumer transactions.

So here we so indisputably are, in the online universe described by Professor Kim, where wrap contracts proliferate like bunnies every time the average user goes online. Often the rights users click away, or lose under terms of service (TOS) based on mere web site use, were once established copyright limitations, like first sale and fair use. As Professor Kim’s

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11. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (upholding no-transfer terms in software license and finding first sale inapplicable because the software was licensed not sold).

12. See *Kindle Store Terms of Use*, AMAZON (Sept. 6, 2012), <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>.

13. Fair use permits the use of copyrighted works without the copyright owner’s consent in circumstances defined by a multi-factor analysis that grows more complex and obscure with every decision applying the doctrine. See 17 U.S.C. § 107 (2012). *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992), and following cases, held that reverse engineering of software for purposes of interoperability was permissible fair use. Nonetheless, the court in *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638-39 (8th Cir. 2005), applying *ProCD*’s no-preemption analysis, held that software providers can avoid that defense by the simple expedient of a wrap contract forbidding reverse engineering.

examples show, users also unwittingly give away perpetual licenses to copyrights (and other intellectual property rights) in user-generated content. They give away control over their personal information and rights to access the courts. In an astonishing development, it was recently revealed that Facebook manipulated 700,000 users' newsfeeds as part of a psychology experiment conducted without their informed consent. Why did Facebook presume it had the right? It relied on the broad scope of its wrap TOS, of course.<sup>14</sup>

Sadly, once those constraints become the "reasonable expectation" in digital contexts, their beneficiaries attempt to export them offline. The fate of the first sale doctrine is instructive. Once courts approved licenses nullifying first sale in electronic media, publishers sought to restrict transfer of physical copies as well. Professors' examination copies of physical textbooks, which support a lively secondary market, now routinely sport legends declaring that they cannot be resold without the publisher's permission, an obvious contravention of the first sale doctrine. Aspen Publishers recently announced that law students who wished to keep their casebooks must pay a substantially higher price than those willing to buy a licensed digital/paper package requiring them to return the hard copy book at the end of the course, thereby reducing Aspen's competition from the used book market.<sup>15</sup> In *UMG Recordings, Inc. v. Augusto*,<sup>16</sup> the recording company argued unsuccessfully that unsolicited compact discs sent to disk jockeys and music critics could not be subsequently resold because the discs were merely "licensed," not sold. While these efforts have had limited success thus far, clearly the fate of wrap doctrine affects offline as well as online transactions.

Moreover, as transactions continue to move online, there will be progressively less offline access to information under old, wrap-free business models as virtual storefronts replace actual stores. Professor Kim notes that the widespread adoption of onerous licensing terms means that any consumer desiring to avoid such terms must cut off nearly all digital interactions.<sup>17</sup> Given the impact of wrap doctrine on copyright law, that not only means walking away from economic transactions, but also shutting

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14. Cory Doctorow, *Facebook's massive psychology experiment likely illegal*, BOINGBOING (June 30, 2014), <http://boingboing.net/2014/06/30/facebooks-massive-psychology.html>.

15. *Aspen Backs Off New Casebook Policy*, THE FACULTY LOUNGE (May 8, 2014), <http://www.thefacultyounge.org/2014/05/aspen-backs-off-new-casebook-policy.html>. Aspen's announcement triggered a listserv explosion among IP and cyberlaw professors. *Id.*

16. 628 F.3d 1175, 1180 (9th Cir. 2011).

17. KIM, *supra* note 8, at 206.

down access to vast informational resources – walking away not only from the marketplace, but also from much of contemporary culture.

## II. CAN WE GET BACK AGAIN?

Even a brief survey of Professor Kim's many examples of wrap contracts run amuck indicates how closely wrap doctrine and copyright are now entangled with resulting drastic impact on information access. Her book offers a number of well-considered, pragmatic proposals to rectify the situation. I address them in two rough categories: (1) the reworking of formation rules to include the duty to draft reasonably, including an enhanced assent requirement for terms affecting non-drafters' "rights and entitlements," and (2) a return to traditional contract doctrines such as protection of the parties' reasonable expectations, good faith, and unconscionability.

