Reciprocal Share-Alike Exemptions in Copyright Law

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Abstract

This article introduces a novel element to copyright law's exemptions' scheme, and particularly the fair use doctrine – *a reciprocal share-alike requirement.* I argue that 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. Among other aspects, reciprocal share-alike obligations may trump contractual limitations and technological protection measures that are imposed by parties who relied on a copyright exemption in the course of their own use of copyrighted materials. Thus, fair-use beneficiaries should be obliged to treat-alike subsequent third parties who wish to access and use copyrighted materials – now located in their new "hosting institution" – for additional legitimate uses.

For example, if Google argues that its *Book Project's* reproductions of entire copyrighted works are fair use, a similar exemption should apply to the benefit of future third-parties who wish to reproduce and distribute, for similar purposes, digital copies of books from Google's databases and applications. Google should also be prohibited from imposing technological protection measures and contractual obligations that revoke its reciprocal share-alike obligations. Similar quid-pro-quo schemes may apply in the context of content-sharing platforms that initially rely on the DMCA's safe-harbor for hosting services providers but later on impose proprietary restrictions on third parties who wish to reproduce and further use materials that were uploaded on the platform by end-users (e.g. as in the case of YouTube.com). And one could go on and apply this basic logic of a *reciprocal share-alike quid-pro-quo* on many other elements in copyright law's scheme of exemptions and limitations.

I argue that the making of copyright's exemptions reciprocal corresponds well and improves the economics of copyright and public-welfare considerations. Overall, reciprocal share-alike exemptions structure copyright law in manner that strikes a better balance between copyright's contribution (incentive) to cultural production and copyright's social cost – the burdens it imposes on future creators. As long as a reciprocal share-alike requirement is structured in a scope that maintains enough incentives to produce secondary works, it represents a social benefit that copyright law should capture. In addition, the article argues that reciprocal share-alike exemptions further enhance democratic, autonomy and distributive values that underlie a public-oriented vision of copyright law.

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Introduction

Impose a *reciprocal share-alike requirement* on beneficiaries of the fair-use defense and other copyright exemptions. This is, in a nutshell, the proposal of this article and the missing element in current theoretical and doctrinal structure of copyright law.

In the last decade, copyright law scholars, policy makers and cultural environmentalists are constantly seeking innovative schemes for improving copyright law's regulation of cultural production and cultural exchange.[1] Maintaining a robust public domain,[2] reconciling technological protection measures with copyright law's exemptions and limitations schemes[3] and contesting the ongoing extension of copyright's term[4] are just a few examples for the

[1] The literature on this topic is too vast to be fully surveyed here, but see Symposium, *Cultural Environmentalism @ 10*, 70 Law & Contemp. Probs. (James Boyle & Lawrence Lessig, eds., Spring 2007) (including articles by Lawrence Lessig, James Boyle, Molly Shaffer Van Houweling, Julie E. Cohen, Rebecca Tushnet, Jessica Litman and Mark A. Lemley that critically assess the scholarly and public-advocacy developments in this area in the last decade).

[2] See e.g. collection of articles in THE PUBLIC DOMAIN OF INFORMATION (P. Bernt Hugenholtz & Lucie Guibault, eds., 2005).

[3] See e.g.Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 Am. J. Comp. L. 323 (2004); Dan Burk & and Julie Cohen, *Fair Use Infrastructure for Rights Management Systems*, *15* Harv. J.L. & Tech. *41* (2001); Jerome H. Reichman, Graeme B, Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, Berkeley Technology Law Journal, Forthcoming Available at SSRN: http://ssrn.com/abstract=1007817

[4] See Eldred v. Ashcroft, 537 U.S. 186 (2003) (rejecting an attempt to challenge the constitutionality of the Sonny Bono Copyright Term Extension Act, including on First Amendment grounds). In 1998 Congress passed

challenges that are being met in recent years. Overall, the task of striking a balanced equilibrium does not seem to come at ease. In the legislative arena, advocates of a public-oriented copyright law confront influential interests groups from the content industries.[5] The limitations of international copyright treaties, including those of the Bern Convention and the TRIPS Agreement,[6] are another hedge against remedying the deficiencies of copyright law at the domestic level.[7] At the judicial arena, attempts to endorse freedom of speech values and the First Amendment, as a normative source for mitigating copyright's expansion, have had very little practical impact.[8] And finally, in addition to the internal contours of copyright law, contractual limitations and technological protection measures are two additional factors that further destabilize copyright's impact on cultural production and cultural exchange.[9]

This article introduces a novel element to copyright's exemptions' scheme - and particularly the fair-use doctrine – that is aimed to overcome this current deadlock of copyright law - *a reciprocal share-alike requirement*. I argue that beneficiaries of a copyright exemption need to comply with a complementary set of *ex-post reciprocal share-alike*

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the Sonny Bono Copyright Term Extension Act (Pub. L. No. 105-298, 112 Stat. 2827 (1998), amending 17 U.S.C. 302-04) and thus extending the term of copyright protection by an additional twenty years. Currently, therefore, for works authored by individuals, the term now extends until seventy years after the death of the author (17 U.S.C. 302(a) (2000); for works "authored" by corporate entities, the term is now ninety-five years from the date of publication or 120 years after creation, whichever expires first. Not only does this apply to future works, but Congress also made this extension retroactive, applying it to all existing works still under copyright protection at the time the extension went into effect (Pub. L. No. 105-298, 112 Stat. 2827 (1998), amending 17 U.S.C. 302-304). As a result of this retroactive extension, no published works will pass into the public domain for twenty years after the Act went into effect. The constitutionality of the Sonny Bono Copyright Term Extension Act was challenged unsuccessfully in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

[5] Apparently this is no coincidence. The legislative process is captured by the content industries. As public choice theorists have shown, small homogenous groups that have a lot to gain, such as the content industries, have persistently pressured for even stronger proprietary rights. See WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW (2004); JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

[6] See The Bern Convention for the Protection of Literary and Artistic Works (of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979); the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994).

[7] Whereas, overall, international pressure on national governments makes it difficult to rely on the global arena for remedying the deficiencies of intellectual property laws at the domestic level. See PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2003); SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (Steve Smith ed., 2003).

[8] See See e.g. Neil. W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev., 1 (2001) and Eldred v. Ashcroft, 537 U.S. 186 (2003) (rejecting an attempt to challenge the constitutionality of the Sonny Bono Copyright Term Extension Ac, including based on First Amendment grounds).

[9] See footnote 3 *supra* and sources cited therein and also Lucie M.C.R. Guibault, COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT (2002); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 Mich. L. Rev. 462, 538-59 (1998); Niva Elkin-Koren, *Copyrights in Cyberspace - Rights Without Laws?*, 73 Chi.-Kent L. Rev. 1155, 1187-99 (1998).

obligations that come on top of the exemption that they benefit from. Among other aspects, reciprocal share-alike obligations may trump contractual limitations and technological protection measures that are imposed by parties who benefited from a copyright exemption in the course of their own use of copyrighted materials.

Thus, for example, fair-use beneficiaries should be obliged to treat-alike subsequent third parties who wish to access and use copyrighted materials of these beneficiaries for similar subsequent uses. If Google argues that its *Book Project's*[10] reproductions of entire copyrighted works are fair use,[11] a similar exemption should apply to the benefit of future third parties who wish to reproduce and distribute, for similar purposes, digital copies of books from Google's databases and applications. Google should also be prohibited from imposing technological protection measures and contractual obligations that revoke its reciprocal share-alike obligations.

Another example is content-sharing platforms that initially rely on the DMCA's[12] safe-harbor for hosting services providers, but later on impose proprietary restrictions on third parties who wish the reproduce and further use materials that were uploaded on the platform by end-users (e.g. as in the case of YouTube.com).[13] According to a reciprocal share-alike requirement, hosting services providers that rely on section's 512(c) safe-harbor[14] should be prohibited from limiting - contractually, technologically, or otherwise legally - secondary uses of materials and information (e.g. metadata) that reside on their platforms after being uploaded by third parties. The flip-side of content-sharing platforms' reliance on section's

[10] See http://books.google.com/googleprint/library.html. This initiative of Google, which was announced in cooperation with the University of Michigan, Harvard University, Stanford University, the New York Public Library, and Oxford University, intends to digitize and make searchable the contents of millions of books in the libraries' collections, some of which are in the public domain and some of which are still under copyright. As for books in the public domain, users would have free access to the full text books. As for copyrighted books, Google Library would digitize the full text unless publishers object to the digitization of specific works, but searches would only retrieve limited samples, so that the searcher would still need to find a way to get a copy of the full book on her own. Helpfully, Google plans to provide links to sites offering books for purchase alongside the search results.

[11] See Google Book Search Publisher Questions, http://books.google.com/googlebooks/publisher_library.html: "Yes. The use Google makes is fully consistent with both the history of fair use under copyright law, and also all the principles underlying copyright law itself. Copyright law has always been about ensuring that authors will continue to write books and publishers continue to sell them. By making books easier to find, buy, and borrow from libraries, Google Book Search helps increase the incentives for authors to write and publishers to sell books. To achieve that goal, we need to make copies of books, but these copies are permitted under copyright law. This project is very similar to web search. In order to electronically index a webpage, you need to make a copy of it. In order to electronically index a book, we have to make a digital copy of the book. As with web search, the copies we make are used to direct people to the books."

[12] Digital Millennium Copyright Act, Pub. L. No. 105-304, 103, 1201, 112 Stat. 2860, 2863-65 (1998) (codified as amended at 17 U.S.C. 103, 1201 (2000)). See 17 U.S.C. 512 (2000).

[13] See section II(C)(II) *infra*.

[14] 17 U.S.C. 512 (2000).

512(c) safe-harbor is a reciprocal obligation not to organize the platform around a proprietary regime.

The inspiration for making copyright's exemptions reciprocal is partially based on the share-alike option that is available through the *Creative Commons* licenses.[15] The share-alike license creates a viral licensing scheme, requiring creators of derivative works to subject subsequent users of their derivatives to the same license that governs the original. Both proposals share a common ideological background that aims to advance the values of cultural democracy, cultural environmentalism and distributive values regarding the allocation of speech and creative resources.[16] Yet, as opposed to the Creative Commons scheme, my proposal is broader in its scope and is more ambitious in its attempt to make reciprocal share-alike obligations an *in-rem cogent* binding element of copyright law.

Throughout the article, I argue that making copyright's exemptions reciprocal corresponds well with the economics of copyright and public-welfare considerations. Overall, reciprocal share-alike exemptions structure copyright law in manner that strikes a better balance between copyright's contribution (incentive) to cultural production and copyright's social cost – the burdens it imposes on future creators.[17] As long as a reciprocal share-alike requirement is structured in a scope that maintains enough incentives to produce secondary works, it represents a social benefit that copyright law should capture. In addition, the article argues that reciprocal share-alike exemptions further enhance democratic, autonomy and distributive values that underlie a public-oriented vision of copyright law.

By proposing to make copyright exemptions reciprocal, I am not ignoring the difficulties and disruptions that a share-alike requirement may generate in some circumstances. I discuss these difficulties in part IV *infra*. Just like other elements and principles of copyright law, a reciprocal share-alike requirement may involve information costs, ambiguity and vagueness

[15] The Creative Commons is a nonprofit U.S. based organization that operates a licensing platform promoting free use of creative works (See <Creative Commons, http://creativecommons.org>). Within this framework, right holders can choose any combination of the following standardized terms: Attribution (requiring credit to the author), Noncommercial (authorizing all uses for noncommercial purposes), No Derivative Works (authorizing the use of verbatim copies and prohibiting the creation of derivatives), and, finally, Perpetuity. The basic idea behind the Creative Commons is to facilitate the release of creative works under standardized, automated and relatively generous licensing scheme that makes copyrighted works available for sharing and reuse.

[16] See section II(C)(II)(c) and section III(B) *infra*.

