How do you solve a problem like a clickwrap? End User License Agreements, Terms of Use and Technological Protection Measures routinely accompany the provision of digital goods, often restricting users beyond the dictates of copyright and other intellectual property laws. They may restrict the ways in which a work or product may be used or prohibit its resale; they may dictate that a product may be used in conjunctions with only some works or products but not others; they may prohibit the copying of facts or other non-copyrightable subject matter, or prohibit reverse engineering. All of these restrictions share a common feature: they purport to prevent users from engaging in acts which otherwise would be perfectly legal, and whose legality is not bug but rather a feature of the copyright system. Does such private reordering of the respective rights of owners and user constitute an encroachment onto rights deliberately allocated to users and its prolifération a sign of a systematic failure of the statutory scheme, or does it actually demonstrate that the market framework contemplated by the Copyright Act, in which entitlements are exchanged for the transacting parties’ mutual benefit, is running full-steam?

Obviously, answering this question will affect the legal response to such restrictions. Endorsing the former view would tend to view user rights as inalienable and favor an array of legal responses, ranging from simply rendering such restrictions unenforceable to more severe responses such as a finding of copyright misuse or perhaps even antitrust liability, and it would naturally look skeptically at TPMs and favor liberal rights to circumvent them. In contrast, endorsing the latter view would tend towards adopting a laissez-faire approach, supporting full alienability of user rights and generally enforcing any restriction that copyright owners might choose to impose.

A third approach, treating user rights as partially (in)alienable, lies at the centre of this paper. It begins by explaining why treating user rights as either inalienable or fully alienable is unsatisfactory and then proceeds to develop a framework for determining the conditions of partial (in)alienability: when private reordering of owners and user rights should be permitted and when it should not.

The framework utilizes three types of considerations or indexes. The first is the autonomy/intrusiveness index. It is based on the premise that in a liberal democracy, limiting one’s autonomy requires justification, and on the observation that user rights create a space of individual autonomy in which individuals can engage with creative works while being free from government regulation. It also recognizes that enforcing privately created restrictions limiting this autonomy is in itself a form of government interference with such autonomy, but also recognizes that the freedom to make enforceable promises, including promises to refrain from certain acts is also a fundamental aspect of one’s autonomy. Therefore, the autonomy/intrusiveness index measures how intrusive on individual autonomy a restrictive condition is. The more intrusive it is, the stronger is the need to justify it, either on grounds of
copyright’s underlying public policy, or on the grounds that it truly and fully reflects the user’s exercise of her autonomy.

The second index is the market/scope index. This index takes seriously both the distinction between in personam and in rem obligations (which in the present context means that private reordering of transacting parties’ respective rights does not imply a priori fundamental modification of the public ordering), as well as the premise that market competition can potentially alleviate many of the concerns raised by critics of private ordering. However, it also takes seriously the limitations on the applicability of the in personam /in rem distinction and the limits of market discipline. This index measures factors such as the ratio between users bound by the restriction and those who are not, how competitive the market is or can be, and whether information asymmetry, cognitive biases or the presence of externalities limit the disciplinary power of competition.

The third index is the innovation index, which measures the extent to which restrictions are consistent with the goals of copyright. It recognizes that some restrictions on user rights can (sometimes counter-intuitively) be consistent with the type of cultural and technological innovation that copyright law seeks to encourage, either because such restrictions may be necessary to prevent opportunism and foster trust necessary for collaborative creative projects, or because they can allow copyright owners to maximize their reward and improve their desire and ability widely to disseminate works. But it also takes seriously the fact that the sources of innovation vary, and that users are becoming an important source of innovation and creativity more than ever before. Since user innovation depends critically on users’ ability to modify existing works, use them as building block for other works, or otherwise use them in ways not contemplated by the owner, guaranteeing this ability may be crucial for user innovation. From this perspective, inalienable user rights are necessary for user innovation, whereas full alienability may suppress it. Therefore, as an instrument of innovation policy, it would be imprudent for copyright law to create rules supporting one model of creative innovation while suppressing others, and partial (in)alienability can manage these trade-offs.

Any particular alienation of user rights can be analyzed and ranked according to each of these indexes, and determine the degree of tolerance or hostility towards such forms private reordering of owners’ and users’ respective rights.