The suggested abandonment of the blanket assent rule is essential. Such a binary, all-or-nothing, rule is far too inflexible in the complex, rapidly changing digital environment. Professor Kim's categorization of wrap terms into shield, sword, and crook provisions requiring different levels of assent offers a more nuanced approach: shield terms handily survive; the more objectionable sword and crook provisions by which the drafter seeks to negate or surreptitiously appropriate the other party's rights or entitlements require a clearer manifestation of volition in the form of multiple clicks, separate emails, or the like. A duty is imposed on drafters to draft reasonably using all the capabilities of online formats, from graphics to placement on the page to noninterference with transactional flow, to assure that consumers not only see, but also "notice" and can consider onerous terms that the drafter seeks to impose.<sup>18</sup>

Online mass consumer transactions are not feasible without the use of standard form contracts. Professor Kim's proposals avoid the untenable position of simply ruling them out altogether as "not contracts" because of lack of assent. The proposals dovetail nicely with traditional doctrine recognizing the validity of liability limitations. Additionally, they have the advantage of dealing directly and pragmatically with actual practices in the digital environment, rather than drawing on analogies to past practices in the offline world. From the copyright viewpoint, they should make it more difficult for drafters unilaterally to abolish established doctrines friendly to users and the public domain.

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18. *Id.* at 176-200.

I foresee a threshold issue with Professor Kim's requirement for enhanced assent only to terms affecting "rights and entitlements." Crook terms automatically transferring perpetual copyright licenses in user generated content would appear to fall into the protected category since they impact the copyright owner's recognized bundle of rights. Professor Kim characterizes first sale and fair use as licensee entitlements that would also require enhanced assent.<sup>19</sup> Copyright law, however, does not precisely recognize first sale or fair use as affirmative "rights" or entitlements. Rather the defendant in an infringement action can raise them as defenses, and must bear the burden of proving them. Other recognized limitations on owners' rights, such as provisions allowing library copying<sup>20</sup> or educational and charitable performances of works,<sup>21</sup> are simply proclaimed "not infringements." It is not entirely clear that the description "rights and entitlements" would apply to these limitations. Distinctions between affirmative rights and mere defenses appear in other intellectual property regimes as well. Trademark and patent law, for example, recognize exhaustion doctrines analogous to first sale. Adoption of broader terminology or a definition that more clearly encompasses terms negating legal defenses might be helpful here.

While I generally favor the enhanced assent proposals, two barriers are evident. First, the insertion of additional clicks or other mechanisms to draw consumers' attention to onerous terms may fail to put a dent in consumers' inattentive blindness. Consumers' reasonable expectations, thanks to wrap doctrine, are that it is entirely unreasonable to bother reading terms for which there are no real alternatives. Admittedly, Professor Kim's purpose is not to force users to read terms of service but rather to create transactional barriers that adversely affect their online experience in such a way that, if sufficiently annoyed by a drafter imposing onerous terms, they might seek out a different business with a more favorable TOS.<sup>22</sup> Some form of consumer education campaign might help to call consumers' attention to the purpose of the enhanced requirements and the availability of new options. However, for the proposals to work even to that limited extent, some drafters must either voluntarily break ranks to offer alternatives to the identical license terms that now prevail under wrap norms or they must be forced to do so by judicial or legislative adoption of the measures she proposes, which may be problematic for reasons discussed below.

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19. *Id.* at 195.

20. 17 U.S.C. § 108(a) (2012).

21. 17 U.S.C. § 110(1)-(4).

22. KIM, *supra* note 8, at 197.

Professor Kim's enhanced assent proposals aim to restore volition to automated transactions where it is now entirely lacking. The proposal parallels a similar movement in copyright law, where several recent decisions involving digital technologies require volitional conduct by intermediaries to support claims of direct, as opposed to secondary, liability for infringement.<sup>23</sup> The cases reflect judicial discomfort with imposition of direct liability in the absence of affirmative conduct by the defendant, a situation not unlike the imposition of binding contracts in the absence of a volitional act. However, the copyright decisions are narrowly written to address specific digital technologies and do not directly address consumer concerns. Moreover, the Supreme Court majority in its most recent copyright decision gave exceedingly short shrift to the volition requirement.<sup>24</sup> Thus, the volition trend in copyright may ultimately offer little help in the attempt to reinsert contractual volition into online transactions.