[17] For a discussion of copyright's economics and the contribution of a reciprocal share-alike requirement in striking a better balance between the economic incentive that copyright grants and the burdens it imposes on future cultural activities see section III(A) *infra.*

that require resolving.[18] Yet, these difficulties need not discourage policy makers from considering the adoption of reciprocal share-alike exemptions.

One advantage of reciprocal share-alike exemptions is their ability to overcome limitations that international copyright law and political pressures impose on domestic copyright law.[19] Another advantage of reciprocal share-alike exemptions refers to their contribution in overcoming institutional biases of media markets. Copyrighted materials are both *inputs* and *outputs* of cultural production activities. This fact inflicts a contradiction between content producers' capacity as consumers-users of copyrighted materials and their concurrent capacity as owners of copyrighted materials. Consequently, corporate media juggles between relying on copyright's exemptions scheme, for its own cultural production activities, and imposing proprietary restrictions on those who wish to access and use its cultural outputs. Entities that own and manage large portfolios of copyrighted works are likely to favor their proprietary capacity, as copyright owners, over their ability to extract privileges from copyright's exemptions schemes. Other participants in the creative playground, such as amateur creators, tend to be in a more disadvantaged position while being significantly limited in their ability to access and use corporate media's copyright portfolios. Among other aspects, reciprocal share-alike copyright exemptions attempt to overcome this contradiction by enhancing distributive values and an element of reciprocity into copyright law. As parts II-III further elaborate, by doing so, reciprocal share-alike exemptions also decentralize and improve the diversity of creative spheres.

Structurally, the article consists of four parts. Part II outlines my proposal for reciprocal share-alike copyright exemptions. I illustrate my proposal through three case-studies of copyright exemptions: **(a)** the fair-use defense; **(b)** the DMCA's safe-harbors for hosting services providers and their application in the context of content-sharing platforms; **(c)** a copyright exemption for digital archiving in relation to current pending reform proposals in section 108 of the Copyright Act.[20] Based on these case-studies, part III further elaborates the justifications for introducing elements of reciprocity and a viral share-alike requirement to copyright law's exemptions. I begin by explaining why reciprocal share-alike exemptions correspond well with economic analysis. I then analyze the role of reciprocal share-alike exemptions in advancing a broader framework of considerations that wishes to advance users'

[18] See part IV *infra*.
[19] See part III *infra*.
[20] See Part II(C)(II) *infra*.

rights, democratic and distributive values. Part IV discusses several potential critiques and counterarguments against the thesis of this article. Part V summarizes and concludes.

Part II – Reciprocal Share-Alike Copyright Exemptions

A. A Preliminary Outline of the Proposal

The basic logic of reciprocal share-alike exemptions is quite simple and straightforward. Whenever a party that uses copyrighted materials relies on a copyright exemption, subsequent users that wish to access and use the new expression (which uses the originating copyrighted materials), 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.

The reciprocal share-alike requirement involves both a *duty* of the secondary user, who initially relied on a copyright exemption, and a *right* of subsequent "third-generation" users, who now wish to make use of the secondary work. It is the duty of the secondary user to make her work accessible and usable for similar subsequent uses. It is the right of "third–generation" subsequent users to access and use components from the secondary work for uses that comply with the conditions of the reciprocal-share-alike requirement. Consider the following examples as potential instances for implementing a reciprocal share-alike requirement:

(a) A search engine that produces and displays thumbnail images from web-sites' in its results pages, or a search engine that caches the content of entire web-sites as part of its information retrieval services.[21] According to my proposal, as long as these actions are based on a copyright exemption, such as the fair-use defense,[22] or the DMCA's safe-harbor for caching,[23] subsequent third-parties should be legally entitled to freely use these outputs of

[21] See e.g. the facts of the following cases (Perfect 10, Inc. v. Amazon.com, Inc., No. 06-55405, 2007 U.S. App. LEXIS 11420 (9th Cir. May 16, 2007; Kelly v. Arriba, 336 F.3d, 811 (9th Cir 2003); Kelly v. Arriba 280 F.3d 934 (9th Cir. 2002); Field v. Google (412 F. Supp. 2d 1106 (D. Nev. 2006). The Perfect 10 v. Amazon and Kelly v. Arriba cases involved the production and use of thumbnail images. The Field v. Google case dealt with caching. "Caching", could be broadly defined as "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request".

[22] 17 USC S § 107 (2005).

[23] See 17 U.S.C. § 512(b) (2005). This section determines that an internet service provider shall not be liable for infringement of copyright by reason of the *intermediate and temporary* storage of material on a system or network controlled or operated by or for the service provider. In order to shelter under the exemption, the internet service provider must comply with three main conditions: (1) the copyrighted material was made available online by a person other than the service provider; (2) the copyrighted material was transmitted by that person through the system or network to another person; and (3) the storage was carried out through an automatic technical process for the purpose of making the material available to users of the system or network

search engines as well as to overcome technological protection measures and contractual limitations that attempt to impose restrictions in this context.

(b) A second example refers to commercial digital images collections - such as the ones of Getty Images, Corbis and the Bridgeman Art Library[24] – that produce, manage and merchandize digital images of originating cultural works. Many of these originating cultural works are works that already fell into the public domain. Yet, the databases of these digital images may be protected by technological protection measures and contractual limitations. At least in some circumstances, copyright protection may also rise if the digital images are considered as complying with the requirement of *originality* which is a prerequisite for copyright protection.[25] According to a reciprocal share-alike requirement, databases of public domain works should be obliged to make their materials accessible and usable by the public for free, regardless of the digital images' degree of creativity. I will return to this issue in section II(C)(III) when discussing the proposal of a compulsory license for digital archiving.

(c) Another example is the mechanical compulsory license in section 115 of the copyright act. Section 115 acknowledges a compulsory license regarding the making and distribution of sound recordings with musical works that were previously distributed with the consent of their copyright owner. According to a reciprocal share-alike requirement, producers of sound recordings that relied on section 115 compulsory license are obliged to treat-alike subsequent producers who wish to use extracts from the sound recordings for purposes such as sampling, even if such activity does not fall to any other copyright exemption.[26]

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who, after the material was transmitted had requested access to the material from the person who had made it available. Section's 512(b) exemption is further conditioned upon the obligation of the internet service provider to remove from the cache server any material that was claimed to be infringing material, as well as an obligation to condition access to the cached materials upon the terms, conditions and fees that were imposed by the provider of such materials.

[24] See:
<http://www.corbis.com/corporate/overview/overview.asp>;
http://www.bridgeman.co.uk/about/about_us.asp>; < http://creative.gettyimages.com/source/home/home.aspx>

[25] *See* 17 U.S.C. § 102(a) (2000). See also The Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp 2d 191 (S.D.N.Y, 1999) (ruling that photographs of art works, which were themselves out of copyright protection, should be denied copyright protection on account of lack of creativity. The court did not deny the fact that most of the photographs did require some amount of originality in the skill and effort invested in positioning the subjects, lighting, angle, selection of film and camera. However, according to the court, since the final outcome was no more than a slavish copy of an existing work, it could not meet the "creative spark" which, according to the Supreme Corut's *Feist* decision was the *sine qua non* of originality (see Feist Publications, Inc. v. Rural Tel. Services, 499 U.S., 340, 348).

[26] In the context of sampling, courts ruled that generally, unauthorized sampling should be considered as a copyright infringement and not as fair-use. See Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

(d) Parodies, satires and appropriation art are types of secondary works that tend to rely on the fair-use defense when using and integrating elements from copyrighted works.[27] According to a reciprocal share-alike requirement, works of these kinds, which rely on the fair-use defense in the course of their production, should be freely accessible and usable by subsequent "third-generation" creators and users. For example, if the "Saturday Night Live" television show includes a satire on "Sex and the City", or if the artist Jeff Koons appropriates copyrighted works in the course of his artistic expressions,[28] later creators and users should be entitled to access and make additional uses of these works without any restrictions other than on slavish copying in the course of direct commercial competition.

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These are just a few examples, in a nutshell, to be followed, in section II(C), by three detailed case-studies of reciprocal share-alike requirements. My purpose in the following paragraphs is to use these examples as a benchmark for two preliminary observations regarding reciprocal share-alike requirements. First, reciprocal share-alike requirements are not intended to govern the relationship between originating copyright owners and "third-generation" subsequent users. This relationship is governed by other elements of copyright law, each case according to its particular merits. Reciprocal share-alike requirements focus on the relationship between secondary users and later "third-generation" subsequent users, who built upon ancillary and derivative works of secondary users. Returning now to the example of mechanical compulsory license under section 115 of the Copyright Act, a reciprocal share-alike requirement would govern the relationship between producers of a "cover-versions" album and third-parties who wish to make use of it. Yet, the relationship between such third-parties and the authors of the originating musical works would still be governed by the general principles and schemes of copyright law. As a practical matter, however, at least in some circumstances, in their relationship with originating copyright owners, "third-generation" subsequent users may benefit from exemptions and privileges similar to the ones of their predecessors (the secondary users). Moreover, in section II(C)(II) I will demonstrate that there are instances in which while originating copyright owners are

[27] See e.g Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

[28] See < http://jeffkoons.com/>/ Jeff Koons was also involved in a series of copyright infringements litigations in which he argued for the fair-use defense, all of which, except the Blanch case (ibid) he lost. See also Rogers v. Koons, 960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934, 121 L. Ed. 2d 278, 113 S. Ct. 365 (1992); Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993); United Feature Syndicate v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993)).

easily willing to permit free use of their works, it is the layer of "secondary-users" that imposes restrictions and obstacles on "third-generation" subsequent uses.

A Second related point is that reciprocal share-alike exemptions come on top, and not instead, of other copyright exemptions. Returning again to the example of section 115 and its mechanical compulsory license, certain uses of a musical recording that were made under section's 115 compulsory license, may be classified as fair-use. The purpose of the reciprocal share-alike requirement is to go one step further. Once a music producer relied on section 115, his obligations toward future users of his recording may be broader than the general fair-use defense and they may also enforce a compulsory license scheme regarding similar uses by subsequent "third-generation" users.

B. Doctrinal Aspects

Overall, current doctrinal structure of copyright law is able of adopting elements of a reciprocal share-alike requirement with relative ease. Several of copyright law's main doctrines are structured in a manner that is responsive to elements of reciprocity and a share-alike requirement. The fair-use defense is the first copyright doctrine that arises in this context. The equitable nature of fair use and its common law origins[29] make it an appropriate legal mechanism for such a development. Fair use is also considered as a mechanism that is aimed to advance efficiency,[30] a ubiquitous creative sphere, free speech[31] and distributive values in creative activities.[32] In part III I will show how these considerations, which are part of fair-use analysis, are advanced by a reciprocal share-alike requirement. Hence, from this perspective also, there seems to be reason in integrating a reciprocal share-alike requirement into fair-use analysis.

Another accumulative mechanism for implementing a reciprocal share-alike requirement is the doctrine of *copyright misuse*.[33] Copyright misuse protects a defendant's use of

[29] See *Sony Corp. v. Universal City Studios, Inc*., 464 U.S. 417, 454 (1984) (characterizing fair use as "often described as an "equitable rule of reason,"). See also *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 547 (1985).

[30] See e.g. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax case and Its Predecessor*, 82 COLUM. L. REV 1600 (1982); Glynn S. Lunney, *Fair Use and Market Failure Sony Revisited*, 82 B.U.L. Rev, 975 (2002).

[31] See Eldred v. Ashcroft, 537 U.S. 186 (2003); *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 547 (1985) (classifying fair-use as a mechanism for internalizing free speech consideration into copyright law).

[32] See e.g. Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 *Tex. L. Rev.*, 1535 (2005).

