

Reciprocal Share-Alike Exemptions in Copyright Law

Draft available at SSRN: <http://ssrn.com/abstract=1095711>. "RSACE = Reciprocal Share-Alike Copyright Exemptions"

The Proposal: beneficiaries of a copyright exemption should comply with a complementary set of *ex-post reciprocal share-alike obligations* that come on top of the exemption that they benefit from. Whenever a party that uses copyrighted materials relies on a copyright exemption, subsequent users who wish to access and use his secondary cultural product, for similar purposes, should be legally entitled do so freely, as well as legally entitled to overcome technological protection measures and contractual limitations in this regard.

Sources of Inspiration: (1) the Creative Common's share-alike requirement; (2) copyright's imbalanced expansion and the political deadlock in reformulating copyright's exemptions and limitations scheme; (3) improving the economic equilibrium of copyright – resolving failures and disruptions that the current exemptions and limitations scheme does not take into account; (4) responding the new challenges that social cultural production (web 2.0....etc...) impose on copyright's traditional incentive-access paradigm; particularly, commercial exploitation of users-generated content as a new form of free-riding and the impediments that it might impose on cultural production.

Potential Applications: (1) fair use – e.g. Google's Library Project reliance on the fair-use defense and the later proprietary regime that Google imposes on subsequent third-parties who wish to use the project's databases; (2) content-sharing platforms that rely on section's 512(c) safe-harbor for hosting services providers and then impose proprietary restrictions on subsequent third-parties who wish to access and use the platform's content; (3) adjusting a new particular copyright exemption for digital archiving that is based on a reciprocal share-alike requirement; (4) prohibiting technological protection measures and contractual restrictions regarding access and use of secondary works that relied on a copyright exemption in the course of their production.

How to Implement? (A) Judicial adjustment and interpretation of: (1) the fair-use defense; (2) the doctrine of copyright misuse; (3) section's 512(c) safe-harbor for hosting services providers + (B) particular legislative amendments to copyright's exemptions and limitations scheme.

Scope of Application: three potential layers: (a) originating "first-generation" copyrighted materials; (b) particular secondary works that were produced with reliance on a copyright exemption; (c) other works of the same secondary user.

Justifications: (1) economic justifications – facilitating instances of quid-pro-quo in which secondary users are basically willing to "buy" a copyright exemption in exchange to their compliance with a reciprocal share-alike requirement. RSACE overcome the fact that there is no voluntary market transaction due to the fact that "third-generation" subsequent users are not taking part in negotiations over the exemption's conditions; (2) economic justifications - using reciprocal share-alike exemptions as a tool for overcoming risk-aversion by potential contenders for copyright exemptions (e.g. "small players' glooming on Google's "deep-pockets" in battling over the scope of copyright's exemptions"); (3) the virtues of creative reciprocity; (4) distributive and democratic considerations; (4) copyright communications policy – advancing affirmative regulation that supports public-oriented and civic-engaged forms of cultural production.

Counter Arguments: (1) potential negative impacts on the incentive to produce secondary works; (2) information costs; (3) reciprocal share-alike exemptions' inferiority and redundancy in comparison to copyright's general exemptions' scheme; (4) the partiality and limited impact of reciprocal share-alike exemptions.

RSACE as a Response to New Types of Free-Riding Problems in Cultural Production