Professor Kim also calls for a return to more traditional contract doctrines of good faith, reasonable expectations, and unconscionability.<sup>25</sup> She provides specific examples eminently suited to application in the online environment. In a rational universe, the proposals would be good steps on the path to a less coercive contracting environment, and by extension, a possible revitalization of copyright limitations that wrap doctrine has eviscerated. However, the failure thus far of attempts to reintroduce first sale to the digital universe sounds a cautionary note. Federal legislation that would amend the Copyright Act to allow transfer of lawful digital copies if the transferor destroys his original copy has gone nowhere.<sup>26</sup> Technologies now exist that would enforce first sale online, allowing the development of secondary markets in used information while preventing proliferation of illegal copies. Both Amazon and Apple have applied for

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23. See, e.g., *Fox Broad. Co. v. Dish Network, L.L.C.*, 723 F.3d 1067, 1073 (9th Cir. 2013) (satellite-television video programming distributor providing set-top box with digital video recorder and commercial-skipping capabilities could not be liable for direct infringement where it created a copy only in response to a customer's command); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (cable television company not directly liable for digital video recordings made automatically upon customer's command); *Parker v. Google, Inc.*, 242 Fed. App'x 833, 837 (3d Cir. 2007) (search engine archiving of usenet posting not direct infringement in absence of volitional conduct); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (Internet service provider not directly liable when its facility was used by subscriber to violate copyright in absence of any volitional conduct by the ISP).

24. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2498, 2507 (2014).

25. KIM, *supra* note 8, at 200-10.

26. See, e.g., The Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2002).

patents for such technologies.<sup>27</sup> However, Redigi.com, the first business that attempted to create a “pre-owned digital marketplace” in which technology would enable first sale to function, failed to survive even a summary judgment motion when copyright owners sued it for direct and secondary infringement.<sup>28</sup> The entwinement of distribution and reproduction under RAM copy doctrine proved insurmountable. The road into the digital universe for traditional contract doctrines may prove to be equally rocky. Once courts have adapted legal rules to digital transactions, as they have with wrap doctrine and copyright doctrine, the adapted rules themselves present barriers to reinstatement of traditional principles.

Hence the hard question: Professor Kim’s proposals are eminently reasonable, but how would she suggest that they be implemented? Her proposals must somehow overcome the path dependence established through a now lengthy series of case precedents. The courts created wrap doctrine but how likely are they to “unring” that bell? Should one look instead to the legislatures or to private market forces? Professor Kim’s analysis focuses on adjudication, the source of wrap doctrine in its present form. In cases involving digital technologies, I note two problems in addition to the obvious reluctance of courts to alter precedent: the courts’ addiction to adjudication by analogy and the failure of courts to consider implications for consumers in cases often brought between competitors or against particularly unsavory defendants.

The result-driven, theory-free brand of jurisprudence embodied by *ProCD* has frequently prevailed in wrap contract and copyright cases involving digital technologies. In both areas, judges claim to apply traditional doctrine equally to analog and digital circumstances while ignoring significant distinctions between the offline and online contexts. They rely heavily on analogies to situations with which they are more comfortable, rather than carefully analyzing the actual practices in front of them in the digital environment. Just as Judge Easterbrook, in *ProCD*, compares software shrinkwraps to airplane tickets and insurance contracts, so courts in copyright cases compare databases to microfiche, computer menus to videotape recorder buttons, digital recording systems to copy shops, and so on. The Supreme Court most recently engaged in a battle of analogies in *American Broadcasting Cos. v. Aereo, Inc.*<sup>29</sup> where the majority opined that Aereo’s system for retransmitting broadcast television

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27. David Streitfeld, *Imagining a Swap Meet for E-Books and Music*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music.html>.

28. Capitol Records, L.L.C. v. ReDigi Inc., 934 F.Supp.2d 640, 655-56 (S.D.N.Y. 2013).

29. 134 S.Ct. 2498 (2014).

shows was comparable to cable television, while the dissent argued vigorously that Aereo was more like a copy shop that provides its patrons with a library card.<sup>30</sup> Not helpful.

Courts in such cases seemingly pick their desired result, and then pick the analogy that gets them to that result, providing little or no doctrinal framework for future cases. They may be protecting new business models against free riders, but are equally likely in the copyright cases to protect established industries against new competitors. Until judges eschew the battle of analogies and more directly engage with the digital universe, as Professor Kim's proposals do, the significant body of precedent now established for wraps does not bode well for judicial adoption of such proposals. Just as troubling, the courts' reliance on analogy often indicates a basic unfamiliarity with the digital environment. An obvious case in point is Judge Easterbrook's counterfactual assumption that anyone unhappy with the terms contained in a shrinkwrap software license could simply return the opened box to the store. While younger, more tech-savvy judges will eventually take office, judicial unfamiliarity with the digital universe presents an issue for the immediate future. Some means of better educating judges on digital issues seems desirable – perhaps a reading of Professor Kim's scenarios of wraps in Wonderland<sup>31</sup> should be required in all wrap enforcement cases.