[33] see Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990); DSC Communications Corp. v. DGI Tech., Inc., 81 F.3d 597, 601 (5th Cir. 1996); Alcatel USA, Inc. v. DGI Technologies, Inc., n190. 166 F.3d 772 (5th Cir. 1999). See also Ramsey Hanna, *Note, Misusing Antitrust: The Search for Functional Copyright Misuse*

copyrighted material when the plaintiff has claimed a right in his work beyond the scope of copyright law and when such a claim is contrary to public policy. Traditionally, the doctrine of copyright misuse has been dedicated mostly to circumstances of anti-competitive conducts by copyright owners. Yet, based on its equitable background, there is no prevention of expanding the doctrine's scope to circumstances that justify the implementation of a reciprocal share-alike requirement. The anticipated scenario in this context would be one of a refusal to license materials that were previously produced while benefiting from a copyright exemption. In such circumstances, the reciprocal share-alike requirement may give rise to a copyright misuse claim. Finally, once acknowledging the advantages of reciprocal share-alike exemptions, there may be circumstances that will justify particular legislative amendments in this direction. I demonstrate such circumstances in section II(C)(III) *infra* when discussing the case-study of a particular exemption for digital archiving.

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Just like other copyright doctrines (e.g. fair-use and the idea-expression dichotomy), the implementation a reciprocal share-alike requirement is expected to face difficulties that derive from potential ambiguities in its scope. More specifically, the main challenge lies in delineating the boundaries of legitimate-justified reciprocal uses of a work the creation of which was based on a copyright exemption. Just like fair-use, reciprocal share-alike requirements consist of an open-ample standard that courts and at times, legislators will have to develop from one case to another. In section II(c) *infra* I will make first steps in this context when discussing the implementation of a reciprocal share-alike requirement in three case-studies, including fair-use and the safe-harbor for hosting services providers. At this stage, I wish to emphasize the following aspects:

Overall, reciprocal share-alike requirements are aimed to provide their beneficiaries with something more than copyright's general framework of exemptions. Copyright's general scheme of exemptions scheme is unilateral. Reciprocal share-alike exemptions are broader because they are multi-lateral. For this reason a reciprocal share-alike requirement may trump technological protection measures and contractual limitations. In addition, a reciprocal share-alike requirement may also lower the thresholds for establishing a legitimate authorized free-use by "third-generation" subsequent users. This last point requires further elaboration:

Standards, 46 Stan. L. Rev. 401, 416-19 (1994); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095 (2003).

As Jim Gibson demonstrated recently,[34] open-ample copyright exemptions involve a considerable degree of vagueness. Therefore, when copyright defendants are risk-averse, open-ample copyright exemptions also involve a chilling effect. In such occasions, market practices tend to create a feedback loop in which risk aversion induces "small-pocket" users to buy licenses out of an excess of caution. Users may take licenses even when they would have had a good claim of a copyright exemption. Reciprocal share-alike exemptions provide a mechanism that balances and unwinds this tendency. Whenever a major market-player establishes parts of his cultural-creative activities on a copyright exemption, subsequent users are then able to glom on the exempted outputs of this market player for additional uses with similar purposes.

Reciprocal share-alike exemptions thus mitigate the negative spillovers of risk-averse copyright users. They enable risk-averse copyright users to rely on major players who are more inclined to take risks in the course of contending for a copyright exemption. Consider the following example: Google argues that the fair-use defense legitimizes and authorizes reproduction of entire copyrighted works for archiving purposes.[35] In such circumstances, the imperative of a reciprocal share-alike requirement would be that visa-vi Google, future third-parties are entitled to a similar derivative privilege regarding reproduction of entire works from Google's various databases and web-utilities. Once Google decides to manage parts of its infrastructures around a fair use presumption, Google is obliged to entail future third-parties similar powers and privileges. Google's capacities to take legal and financial risks, in delineating the boundaries of fair-use, thus become a certificate of guarantee for risk-averse users who wish to use of Google's materials.

Another aspect is that the elements of "reciprocity" and "share-alike" are not identical. The *share-alike* element focuses on a requirement that secondary users will treat-alike future "third-generation" subsequent users in the course of additional creative activities *with attributes similar to the ones of the originating exempted uses*. Consider, for example, a museum that relies on the fair-use defense when producing digital images of copyrighted art works for commentary purposes - e.g. an online catalogue of an exhibition, or a book about an artist. The share-alike requirement would oblige the museum to treat-alike future third-parties who wish to use the museum's own copyright portfolio for similar purposes. Hence, a

[34] See Jim Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882 (2007).
[35] See footnote 11.

Wikipedia article[36] on art related aspects, or an artist, would now be able to produce and use digital images from the museum's collection of art works.

The element of *reciprocity* is broader and a little more complex. Consider, for example, a content-sharing platform that shelters under the DMCA's section 512(c) safe-harbor for hosting services providers.[37] According to the reciprocity requirement, content-sharing platforms that shelter under section 512(c) may not limit - contractually, technologically, or otherwise legally – derivative uses of materials and information (e.g. metadata) that reside on the platforms after being uploaded by third-parties. In this example there is no exact resemblance between the activities of the content-sharing platform and subsequent uses of materials that were uploaded on the platform. The crux point here is a little different. The content-sharing platform is regarded as a mere conduit for third parties' content and it is for this reason that it may shelter under section's 512 "notice and take-down" safe harbor. Yet, the flip-side of content-sharing platforms' reliance on section's 512(c) safe-harbor is a reciprocal obligation not to organize the platform around a proprietary regime. Reciprocity, therefore, is a concept that is broader than the "share-alike" element. It may apply also on "third-generation" subsequent uses that are not similar to the secondary uses from which they draw copyrighted materials. In the example of content sharing-platforms, the reciprocal obligation not to limit subsequent uses of materials that were uploaded on the platform covers also uses that are broader than the platform's function as "a network that hosts information at the direction of users". Yet, the partial immunity of content-sharing platforms, from copyright infringement claims, due to their classification as a "mere conduit", imposes a qui-pro-quo obligation not to enforce a proprietary regime on future third-parties.

Finally, a regime of reciprocal share-alike exemptions requires determinations regarding the scope of copyrighted materials that it applies to. One alternative is to limit the applicability of a reciprocal share-alike requirement only to the originating copyrighted materials that were obtained and used based on a copyright exemption. A second broader alternative is to apply the requirement also to additional copyrighted materials that were created, added and integrated by the secondary user in the course of his reliance on a copyright exemption. Consider, for example, a *fan-fiction* work that relies on the fair-use defense in the course of its use of copyrighted materials. The question here would be whether the reciprocal share-alike requirement may enable also free use of the *novel* creative elements

[36] http://www.wikipedia.org/ . Wikipedia is a collaborative commons-based peer-production open-content encyclopedia project.
[37] See section II(C)(II) *infra.*

within the fan-fiction work. Similarly, regarding sound recordings that were produced based on section's 115 compulsory license scheme, the question would be whether and to what extent, the reciprocal share-alike requirement applies also with regard to the new sound recording that was produced.

The justifications set forth in part III *infra* may justify a broad implementation of the reciprocal share-alike requirement and its extension also to additional creative materials that were added and integrated by the secondary user. Yet, here also, the reciprocal share-alike requirement bears much resemblance to the nature of fair-use as an open-ample standard-based exemption. The justification, scope and attributes of a reciprocal share-alike requirement may vary from one scenario to another. Just like in the context of fair-use, courts will have to develop, on a case to case basis, a codex for considerations and instances that justify the imposition of a reciprocal share-alike requirement in a scope and degree that may change from one instance to another. I will return to this point in the next section where I begin laying the grounds for such a codex.

C. Three Case-Studies

My purpose in this section is to exemplify the idea of reciprocal share-alike exemptions through three case-studies: the fair-use defense; the DMCA's potential safe-harbor for content-sharing platforms and a particular copyright exemption for digital archiving. Through these case-studies I demonstrate the adaptability and advantages of incorporating reciprocal share-alike requirements into copyright law's exemptions' scheme. My second purpose is to make preliminary steps in developing a codex of considerations and parameters that courts and legislators will take into account in the course of crafting copyright's reciprocal share-alike exemptions. Based on this discussion, part III then includes a theoretical analysis regarding the justifications and potential objections for reciprocal share-alike copyright exemptions.

(I) Fair-Use

Fair Use is an affirmative defense to what would otherwise be an infringing act.[38] Fair use allows "others than the owner of the copyright" to use, without permission, copyrighted work when it is "reasonable",[39] in order to promote "science and the useful arts."[40] There is no

[38] See 17 U.S.C. §107 (2000). Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row Publ., Inc. v. Nation Enter., 471 U.S. 539, 561 (1985).
[39] Harper & Row Publ., Inc. v. Nation Enter., *supra* note 38, at 549.
[40] U.S. Const. art. 1, §8, cl. 8; Harper & Row Publ., Inc. v. Nation Enter., *supra* note 38, at 549.

bright line rule to distinguish what is reasonable fair use from what is actionable infringement.[41] The statute provides a list of examples of fair use, including "teaching . . . , scholarship, or research," but the list is not exhaustive. Instead a court is to "apply an equitable rule of reason" by weighing four non-exclusive statutory factors, none of which are singularly determinative, to decide if a use is "fair use."[42] The four factors that section 107 mentions are: **(1)** the purpose and character of the use; **(2)** the nature of the copyrighted work; **(3)** the amount and substantiality of the portion used and **(4)** the effect of the use on the potential market for or the value of the copyrighted work.[43] This case-by-case analysis facilitates the balancing of various competing interests, but by its nature, it fails to offer guiding-lines that are both clear and certain.

According to my proposal, the fair-use defense should impose a reciprocal share-alike obligation on those who rely on fair use in the course of their cultural production and cultural distribution activities. The reciprocal share-alike requirement is not intended to invalidate, retroactively, an exempted fair-use, if the secondary user refuses to enable future third-parties with similar privileges. Rather, the reciprocal share-alike requirement provides future third-parties with an independent unconditional privilege to make free use of secondary materials that were produced with reliance on the fair-use defense. The only condition is that such subsequent uses will carry attributes similar to the ones of the originating secondary uses. Consider the following examples:

If a broadcasting station considers a parody, embedded in a television program, as fair use, a similar rule should apply on future transformative uses of the broadcasting station's own creative materials. Thus, the broadcasting station should be prohibited from preventing public access or secondary uses of its parodic television program. If Google claims that its Book Library project's[44] reproduction of entire copyrighted books, for archiving purposes, is fair-use, a similar rule should apply on reproduction of entire books and other copyrighted materials, from Goggle's databases, for archiving purposes. Moreover, once relying on fair-use, Google should be prohibited from limiting access and further uses of its entire "naked" database. People should be able to browse and search Google's Book Library just like they browse and search the entire world wide web and not only through Google's proprietary searching utilities. Similarly, consider Google's claim that the creation of reduced-size

[41] Campbell v. Acuff-Rose Music, Inc, *supra* note 38, at 577; Sony Corp. of Am. v. Universal City Studios, Inc., *supra* note 29 at 448, n.31
[42] *Sony*, *id* at 448-50.
[43] 17 U.S.C. §107 (2000).
[44] See footnotes 10-11 *supra*.

"thumbnail" images, from web-sites' visual content, is fair-use.[45] According to a reciprocal share-alike requirement, once establishing the production of thumbnail images on the fair-use defense, Google should enable free access and free use of its entire thumbnail images' databases for similar purposes by subsequent third-parties.

There are two categories of materials that a reciprocal share-alike fair-use may deal with. First, copies of the originating copyrighted materials that were obtained with reliance on the fair-use defense. Regarding this category, usually, the secondary user will not have a valid copyright claim. Therefore, the impact of a reciprocal share-alike requirement would focus on prohibiting technological and contractual restrictions that the secondary user may attempt to enforce against third-parties. The second category refers to new copyrighted creative works that secondary users produced with reliance on the fair-use exemption. Regarding this category, the meaning of a reciprocal share-alike requirement is that subsequent users are able to freely access and use the new copyrighted work up to an extent and degree similar to the ones that the original secondary user contended when relying on the fair-use defense. There is no requirement of exact resemblances between the two uses, but rather a broader notion of reciprocity. Indeed, delineating the boundaries in this context involves a considerable degree of uncertainty and ambiguity, just like the traditional fair-use defense does.[46] Yet, in the long-run and across times, this ambiguity and uncertainty will gradually be resolved. Overall, this ambiguity also seems minor than the usual vagueness users face when considering to rely on the fair-use defense. The reason for this divergence lies in the fact that "third-generation" subsequent users, who rely on the reciprocal share-alike requirement, have the preceding secondary use as a detailed benchmark for defining the nature and scope of their legitimate free use.

There is still one prominent challenge that can be raised against the proposal of a reciprocal share-alike fair-use. According to this critique, the whole notion of a reciprocal share-alike requirement is unnecessary. It complicates fair-use analysis while the same goals may be achieved through the following, more simple, structure. Since "third-generation" subsequent users are also entitled to their own fair-use privilege, their reliance on the traditional fair-use defense should suffice when establishing their powers and liberties in using copyrighted materials. Hence, there is no need, or justification, to complicate copyright law with a reciprocal share-alike requirement. Moreover, one may argue, that the whole

[45] See Perfect 10, Inc. v. Amazon.com, Inc., No. 06-55405, 2007 U.S. App. LEXIS 11420, at 38 (9th Cir. May 16, 2007).
[46] See Joseph P. Liu, *Copyright and Breathing Space*, 30 Colum. J.L. & Arts 429 (2007).

notion of a reciprocal share-alike requirement could be part of the considerations that should guide courts in determining the scope and nature of fair-use arguments by "third-generation" subsequent users. My answers to this challenge cover several layers.

Basically, I entirely agree that one out of several tracks, in implementing the notion of a reciprocal share-alike requirement, may be fair-use arguments by future "third-generation" subsequent users. Nevertheless, this fact does not undermine the value of developing the notion of reciprocal share-alike exemptions and making it a condition of the fair-use defense. To begin with, as already mentioned, a reciprocal share-alike requirement may trump also technological and contractual restrictions. In such circumstances, the general traditional fair-use defense that "third-generation" subsequent users may benefit from would not suffice. More generally, adding a reciprocal share-alike requirement, as a condition of the fair-use defense, may also provide future third-parties with powers and privileges that are broader than the ones that they would have had when arguing for their own fair-use defense. Recall, that since fair-use includes a strong element of uncertainty and ambiguity, risk averse copyright users often seek a license when none is needed. This in turn causes a “doctrinal feedback” that expands copyright boundaries.[47] A reciprocal share-alike requirement mitigates this tendency. Gradually and in the course of time, it creates "free-zones" in which a presumption of legitimacy is stamped on certain types of uses. Thus, a reciprocal share-alike fair-use enables individuals and small market players to glom on the conducts of major market players who are able and more inclined to insist on fair use in disputed and marginal cases.[48]

Additionally, the reciprocal share-alike requirement may transform the burden of proof in fair-use cases. The Supreme Court defined fair-use as an "affirmative defense," ruling in effect that the burden of proof is on the party claiming fair use.[49] This means that without a reciprocal share-alike requirement, "third-generation" subsequent users bear the burden of proving that their use meets the conditions of section 107. A reciprocal share-alike requirement shifts the burden of proof to the originating secondary user who initially relied on the fair-use defense in the course of his own use of copyrighted works. As long as a "third-generation" user makes a use with attributes similar to the ones of the originating secondary use, a presumption of legitimacy arises. The power of a reciprocal share-alike fair-

[47] See Gibson, *supra* note 34.
[48] See also footnote 34 and the text accompanying it.
[49] See also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 568 (1985). See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (remanding case involving alleged parody fair use for further findings on whether the defendant had met the burden of proving absence of harm to potential derivative work markets for plaintiff's song).

use, therefore, is also in creating a codex of instances that are presumed as legitimate privileged uses because they were treated as such by their predecessors.

(II) Reciprocal Share-Alike Copyright Exemptions for Content-Sharing Platforms

Another instance in which a reciprocal share-alike copyright exemption may be suitable relates to content-sharing platforms and their potential partial immunity from liability for copyright infringements; all with regard to materials that were uploaded on the platform by third-parties. The main question in this context is whether and under what conditions content-sharing platforms may shelter under the safe-harbor of section 512(c) of the Federal Copyright Act as added by the DMCA.[50] The most recent example for the centrality of section 512(c) in this context is a law suit filed by the entertainment conglomerate Viacom against YouTube.com for nearly 600,000 unauthorized clips of Viacom's entertainment programming that have been available on YouTube.[51] Several scholars, including Timothy Wu[52] and Lawrence Lessig[53] expressed the view that section's 512(c) safe-harbor applies also with regard to the activity of content-sharing platforms and other types of web 2.0 applications. Overall, the approach of Wu and Lessig seems both justified and fundamental. It is fundamental for continuous operation of content-sharing platforms. It is justified because as Lessig points out, with the enactment of the DMCA, the safe-harbors for internet service-

[50] 17 U.S.C. 512 (2000). Section 512(c) which deals with "Information residing on systems or networks at direction of users" limits service providers liability for content posted or hosted at the direction of end users. The provision protects those service providers that receive no financial benefit "directly attributable to the infringing activity," where the provider has neither the right nor ability to control the activity and where, if properly notified, the service providers suppresses access to the infringing content. However, it does not protect service providers with actual or constructive knowledge of infringing content who do not, on their own initiative, move quickly to disable access. Section 512(c) additionally details the need for service providers to provide agents charged with handling infringement notifications on their behalf and enumerates the elements constituting notification sufficient to shift the liability burden back on to the service providers. The legislative history of section 512(c) lists as examples to its applicability circumstances such as "providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users.", whereas not included here would be material "that resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user". See Commerce Rep. (DMCA), p.53. The question still remains whether and under what conditions section 512(c) safe-harbor will shelter content-sharing platforms such as YouTube.com regarding copyright infringements that took place on the content-sharing platform.

[51] See Greg Sandoval, "Viacom sues Google over YouTube clips", Story last modified Tue Mar 13 15:21:21 PDT 2007 <http://www.news.com/Viacom+sues+Google+over+YouTube+clips/2100-1030_3-6166668.html.

For a copy of Viacom's complaint see:
http://www.news.com/pdf/ne/2007/ViacomYouTubeComplaint3-12-07.pdf/

[52] See Tim Wu, Does YouTube Really have Legal Problems?, Slate Magazine, Oct. 26, 2006 (at < http://slate.com/id/2152264>

As Wu writes: "In 1998, that (section 512(c) meant Geocities and AOL user pages. But in 2006, that means Blogger, Wikipedia, Flickr, Facebook, MySpace, and, yes, YouTube—all the companies whose shtick is 'user-generated content."

[53] Lawrence Lessig, Make Way for Copyright Chaos, New York Time, March 18 2007, (at <http://www.nytimes.com/2007/03/18/opinion/18lessig.html?ex=1331870400&en=a376e7886d4bcf62&ei=5088&partner=rssnyt>

providers were part of a quid-pro-quo against the enactment of the anti-circumvention prohibitions. Copyright owners were given much more (and maybe even too much) control with regard to their portfolio of copyrighted works. Yet, along side, congress had made a complementing move by reducing the liability of [content] intermediaries and service-providers from an *opting-in* strict liability regime to an *opting-out* "notice and take down" regime.[54]

These are complex issues that exceed the scope and purpose of this article. For my current purposes, the important point is that the applicability of section's 512(c) safe-harbor can and should be conditioned upon a reciprocal share-alike requirement. Content-sharing platforms that rely on section's 512(c) safe-harbor should not limit - contractually, technologically, or otherwise legally - secondary uses of materials and information (e.g. metadata) that resides on their platforms after being uploaded by third-parties. According to this view, the flip-side of content-sharing platforms' reliance on section's 512(c) safe-harbor is a reciprocal share-alike obligation not to organize the platform around a proprietary regime. Once classifying their activity as "a network that hosts information at the direction of users" and sheltering under section's 512(c) exemption, content-sharing platforms cannot "lock" – either technologically or legally – third parties' materials that their hosting on the platform is privileged.

The proposal to implement a reciprocal share-alike requirement in the context of section 512(c) does not rest on hypothetical scenarios regarding the manners content-sharing platforms operate. Rather it is based on the fact that as a practical matter, at least some user-generated content-sharing platforms impose proprietary restrictions. One prominent example appears in the case of YouTube.com. Basically, users can access the content on YouTube.com free of direct monetary charge. Yet, there are still several proprietary restrictions that Youtube.com imposes on its users. First, technically, the system does not allow users to actually get a copy of content that someone else has uploaded. Users can only view the content or link to it. Users cannot download content and further use it in other platforms and settings. In addition, YouTube.com claims copyright to all content on the

[54] See Wu, *supra* note 52. See also Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 Tex. L. Rev. 1799, 1861 (2007) (discussing the choice between an "opting in" strict liability regime and an "opting out" "notice and take down" regime, in the context of Google's library project, while making analogies to section's 512(c) notice and take down regime with regard to hosting services providers).

website, except users submissions,[55] and including without limitation, the text, software, scripts, graphics, photos, sounds, music, videos, and interactive features.[56]

The purpose of a reciprocal share-alike requirement is to prevent the imposition of proprietary restrictions on user-generated content and particularly content that its contributors have agreed to provide, free-of-charge, a "worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website".[57] Section's 512(c) safe-harbor is based on the social benefits that derive from ubiquitous free flow of content, as well as on the social costs, including chilling and deterrence effects, that a strict liability regime would impose on content-sharing platforms.[58] In addition, the political economy of collaborative user-generated platforms decreases, to a minimum, the financial investment of the platform's operators in acquiring content. The model of cultural production and cultural exchange that content-sharing platforms rely on is a model that uses communities and user-generated content as the inputs and outputs of the platform.[59] In many circumstances, this model operates under a framework in which the platform obtains user-generated content free of payment.

The accumulation of these two elements explains and supports a reciprocal share-alike requirement in the context of section's 512(c) safe-harbor. Such a requirement promotes the same public interests that originally entail content-sharing platforms with a safe-harbor. In addition, such a requirement seems to correspond well and maximize cultural production and cultural distribution in a business model which does not require large-scale investment in the production of creative content. More generally, the case of content-sharing platforms sets a good example for three elements that are associated with reciprocal share-alike exemptions: **(a)** economic efficiency; **(b)** potential contribution to copyright's communications policy; and **(c)** distributive and democratic values.

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[55] User-submissions are subordinated to a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license (see section 6(c) of YouTube.com terms of use at: http://www.youtube.com/t/terms).
[56] See section 6(c) of YouTube.com terms of use at http://www.youtube.com/t/terms).
[57] See section 6(c)of YouTube.com terms of use at http://www.youtube.com/t/terms
[58] See generally Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U.J. Legis & Pub. Pol'y, 16 (2006); Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901 (2002).
[59] See Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 Yale L.J. 369 (2002); YOCHAI BENKLER, THE WEALTH OF NETWORKS - HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (using economic, political and technological analyses to explain how new information technologies make it easier for individuals to collaborate in producing cultural content, knowledge, and other information goods, *without a requirement of monetary incentives*).

(a) Economics

A reciprocal share-alike requirement improves the efficiency of cultural production and cultural exchange through content-sharing platforms. It does so by decreasing the burdens and costs on future creative activity that seeks to access and use user-generated content. Without a reciprocal share-alike requirement, commercial content-sharing platforms are more likely to burden future creative activity through the imposition of restrictions and costs. Yet, as already mentioned, in many occasions, these restrictions are barley required for the operation of content-sharing platforms. Therefore, they seem to bear no social benefit.