The failure of courts explicitly to consider consumer interests is, to some extent, an unavoidable structural problem. Lawsuits that implicate basic precepts of wrap doctrine, or copyright law, are less likely to be brought against average consumers than against business competitors, free riders like Zeidenberg, or particularly unlikeable defendants like Lori Drew whose misuse of a Myspace account arguably caused a teen suicide. In the nature of the judicial process, no one directly represents the interests of consumers in general, though courts sometimes take note of them. Perhaps consumer interest groups might generate appropriate test cases that more directly present consumer concerns, though the courts have proven notably unfriendly to fabricated copyright test cases.<sup>32</sup> These barriers to judicial resolution argue for legislative treatment.

Unfortunately, legislative avenues look forbidding given the influence on legislatures of lobbyists for the very same corporate drafters who profit

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30. *Id.* at 2506-07, 2514.

31. KIM, *supra* note 8, at 147-55.

32. See, for example, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the Supreme Court overwhelmingly rejected challenges to copyright term extensions brought by plaintiffs in a suit that was essentially organized by several law professors at Harvard's Berkman Center for Internet and Society.

most from wrap contracts. The Uniform Computer Information Transactions Act (UCITA) offers an example. The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted a uniform law to govern online information transactions – originally as a new Article 2B for the Uniform Commercial Code, then as UCITA after the American Law Institute disavowed it. The draft was so unbalanced in favor of software providers that only two states passed it, and several others adopted anti-UCITA legislation before NCCUSL moved the act to the back burner.<sup>33</sup> The demise of UCITA offers a negative sort of hope in that an act demonstrably favoring software providers over consumers ran into a brick wall in state legislatures. The fact that reasonable legislatures may reject an overreaching act, does not, alas, guarantee that they can draft a fair one. The failed legislative efforts to recreate the first sale doctrine online may foretell a similar failure at legislative reworking of wrap doctrine.

It is possible, of course, that some public-spirited online business might adopt a business model that takes explicit advantage of Professor Kim's proposals, as a way to position itself as a consumer-friendly venue willing to adapt its wrap contracts to protect its customers as well as its own interests. However, given the advantages that wrap doctrine confers on online businesses, there is limited incentive for such actions. They may also run into judicial resistance based on existing wrap doctrine, much as Redigi's efforts to create a digital secondary market ran into RAM copy doctrine.

The preceding comments raise a few concerns about proposals that are, by and large, quite sound and long overdue. I would add the following suggestion: the dynamic theory of contract that Professor Kim promotes as essential for online commerce must also reference policy goals beyond those of traditional contract law. Wrap doctrine is a facilitator for and a portal into other legal regimes. Reformers should consider not only wrap doctrine's ability to defeat traditional goals of contract law, but also to thwart the policies behind other legal regimes, including but not limited to copyright.<sup>34</sup> In the digital universe, the legal treatment of wrap contracts initiates feedback loops affecting a multiplicity of other laws. Professor Kim's proposals are sufficiently targeted, and subject to testing, that they do

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33. *A Commercial Code for the Information Age?*, UCITA ONLINE, <http://www.ucitaonline.com> (last visited Aug. 13, 2014). Having participated in the adoption process in Virginia, one of the two adopting states, I can affirm that the adoption process was as fully dominated by the corporations who stood to gain from UCITA as was the drafting process.

34. For example, Facebook's subjection of its unwitting customers to experimentation by researchers from federally funded universities may be allowed by its TOS but runs afoul of federal law requiring informed consent for such research. Doctorow, *supra* note 14.

not threaten to unleash chaos in the digital marketplace. However, they will have impacts beyond the arena of contract doctrine and reformers should, to the extent possible, try to anticipate those consequences. Such an approach may well require more cross-regime collaboration than is typical, but will certainly produce better results in the long run.

#### CONCLUSION

I have suggested that contract and copyright law have been particularly closely associated in the judicial development of wrap doctrine, so much so that current wrap doctrine threatens the balance of both regimes. Professor Kim's proposals are generally well considered and might redress the imbalance, with the caveats I have noted above, including one rather large one – a viable means of implementation. As, or if, reformers attempt to reorient wrap doctrine back towards traditional contract principles, it is imperative that they consider potential impacts of revisions in wrap doctrine on other legal regimes.