Similarly, a reciprocal share-alike requirement provides better tools to overcome externalities that are associated with the activity of proprietary content-sharing platforms. Restrictions that are imposed by content-sharing platforms tend to undermine the utilization of the platform's content for future access and creative activity. This social cost, however, is not internalized by diffused individual users of the content-sharing platform – either ex-ante uploaders or ex-post recipient users – who lack the incentive to negotiate over the platform's terms-of-use conditions. Users may not require direct financial benefits as a precondition for investing time, efforts and resources in producing and distributing content. Nevertheless, the exposure of users to restrictions and costs is likely to undermine their incentives and dedication for further creative activity and contribution to content-sharing platforms. The reciprocal share-alike requirement functions as a mechanism for overcoming this market-failure. It regulates and prevents content-sharing platforms from imposing such restrictions after glomming on the contribution of end-users and while benefiting from the safe-harbor of section 512(c). This in turn facilitates further uses of materials that were uploaded on content-sharing platforms. As long as the reciprocal share-alike requirement does not undermine the incentive for operating content-sharing platforms, the benefits of such a requirement seem to outweigh its costs; or at least, this seems to be the case whenever the content is uploaded and distributed, for free, by its originating contributors.

(b) Copyright's Communications Policy

The example of content-sharing platforms also highlights the role of reciprocal share-alike exemptions in copyright's communications policy. Together with telecommunications and media regulation, copyright law functions as a focal legal mechanism for regulating media and communications platforms.[60] The content layer, which is a central component of speech

[60] See Timothy Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278 (2004).

and communicative activities, is basically governed by copyright law.[61] Moreover, any regulation of the content layer has direct implications on the identity and conducts of media and communications entities, as well as on the advancement of goals such as diversity and competitiveness.[62]

Reciprocal share-alike exemptions advance communications' policy goals of competition, institutional diversity and decentralization in networked cultural retrieval markets. Reciprocal share-alike obligations prevent dominant content-sharing platforms from misusing their market-share and consequently, their appeal to contributing users, by restricting users and other infrastructures from further utilizing content that was uploaded on the platform. Presumably, a reciprocal share-alike requirement may decrease the incentive of commercial enterprises to invest resources in developing or acquiring content-sharing platforms. Yet, here also, from a communications policy perspective, there may be advantages to a policy that strengthens public-oriented and individual-based content-sharing platforms, while reducing the incentives and therefore, the presence of commercial content-sharing platforms. A reciprocal share-alike requirement thus serves as a regulatory mechanism that structures content-sharing platforms with attributes closer the ones of "common-carriers".[63] The manner this regulation operates is by conditioning the safe-harbor for content-sharing platforms upon a requirement to make the content accessible and usable by future third-parties. The incentive to apply open-access standards is thus achieved through the partial immunity from legal and financial risks that the safe-harbor regime grants content-sharing platforms.

(c) Distributive and Democratic Values

Another related aspect is the contribution of a reciprocal share-alike requirement to the advancement of distributive and democratic values. In the last decade, academic scholarship, as well as public advocacy, has advanced what could be broadly described as a democratic

[61] See Yochai Benkler *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 Fed. Comm. L. J. 561 (2000).
[62] See Wu *supra* note 60, Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613 (2001); Randal Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 Antitrust Bull 423, (2002).
[63] The concept of a "common carrier," dating from 16th century English common law, captures private entities that perform public functions. Since at least the middle ages, most significant carriers of communications and commerce have been regulated as common carriers. Common carrier rules have resolved the disputed issues of duty to serve, nondiscrimination, and interconnection. Facilities such as railroads, telegraphs and telephone companies were obliged either by common law or by legislation to implement an equal "duty to serve" regime. The history of common carrier duties illuminates three reasons supporting the imposition (and the occasional elimination) of those requirements. Common carrier duties have been imposed variously upon theories of de facto and de jure monopoly, on the theory that the enterprise had become "essential," and upon theories that the enterprise was publicly concerned in a particular manner (See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225 (2002) (surveying the history of common carriers and arguing that the same reason justify a general interconnection obligation for Internet carriers).

movement of copyright law. This development reflects new perspectives on the freedom of speech – copyright interface,[64] in at least, three key levels: **(1)** An in-depth inspection of instances and manners in which copyright law tends to abridge free-speech values both in terms of individual speakers' negative liberty of expression and in terms of audience reception theories that concentrate on copyright's negative impact on the advancement of a robust, pluralistic and diversified creative spheres;[65] **(2)** the advancement of *democratic theories* of copyright law, which both justify and attempt to construct copyright's scope according to the central values of a liberal democracy.[66] **(3)** Additionally, several scholars, including Molly Shaffer Van Houweling and Jack Balkin, emphasized the importance of structuring copyright law around distributive justice considerations that champion broad and equal distribution of expressive opportunities.[67]

As a practical matter, the implementation of distributive and democratic values, as part of copyright law, faces many difficulties and hurdles.[68] At this juncture, one may notice again the virtues of reciprocal share-alike exemptions; overall, and in the unique context of content-

[64] Prior to that, the first wave of academic discussions evoking the tensions between copyright law and freedom of speech took place in the early seventies. It was a very short but influential round of doctrinal and formalistic academic discourse, led by a seminal article by Melville B. Nimmer and several other articles that followed it (see Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, in 19 Copyright Law Symposium 43 (American Society of Composers, Authors and Publishers eds., 1971); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970). The finalization of this round was in a de-facto immunization of copyright law from a scrutinized inspection under the First Amendment. Nimmer's observation was straightforward: the conflict between copyright and free speech is generally ameliorated by copyright's role in incentivizing new expression and by copyright's "internal safety valves," copyright law doctrines that limit the scope and duration of copyright holder rights, most prominently the idea-expression dichotomy and the fair use exemption. It did not take long for courts, including the Supreme Court, to embrace Nimmer's opinion that no true conflict exists between copyright and freedom of speech (see *Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)* (explaining that First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable .expression and uncopyrightable facts and ideas")).

[65] See e.g. Neil. W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev., 1 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev., 354 (1999); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and L*aw, 76 N.Y.U. L. REV. 23, (2001).

[66] See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215 (1996); Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in THE COMMODIFICATION OF INFORMATION (Niva Elkin-Koren & Neil W. Netanel eds., 2002), 79-106; Neil V. Netanel, *Copyright and a Democratic Civil Society*, 106 Yale Law Journal 283 (1996);.Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002); William Fisher, "Theories of Intellectual Property", in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Edited by Stephen R. Munzer, Cambridge, Mass., Cambridge University Press, 2001), 168.

[67] See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 Tex. L. Rev., 1535 (2005). See Jack M. Balkin, *Commentary: Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U.L. Rev. 1, 4-5 (2004); Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 Tex. L. Rev. 1799, 1843-1855 (2007).

[68] See footnotes 5-7, 85-89 and the text accompanying them.

sharing platforms. A reciprocal share-alike requirement promotes distributive and democratic values by advancing free and equal access, as well as the ability to use, materials that were uploaded on content-sharing platforms. It does so while bypassing the usual obstacles that copyright legislation and the political process tend to impose in this context. Moreover, as already mentioned, a reciprocal share-alike requirement provides a mechanism of incentives that voluntary induces content-sharing platforms to adopt an open-access model. By making this observation I am not arguing that a reciprocal share-alike requirement is likely to democratize and decentralize media markets over a night. I do argue, however, that there is a practical solution at hand reach, which can improve the functioning of content-sharing platforms and their correspondence with democratic and distributive values.

(III) A Reciprocal Share-Alike Exemption for Digital Archiving

The last case-study is more particular and it refers to copyright exemptions that regulate digitized cultural preservation. The transformation from tangible cultural preservation to digitized cultural retrieval signifies the increasing dominance of copyright law over cultural preservation activities. Once transformed into digital domains, reproduction – an act that is exclusively reserved to copyright owners– becomes an integral element – a prerequisite - in almost any form of digital communication, creation, documentation, archiving and preservation activities.[69] Academic scholars and policy makers tend to agree that current copyright law schemes lack adequate exemptions for digital archiving and digitized cultural preservation. Copyright law's current scheme of exemptions and limitations does not seem to enable effective and sustainable digitized cultural preservation and retrieval activities outside of commercial market-settings. Current scope, interpretation and application of the fair use defense,[70] as well as of other particular exemptions that deal with reproduction for preservation purposes (e.g. section 108 of the Copyright Act[71]), seem to make them almost obsolete in context of digital archiving, and especially in the context of activities that involve large-scale reproductions of entire copyrighted works.[72]

In a recent important work, Diane Zimmerman articulated why commercial markets alone are unable to provide a comprehensive long-term framework for digital cultural preservation

[69] See 17 U.S.C. 106(1). See also *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999).
[70] See 17 U.S.C. 107. see also Guy Pessach, *Museums, Digitization and Copyright Law - Taking Stock and Looking Ahead*, Journal of International Media and Entertainment Law (2007) Available at SSRN: http://ssrn.com/abstract=961328
[71] 17 U.S.C. 108 (2000). See also Pessach ibid
[72] See Diane L. Zimmerman, *Can our Culture be saved? The Future of Digital Archiving*, 91 Minn. L. Rev. 989, 1012-1026 (2007).

that accords the public interest. Zimmerman then outlines her proposal for a new copyright exemption – a compulsory licensing scheme that would authorize reproduction of entire copyrighted works for the purposes of digital archiving and cultural preservation.[73] Similar proposals were outlined by Peter Menell[74] and by Section's 108 Study Group.[75] A full discussion of this topic exceeds the scope and purpose of this article. The relevant point for our purposes is the justifications and the manners in which a copyright exemption for digital archiving should incorporate a reciprocal share-alike requirement.

In her proposal, Zimmerman mentions two requirements that beneficiaries from the compulsory licensing scheme should follow. First, the database needs to be in a standardized format that allows users to search its content. Second, the database's public-domain materials need to be free for use by third-parties.[76] My approach takes Zimmerman's proposal one step further by arguing that an exemption for digital archiving should be subordinated to a broader reciprocal share-alike requirement. I suggest that the *entire* content of a digital archive that benefits from the proposed compulsory licensing scheme should be made accessible to the general public; thus, without imposing any technological or contractual limitations on third-parties who wish to access and use the archive.[77]

There are several reasons why an exemption for digital archiving should include a reciprocal share-alike requirement. To begin with, from a long-term perspective, effective capacities to access and use digital archives, including archives that benefit from the proposed compulsory licensing scheme, is no less compelling than effective ability to use originating copyrighted cultural materials for preservation purposes. The same justifications that underlie the proposed compulsory licensing scheme apply also with regard to the contents of digital archives. Therefore, materials that were obtained and archived based on a compulsory licensing scheme should be freely accessible to third-parties and their subsequent uses.

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[73] See Zimmerman, ibid at pages 1027-1040.

[74] See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age,* (July 10, 2007). UC Berkeley Public Law Research Paper No. 999801 Available at SSRN

[75] The Section 108 Study Group currently reexamines the exemptions and limitations applicable to libraries and archives under the Federal Copyright Act, specifically in light of the changes wrought by digital media. See Section 108 Study Group – Information for the 2006 Public Roundtable and Request for Written Comments, available at:http://www.loc.gov/section108/docs/FRbackground2-10-06.pdf (dated February 10, 2006).

[76] See Zimmerman, *supra* note 72, at 1033-1033 (adding that the costs of providing access to an archive's materials (rather than the value of the archived material itself) could still be legitimately imposed on its users).

[77] For a related discussion see also Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 Law & Contempt. Prob. 23 (2007) (making an analogy between [land] conservation easements and "share-alike" requirements that are included within the GPL and creative commons licenses). My proposed scheme in the main text is also based on an easement model, yet it is a model whereas the easement is mandatory and is based upon the grant of a privilege (exemption) for using copyrighted materials.

The compulsory licensing scheme may include, in appropriate circumstances, a compensation for third parties' subsequent uses of originating copyrighted materials. Nevertheless, as opposed to originating copyright owners, digital archives, which obtained their archived materials based on a digital archiving exemption, seem to have no justification for either controlling or being compensated for the use of their materials.[78] Commercial digital archives may use a variety of ways, such as subscription fees or indirect revenues from advertising, in order to recover their costs and make a reasonable profit. Yet, they seem to have no justification for imposing a proprietary regime on digital artifacts that were produced based on a copyright exemption for digital archiving.

More generally, a reciprocal share-alike requirement identifies and keeps tracks of the true subjects and beneficiaries of a digital archiving exemption, which are the general public and an intergenerational public interest in preserving cultural works and making them accessible for future generations.[79] Another function of a reciprocal-share-alike requirement in this context is mitigating the privatization of digital cultural preservation. This goal is obtained by securing the powers of public-oriented and individual-based cultural preservation institutions to access and make use of materials that are managed by commercial cultural retrieval entities (who rely on the proposed compulsory licensing scheme).[80]

At this juncture, there is one counter argument that calls for attention-: the potential negative impact that a reciprocal share-alike requirement might have on the incentive to invest recourses in the production and management of digital archives. This issue cannot be resolved accurately without empirical data regarding both the costs and the potential revenues of digital archives. Yet, even without obtaining this data, there are several reasons why a reciprocal share-alike regime is unlikely to destabilize commercial cultural retrieval databases, as well as otherwise diminish this area of social activity. One reason refers to the fact that cultural retrieval intermediaries function as aggregators of *existing* cultural materials, rather than as authors and creators of such materials. As a result, their fixed costs are relatively low and so are their thresholds of economic incentives. A second related reason

[78] One analogy in this context refers to the issue of database protection and the U.S approach not to provide independent copyright protection for databases that aggregate informational and cultural works. See e.g. Miriam Bitton, *A New Outlook on the Economic Dimension of the Database Protection Debate*, 47 IDEA, 93 (2006).

[79] John Henry Merryman, who is regarded by many as the lead theorist of cultural property law, has emphasized the intrinsic expressive value of cultural property as embodying the values of: truth, memory, and the shared significance of cultural works to communities and individuals within them. See John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 American Journal of International Law, 831 (1986); John Henry Merryman, *The Public Interest in Cultural Property*, 77 California Law Review, 339 (1989).

[80] See Guy Pessach, *[Networked] Memory Institutions - Social Remembering, Privatization and its Discontents*, (January 2008). Available at SSRN: http://ssrn.com/abstract=1085267

is that even without proprietary protection, commercial digital archives may use a variety of methods, such as subscription fees or indirect revenues from advertising, in order to recover their costs and make a reasonable profit. Indeed, the general analogy that comes into mind in this context is of databases and their lack of copyrightability.[81] Since producers of databases focus on accumulating existing cultural materials and knowledge, they do not obtain copyright protection for the mere aggregation of existing creative works. A reciprocal share-alike requirement follows the same logic while imposing obligations that are justified in the light of the digital archiving exemption that database producers would now benefit from.

Finally, even if a reciprocal share-alike requirement does decrease the incentive of commercial cultural retrieval intermediaries, this fact may be seen a potential regulatory virtue of such a requirement. As Zimmerman and others argue, in the unique context of digitized cultural preservation, public-oriented provision may have many advantages over market provision.[82] From this perspective, decreasing the incentives of commercial enterprises, while increasing the capacities and market-share of public-oriented cultural institutions, may represent a desired regulatory goal. The virtues of a reciprocal share-alike requirement in this context are dual: first, enabling all types of players, including commercial enterprises and public-oriented institutions, to benefit from an exemption for digital archiving; second, providing an affirmative framework of incentives that increases the role of public-oriented institutions in digital archiving.

These last points may also explain why in the context of an exemption for digital archiving, the scope of a reciprocal share-alike requirement should be relatively broad. Digital archives that rely on the proposed exemption should make their "naked" databases accessible to third-parties without imposing any legal, technological or contractual limitations on any further retrieval and utilization of the databases' digital artifacts. The reciprocal share-alike requirement may also trump copyright protection whenever courts decide to adopt a broad interpretation of the originality requirement and classify digital artifacts of cultural works, or the database in whole, as copyrighted works.[83] As opposed to the context of the originality requirement and its application on digital archives, here, the

[81] See Bitton, *supra* note 78 and the sources cited therein. For another approach see the European Union's Directive on the Legal Protection for Databases (Database Directive) (Directive 96/9/EC of the European Parliament and of the Council of the European Union of 11 March 1996 on the legal protection of databases, art. 9, 1996 O.J. (L 77) 20 (EC)). As opposed to the U.S. approach, the directive provides protection to databases, granting a 15-year, renewable, sui generis right to prevent the extraction and utilization of raw data in a database, thus providing de facto protection of the raw data itself.

[82] See Zimmerman, *supra* note 72, at 1004-1011. See also Pessach, *supra* note 80.

[83] See footnote 25 *supra* and the text accompanying it.

focus shifts from examining the creative contribution of the databases' producers to the imposition of obligations that "run with" exempted digital archiving.

Part III – Justifying Reciprocal Share-Alike Exemptions

Based of my preceding discussion, the purpose in this part is to further elaborate the theoretical justifications for making copyright's exemptions reciprocal. The three case-studies that were analyzed in part II mentioned several justifications all in conjunction to particular copyright exemptions. My purpose in this part is to locate and further elaborate these justifications within a broader theoretical framework. But before reaching the theoretical discussion, I wish to begin by emphasizing the pragmatic-political virtue of reciprocal share-alike copyright exemptions.

Reciprocal share-alike copyright exemptions represent an important counterbalance against excessive proprietary expansion of copyright law.[84] The pragmatic virtue of reciprocal

[84] Copyright protection has expanded significantly in the last century, and especially in the last decade. Consider the following examples. First, Congress extended the term of copyright protection by twenty years in 1998. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 102, 112 Stat. 2827, 2827-28 (1998) (codified as amended at 17 U.S.C. 101, 108, 203(a)(2), 301(c), 302, 303, 304, 504 (2000)).
The second example refers to the issue of derivative works. Congress and the courts have intensified the extension of copyright protection to restrict works that borrow from already copyrighted works, but bear significant independent expression. Such works, like unauthorized translations, for example, once were not regarded as a copyright infringement. See Stowe v. Thomas, 23 F. Cas. 201, 201-08 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a German translation of Uncle Tom's Cabin was a new work and not merely a reproduction of the original). Today, copyright law recognizes a very broad exclusive right to prepare all manners of derivative works. See 17 U.S.C. 106(2) (2000). In granting the derivative right, as part of the Copyright Act of 1976, Congress broadened and expanded the previous various exclusive rights to adapt certain types of work in certain additional media that were set forth in the Copyright Act of 1909. See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.
Another example for copyright's expansion refers to courts' interpretation and application of the fair use defense. Through out the years, courts' overall inclination has been to adopt a relatively scrutinized approach regarding instances and circumstances that might shelter under fair use. The watershed decision in this context is the Supreme Court's 1985 decision in Harper & Row Publishers, Inc. v. Nation Enterprises (471 U.S. 539 (1985) (holding that a story in The Nation composed of quotes, paraphrases, and facts drawn exclusively from a manuscript by former President Gerald Ford was not fair use under the Copyright Act)). In that case, the Court adopted a narrow, decidedly market-centered view of fair use, labeling the privilege as an "exception" available only in isolated cases (See id. at 559, 566 n.9). Fair use, the Court stated, is inappropriate unless a ""reasonable copyright owner [would] have consented to the use"' given the ""importance of the material copied or performed from the point of view of the reasonable copyright owner."' (*I*d. at 549-50 (quoting Alan Latman, Fair Use of Copyrighted Works 15 (1958), reprinted in Studies on Copyright 779 (1963)). Applying that standard, the Court posited that in order to shelter under fair use, the user must demonstrate the absence of harm to potential markets, including harm that might be caused by other users and harm to even to markets for derivative works that the copyright owner has yet to exploit. Since Harper & Row, the market-centered view of fair use has steadily gained ground. Courts have repeatedly invoked the bare possibility of licensing in potential markets for the copyright holder's work to deny fair use. See, e.g. *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1015 (9th Cir. 2001) (holding district court's ruling that Napster users are engaged in a disfavored "commercial" use of copyrighted music because they "get for free something they would ordinarily have to buy"); *Princeton Univ. Press v. Mich. Document Servs., Inc*., 99 F.3d 1381, 1387 (6th Cir. 1996) (finding that the non-permissive copying of copyrighted material for student course readers did not constitute fair use in part because a contrary ruling might be detrimental to plaintiff publishers' budding system for charging licensing fees for including book excerpts in such readers); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929-31

share-alike copyright exemptions encompasses three layers: **(1)** international copyright law; **(2)** the political-legislative arena and **(3)** conceptual-doctrinal limitations.

Regarding the international arena, one main obstacle that copyright law reforms seem to face lies in the limitations that both the Bern Convention and the TRIPS agreement impose on the adjustment of new copyright exemptions. Article 9(2) of the Bern Convention and Article 13 of the Trips agreement authorize an exemption to the right of reproduction only in "certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." These limitations, usually regarded as the "three-step test", leave little flexibility and breathing-space in adjusting new copyright exemptions that respond to new social and technological conditions.[85] Domestic copyright legislators and courts are thus chained in the limitations of the three-step test. The notion of reciprocal share-alike exemptions bypasses and overcomes the limitations of international copyright law and the three-step test. It does so by crafting

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(2d Cir. 1994) (holding that photocopying of eight journal articles by a Texaco researcher was not fair use in part because a finding of infringement would protect potential copyright holder revenues from licensing such photocopying); see also *Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987) (finding harm to possible future market for unpublished letters even though author had no present intention to publish them during his lifetime).

The last example of copyright's expansion refers to the issue of digital technology in general and the Digital Millennium Copyright Act, Pub. L. No. 105-304, 103, 1201, 112 Stat. 2860, 2863-65 (1998) (codified as amended at 17 U.S.C. 103, 1201 (2000)), in particular. Digital technology further constricts the public domain by narrowing the scope of uses that were traditionally outside the copyright owner's prerogative or enforcement power. For one thing, merely viewing or listening to a work on the Internet may infringe the owner's copyright because such Internet browsing involves the temporary replication of the work in the RAM of the user's computer, which, recent cases suggest, might constitute a potentially actionable reproduction of the work. See, e.g., MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999). Furthermore, the Digital Millennium Copyright Act ("DMCA") prohibits both the circumvention of technology that controls access to copyrighted works and the manufacture and sale of devices that are primarily used to circumvent technological controls over access to, or use of, copyrighted works. See 17 U.S.C. 1201(a)(1)(A), (a)(2)(A), (b)(1)(A) (2000) (banning the circumvention of access controls, trafficking in devices for circumventing access controls, and trafficking in devices for circumventing use controls). In particular, as a number of courts have held, the DMCA appears to prohibit the distribution of circumvention devices that enable access or copying even where user copying would constitute fair use. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 458-60 (2d Cir. 2001) (holding that the distribution of software, which enabled the circumvention of encryption that was designed to control access to, and reproduction of, films stored on DVDs, contravened the DMCA, even if user copying would constitute fair use); Sony Computer Entm't Am., Inc. v. GameMasters, Inc., 87 F. Supp. 2d 976, 987-89 (N.D. Cal. 1999) (holding that a copyright holder demonstrated a strong likelihood of success in claiming that the sale of a video-game enhancer violated the DMCA's antitrafficking provisions, even if the enhancer did not give rise to traditional copyright infringement).

[85] See MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST, 133, 209, 218-219 (2004); Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 322-324 *at* http://www.law.northwestern.edu/journals/njtip/v5/n2/4/. It is worth adding that the reproduction exception in article 9(2) of the Bern Convention does not cover reproduction of *audio-visual works*. Therefore, according to the Bern convention, domestic copyright law legislations are prohibited from adjusting an exemption that would authorize reproduction of copyrighted *audio-visual works* for preservation purposes, including through a compulsory licensing scheme.

derivative copyright exemptions *as obligations* that are imposed on those who wish to rely on an existing copyright exemption. This technique enables a de-facto broadening of copyright's exemptions schemes without confronting the limitations of the three-step test. Indeed, this technique does not deal with the interface of originating copyright owners and "third-generation" subsequent users. It also covers only instances in which initially, a copyright owner relied on a copyright exemption. Yet, as my proceeding examples and case-studies demonstrated, there is still a critical mass of instances in which reciprocal share-alike exemptions can potentially improve copyright law's equilibrium of incentive and access.[86]

Similarly, the notion of reciprocal share-alike exemptions may overcome failures and disruptions in the political-legislative arena. Copyright law is perceived as an area in which a number of small but powerful interest groups from industries, such as the entertainment, communication and software industries, have been shaping, adjusting and reshaping copyright legislation according to their needs.[87] These attributes leave little hope for a conclusive and in-depth legislative reform in copyright's exemptions scheme. Reciprocal share-alike exemptions may mitigate these failures and disruptions because they provide courts with a powerful legal tool for improving copyright's equilibrium. It is true that at least to some degree, like all other governmental branches, the Judiciary and its outcomes are also targeted and at times influenced by the "public-choice" parameters that make organized and powerful interest groups more influential in the legislative arena.[88] Nevertheless, in comparison to the legislative arena, and when operating within an open "standards-oriented" framework, at least in some of the instances, the Judiciary still seems more attentive to public-oriented considerations than the legislative branch. In such instances, the concept of reciprocal share-alike exemptions may be helpful.[89]

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[86] See also part II *supra*.

[87] See generally Stewart .E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Michigan Law Review, 1197 (1996) 1197; Neil W. Netanel, *Locating Copyright within The First Amendment Skein*, 54 Stan. L. Rev., 1, 67-69 (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev., 857 (1987).

[88] See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 Yale Law Journal (1991) 31; Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings Law Journal (1999) 355. Thus, some of the advantages that small powerful interest groups are likely to benefit from, are expected to have their impact also within court proceedings, among them are parameters such as financial resources to invest in legal proceedings and "precedent purchasing", interest group influence over judicial appointments, and problems of collective actions. As Neil Netanel has shown, it was also courts, and not only legislators, that have had a role in weakening some of copyright's traditional public-access safeguards, such as the development a market-oriented, narrowly constructed, approach towards the fair use defense. See Netanel, *supra* note 87 at 12-30, and also *Harper & Row Publishers, Inc. v. Nation Enterprises*. 471 U.S. 539, 549-550, 559 n.9, 561, 568 (1985).

[89] In addition, when one considers the counter-claim that the Judiciary itself is also suspected of being subordinated the same defaults of interest groups' "public-choice-oriented" advantages, one cannot ignore the fact that, historically and empirically, it is the judiciary that has originated and crafted many of copyright's most prominent exemptions and limitations; thus, when only later legislators had either adopted these limitations and

Finally, the notion of reciprocal share-alike exemptions has also pragmatic virtues. As a practical matter, the rhetoric and economic theory of real property are increasingly dominating the discourse and conclusions of the very different world of intellectual property. As Mark Lemley demonstrated,[90] courts and commentators increasingly adopt - explicitly or implicitly - the economic logic of real property in the context of intellectual property cases.[91] This inclination imposes a conceptual hedge against improving copyright's incentive-access equilibrium and more specifically, copyright's exemptions scheme. Reciprocal share-alike exemptions overcome this conceptual hedge because they do not confront directly the property rhetoric of copyright law. Instead, reciprocal share-alike exemptions glom on instances in which future copyright owners are functioning in their initial capacity as users of copyrighted materials and as proclaimed beneficiaries of copyright exemptions.

Similar effects are apparent also in the context of technological protection measures ("TPM's") and excessive contractual limitations that copyright owners tend to impose in standard digital users' licenses. Overall, copyright law has very few effective mechanisms in response to abridgements of copyright's exemptions and limitations through the enforcement of TPM's and contractual limitations.[92] Reciprocal share-alike copyright exemptions provide

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exemptions, or had rejected, at least partially, such judicial developments, while constructing a broader approach towards copyright's protection. Thus, for example, the fair use defense, which is one of the most central exemptions and limitations to copyright, was originated by courts and only later had been adopted by the legislator (For a survey of this historical development see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (Second Edition, 1995) at pages 6-17 (reviewing early English cases), and at pages 19-25 (reviewing the case of *Folsom v. Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) – the first fair use case to be decided in the United States). Other prominent examples are the Idea-Expression dichotomy (See *Nichols v. Universal Pictures Corporation* 45 F.2d 119 (2d Cir. 1930). Only in 1976 this basic principle was codified into the Federal Copyright Law (See 17 U.S.C. 102(b) (1990) according to: "In no case does copyright protection for an original work of authorship extend to any idea ... regardless of the form in which it is described, explained, illustrated, or embodied in such work."); the merger doctrine (See *Baker v. Seldon* 101 U.S. 99, 103 (1879); and the defense of misuse of copyright (See *United States v. Loew's, Inc*., 371 U.S. 38, 44-51, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, (4th Cir, 1990). See also *Clarifying the Copyright Misuse Defense*, 104 Harvard Law Review (1991) 1289). Overall, these examples demonstrate that the judiciary has a long-standing tradition of developing copyright's exemptions and limitations scheme. Reciprocal share-alike exemptions may be seen as another legal tool to be developed and advanced by courts.

[90] See Mark A. Lemley, *Property, Intellectual Property, and Free Riding***,** 83 Tex. L. Rev. 1031 (2005).

[91] Id at 1036-1046.

[92] Several proposals have been made in attempt to overcome this imbalanced outcome that TPM's and the anti-circumvention prohibitions give rise to. Some proposals focus on enforcing fair use privileges against TPM's either directly (e.g. through the creation of a "Key Escrow" System (see Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 Am. J. Comp. L. 323, 374-375 (2004)) or through legalizing "the right to hack" TPM's (See Dan Burk & and Julie Cohen, *Fair Use Infrastructure for Rights Management Systems*, *15* Harv. J.L. & Tech. *41* (2001). Recently, Reichman, Dinwoodie and Samuelson proposed a "reverse notice and takedown regime" to enable public uses of technologically protected materials (See Reichman, Jerome H., Dinwoodie, Graeme B. and Samuelson, Pamela, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works,* Berkeley Technology Law Journal, Forthcoming Available at SSRN: http://ssrn.com/abstract=1007817). According to their proposal, users would be able to give copyright owners notice of their desire to make public interest uses of technically protected copyrighted works, and rights holders would have the responsibility to take down the TPM's or otherwise enable

a legal mechanism for scrutinizing TPM'S and contracts that override and excessively shrink copyright's exemptions and limitations. Here also, the virtue of reciprocal share-alike exemptions derives from the fact that instead of attempting to regulate property rights directly, reciprocal share-alike exemptions regulate the conditions upon which a copyright exemption may be granted. Beyond these pragmatic aspects, I now move to further elaborate the theoretical justifications for making copyright's exemptions reciprocal.

A. Improving the Incentive-Access Equilibrium of Copyright Law

Reciprocal share-alike exemptions can improve the economic functioning of copyright law. In order to grasp their contribution in this context, a brief outline of the economics of copyright law is required.[93] The basic economic justification for the grant of copyright protection derives from the nature of intangible creative works as non-excludable and non-rival public goods.[94] Given these attributes, the grant of an exclusive property right serves as a mechanism to prevent free-riding and thus provide sufficient incentives for the production of socially-valued intangible works. Wendy Gordon analyzes this argument as a *prisoner's dilemma* in which players simultaneously have to choose between creating a work of their own and copying the work of another. For a plausible payoff structure, copying strictly dominates creation and the result is the Pareto-dominated equilibrium that is associated with prisoner's dilemma games. In this case, both players choose to copy and nothing is created. Copyright solves this non excludability problem and escapes the prisoner's dilemma by giving authors legally enforceable property rights to exclude others from using their works without consent (or at least without paying). [95]

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these lawful uses. My proposal comes on top and along-side these proposals. One advantage of my proposal refers to the fact that it imposes an obligation – a duty, on those who rely on a copyright exemption and then attempt to enforce TPM's or contractual limitations. This legal structure of an obligation-duty that is imposed on copyright owners may improve and strengthen the powers of future users.

[93] The literature on economic analysis of copyright law is too vast to be fully surveyed in this Article. Among many important sources, a comprehensive and critical discussion of the economic approach to copyright law, can be found in Gillian L. Lunney, *Reexamining Copyright Incentives--Access Paradigm*, 49 VAND. L. REV. 483 (1996); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

[94] The initial work in this context was by Plant (Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 1 (1934)), and also by Hurt & Schuchman (Robert M. Hurt & N. Schuchman, *The Economic Rationale of Copyright*, AM. ECO. REV. 56 (1966)). In a later period, Landes's and Posner's article (William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 8 J. LEGAL STUD. 325 (1989)) is regarded as the first comprehensive economic analysis of copyright law.

[95] *See* Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853 (1994). Such an analysis, however, is conditional upon a presumption that direct financial benefits from selling copyrighted copies are the sole motive for investing resources in authoring and producing creative works. This presumption has been persuasively criticized, at least in some contexts. The landmark work in this context is by Stephen Breyer (Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970)). Recently,

Along side, any economic analysis of copyright law is also necessarily concerned with the social losses that such a regime might generate. More particularly, copyright imposes burdens and costs on any further creative activity that attempts to rely on, and use existing copyrighted materials.[96] These burdens and costs are magnified given that information and creative works are cumulative by their nature. People tend to build on existing materials in order to make new creative works while adding their own contribution.[97] Copyright protection is a mechanism that increases the costs of borrowing from previous works and thus weakens the incentive of future authors to create. In a broader perspective, the non-rival character of informational goods embodies an unresolved tension between, on the one hand, *efficiency in production* that requires a positive price for producers and creators, and on the other hand, *efficiency in distribution and future creative activity* that requires users to pay a zero price.

For these reasons, one central task of positive copyright law has been to reach an optimal level of both maximum incentive to creation and on the other hand, minimum burdens and costs on further non-rival creative activity that seeks access and rely on existing copyrighted works. This equilibrium is usually achieved by implementing exemptions and limitations into the basic scheme of copyright law and the scope of copyright protection. The fair-use defense is one central mechanism through which a cost-benefit analysis between copyright's incentive, on the one hand, and copyright's burdens, on the other hand, is applied, while defining circumstances and scenarios in which free use of copyrighted materials should be permitted.[98] Another prominent example for such a mechanism is *the idea-expression dichotomy,* which is the basic rule according to copyright protects only fixated expressions and not mere abstracted ideas and facts.[99]

Yochai Benkler has shown how in digital realms and by using commons-based peer production mechanisms, the role of direct financial incentives--and therefore, of copyright protection--is significantly decreasing, at least with regard to some categories of media products and creative works. *See* Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm,* 112 YALE L.J. 369 (2002).

[96] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law,* 18 J. LEGAL STUD. 325, 332-341 (1989).

[97] Well-known is Chafee's remark that: "The World goes ahead because each of us builds on the world of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself,'" Zechariah Chafee, *Reflections on the Law of Copyright,* 45 COLUM. L. REV. 503, 511 (1945).

[98] See William F. Fisher, *Reconstructing the Fair Use Doctrine,* 101 HARV. L. REV, 1532 (1988).

[99] *See, e.g.,* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 91-108 (2003). There are several considerations which support this basic principle of copyright law, including: (1) an attempt to avoid the generation of excessive monopolization costs regarding specific facts that have no substitute; (2) the cost of creating works that rely on existing "copyrighted" facts and the resulting anticipated reduction in the number and diversity of such works; (3) transaction and administrative costs for obtaining permission and enforcing rights in facts; (4) the fear of excessive rent seeking in producing worthless factual works just in order to gain exclusivity over the use of such facts; (5) the reasonable presumption that many people are likely to produce similar factual representations even without the

Reciprocal share-alike exemptions improve copyright's incentive-access equilibrium. They do so by highlighting the fact that market-failures and joint-cooperation problems appear not only at the phase of maintaining incentives to produce intangible creative works, but also at the phase of managing the terms of access and subsequent uses of copyrighted works that were originally produced with reliance on a copyright exemption. Since copyrighted works tend to function both as *inputs* and as *outputs* of cultural materials,[100] this category of copyrighted works is relatively broad. In such circumstances, creators and producers face a dissonance between their ex-ante positioning as consumers-users of third-parties' copyrighted works and their ex-post positioning as owners and proprietary mangers of their own copyrighted works. Before their own cultural work is produced, secondary users may seek broad access and exploitations privileges regarding their creative inputs. Yet, once their secondary work was produced, the same secondary users would now function as copyright owners seeking broad and effective proprietary protection.

Overall, copyright law is well aware of this tension, which is partially regulated and resolved through mechanisms such as the fair-use defense. What current copyright law doctrine and theory tend to ignore are two elements: **(1)** the prospects of improving copyright's incentive-access equilibrium by focusing on the ex-ante expectations and the underlying motives of secondary users who rely on existing copyrighted works in the course of their own cultural activities; **(2)** market-failures that may occur due to the fact that future "third-generation" subsequent users are not involved in determining (negotiating) the terms and conditions of exempted secondary uses. The accumulation of these elements strikes a suboptimal result. Although, in many cases, secondary users, who rely on a copyright exemption, would have probably agreed to comply with a reciprocal-share-alike requirement, as a precondition for their exempted use, currently, copyright law does not require them to do so. This in turn imposes a negative externality,[101] on "third-generation" subsequent users and the public in general, who now suffer from lesser capacities to access and use secondary works.

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copyrighting of facts; (6) and lastly, the assumption that limited copyright protection only with regard to fixated expressions would suffice in order to provide sufficient incentive for the production of creative works, thus, without bearing the significant costs of copyrighting isolated facts.

[100] See Benkler, *supra* note 95, at 401.

[101] Positive and negative externalities occur when the impacts of a product overreach the direct effects of its production and consumption and therefore influence many individuals, as well as society at large. A related instance of positive and negative externalities refers to circumstances in which direct users of a product internalize only some parts of its benefits or costs or when problems of collective action frustrate the ability of a fragmented bundle of users to signal and acquire their desired products.

Subordinating secondary users to a reciprocal share-alike requirement solves these failures. As long as such a requirement does not diminish the incentive to produce the secondary work, it represents a social benefit that copyright law should capture. The virtue of a reciprocal share-alike requirement in this context is that it can module its scope according to the extent of a secondary user's benefits from reliance on a copyright exemption. The core point in this context is that for secondary users, reliance on a copyright exemption reduces the costs of producing the secondary work. Hence, this reduction can and should be transferred to "third-generation" subsequent users without undermining the incentive for producing the originating secondary work. The greater the costs that a secondary user saves in the course of benefiting from a copyright exemption, the broader should be the reciprocal share-alike requirement that this secondary user is be subordinated to; all without eliminating the incentive for producing the secondary work.

Returning to the case-study of content-sharing platforms, one could now better understand the broad reciprocal share-alike requirement that content-sharing platforms should be subordinated to. As long as the platforms' operators get the content that resides on their platform free of charge, their incentive to operate is unlikely to be eliminated by conditioning their safe-harbor, under section 512(c), upon a requirement that subsequent third-parties are able to access and use the content that resides on the platform. On the other hand, in the context of secondary-uses that rely on the fair-use defense, the scope of the reciprocal share-alike requirement may vary from one scenario to another, according to the impact of a reciprocal share-alike requirement on the incentive to produce the secondary work.

B. Users' Rights, Distributive Values and Cultural Democracy

Beyond efficiency considerations, the notion of reciprocal share-alike exemptions can also advance a wingspan of other values and goals that liberal democracies may wish to endorse and promote within their copyright system. In section II(C)(II)(c) I mentioned the role of free speech values, and particularly, equal distribution of expressive opportunities, in structuring copyright law and its underlying doctrines. Additionally, recent scholarship reflects increasing awareness to the centrality of users' rights within copyright law.[102] My purpose here is not to provide an in-depth discussion of these notions and their correspondence with copyright law. The important point for our purposes is that according to these concepts,

[102] See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 Wm. & Mary L. Rev. 951 (2004); Balkin, *supra* note 67, at 7-16; Julie E. Cohen, *The Place of User in Copyright Law*, 74 Fordham L. Rev. 347, (2005); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. Rev. 397 (2003); Julie E. Cohen, *Copyright, Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151 (2007); Jessica Litman, *Lawful Personal Use*, 85 Texas L. Rev. 1871 (2007).

pluralism, active participation and creative autonomy are considered as features that determine what it means for a society to be democratic.[103]

Autonomy includes the freedom to interact in an active way with existing cultural materials, to recreate and reshape them, and to express one's own voice through a dialogue with those of others.[104] Active participation means that all members of society, irrespective of status or financial ability, should have access to experiencing and consuming cultural materials of sufficient quantity, quality, and diversity. All members of society should have meaningful opportunities to engage in creative activities and access the resources needed for such activities.[105] Copyright law, according to these notions, is not just about "the more the better." It is also about ubiquitous access to diversified creative materials within an institutional framework that supports broad, decentered and equal distribution of creative opportunities. In addition, copyright law should be attentive and supportive of the pivotal role that ripping, mixing and re-contextualizing [copyrighted] cultural works has in the quest for economic, political and individual empowerment.[106]

Reciprocal share-alike exemptions take copyright law one step ahead in advancing this broad holistic understanding of copyright law's functions. To begin with, the share-alike requirement functions as a legal tool that empowers chains of subsequent users and their creative opportunities. A second element refers to the *categories of users* and of *creative activities* that are more likely to benefit from a reciprocal share-alike requirement. Amateurs, fan-fiction creators, individual end-users and more generally, consumers, are expected to benefit the most from a reciprocal share-alike requirement. These are exactly the categories of users and creators who are usually the subjects of commercial entities' proprietary regimes, including with regard to products of exempted secondary uses of originating copyrighted materials. The examples and case-studies that were previously discussed, all demonstrate the dissonance between the privileges that search engines, content-sharing platforms and corporate media in general benefit from and, on the other hand, the restrictions and limitations that their users are being subjected to. Additionally, in some instances, the products and outputs of "third-generation" subsequent users are exactly the types of creative engagements that a cultural democracy wishes to advance. The reciprocal share-alike requirement functions as an amplifier for robust proliferation of information and content

[103] See Bracha, *supr*a note 67, at 1846.
[104] Yochai Benkler, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, 133-142 (2006).
[105] See Bracha, *supra* note 67, at 1847-1848, Balkin, *supra* note 67 at 4-5.
[106] See Anupam Chander and Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 Calif. L. Rev. 597 (2007); Madhavi Sunder, *IP3*, 59 Stan. L. Rev. 257 (2006).

flow. It has an effect of a Moore's law,[107] in which every exempted secondary use of a copyrighted work becomes leverage for subsequent privileged creative and cultural endeavors.

Another virtue of reciprocal share-alike exemptions relates to their distributive impact. One upfront consequence of a reciprocal share-alike requirement is that it decentralizes and allocates more equally creative and expressive opportunities. In addition to that, reciprocal share-alike requirements have another more oblique function of overcoming particular distributional biases in copyright law. Recall my discussion in section II(C)(II) regarding content-sharing platforms. Content-sharing platforms represent a paradigmatic example for new types of *hybrid* media entities.[108] Hybrid media entities tend to use communities and user-generated content as the inputs and outputs of their content portfolios. Yet, concurrently, as my preceding discussion indicated,[109] some hybrid media entities then adopt and implement proprietary practices against third-parties who wish to access and use the platform's content. The virtue of reciprocal share-alike copyright exemptions lies in their ability to facilitate cultural production by hybrid media entities; thus, while concurrently, overcoming these entities' inclination toward unilateral imposition of proprietary regimes on collaborative and user-generated content. Reciprocal share-alike exemptions mitigate potential distributional gaps between the broad cultural capacities of hybrid media entities and the disadvantaged position that subsequent third-parties might have to confront with when relying on the content portfolios of the same hybrid media entities.

Part IV – Counterarguments

The notion of reciprocal share-alike exemptions may be exposed to potential critiques and counterarguments. My purpose in this part is to mention four potential disadvantages of my proposal. Although I agree with the basic argumentation and reasoning of all four disadvantages, I do not think that these counterarguments undermine and make redundant the introduction of reciprocal share-alike exemptions to copyright law. Rather, these

[107] Moore's Law describes an important trend in the history of computer hardware: that the number of transistors that can be inexpensively placed on an integrated circuit is increasing exponentially, doubling approximately every two years. See Gordon E, Moore, *Cramming more components onto integrated circuits*, 38(8) Electronics Magazine (1965).

[108] Lawrence Lessig, *Lucasfilm's Phantom Menace*, The Washinton Post, Thursday, July 12, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/07/11/AR2007071101996.html;
See Lawrence Lessig, *The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, blip.tv, and even Google* at http://lessig.org/blog/archives/003570.shtml/.

[109] See section II(C)(II) *supra*.

disadvantages emphasize certain aspects that should be considered when crafting the substance and boundaries of reciprocal share-alike requirements.

A. Reciprocal Share-Alike Exemptions' Inferiority and Redundancy in Comparison to Copyright Law's General Exemptions & Limitations Scheme

One critique of reciprocal share-alike exemptions refers to their inferiority and complex structure in comparison to copyright law's general exemptions and limitations scheme. A simple and more efficient scheme may be one of general *in-rem* exemptions that among other aspects, would apply also with regard to the interface of secondary-users' cultural products and "third-generation" subsequent users. Consider for example the issue of secondary users' imposition of restrictions through technological protection measures and contractual limitations. In comparison to the idea of reciprocal share-alike exemptions, it may be easier and more efficient to adopt a general principle according to all copyright exemptions are privileged from the imposition of conflicting technological and contractual restrictions. Similarly, as my preceding discussion regarding the fair-use exemption indicated,[110] one may argue that instead of complicating copyright law with reciprocal share-alike exemptions, it would be easier to facilitate "third-generation" subsequent users' general fair-use privileges, including against secondary users.[111]

I do not deny the possibility that theoretically, an optimal regime of copyright's general exemptions and limitations may be superior to the notion of reciprocal share-alike exemptions. Nor do I ignore the fact that theoretically, such a regime would make the whole notion of reciprocal share-alike exemptions redundant. Practically, however, I doubt the possibility of achieving such an optimal regime through copyright law's general exemptions and limitations scheme and it is exactly at this point that reciprocal share-alike exemptions come into play.

One reason, which was already discussed in section __ *supra* refers to the political deadlock of copyright law and the de-facto impediments in improving copyright's exemptions and limitations scheme through legislative reforms. Technological protection measures and contractual limitations[112] are one example for instances in which the notion of reciprocal share-alike exemptions may reach better outcomes than the ones that are feasible through legislative reforms and judicial interpretation of the fair use defense. Indeed, a general principle that sustains the superiority of copyright's exemptions over technological protection

[110] *See* part __ *supra.*
[111] *See* part __ *supra* and my answers to this argument as set forth there.
[112] *See* part ___ *supra.*

measures and contractual limitations may solve most of the problems in this context. Yet, pragmatically, such a solution does not seem at hand reach. Thus, whereas the narrower proposal of reciprocal share-alike exemptions rests on grounds that may make it easier to be adopted by courts. [113]

A second related reason refers to the "muddy" attributes of many copyright exemptions. By using the term "muddy" I draw an analogy from Carole Rose's famous observation about the "muddy" attributes of many entitlements in real property.[114] As Rose observed, the structure of entitlements in real property is not, and never has been, characterized only by packets of complete and well-defined rights. Real property entails not just clear rights to exclude, as in the case of trespass, but also a host of less determinate rights under the law of easements, takings, nuisance, posessory interests, adverse possession, and the like. A similar observation could be made with regard to copyright law's exemptions. Put aside the fair use defense, many other copyright exemptions are not crystallized general exemptions that "run with the copyrighted work", but are rather more complex and less determinate exemptions.

Consider, for example, section's 115 compulsory license regarding the making and distribution of sound recordings with musical works that were previously distributed with the authority of their copyright owner.[115] The current structure of section 115 has no determinations or references to the relationship between section's 115 original beneficiaries and later "third-generation" subsequent users. In fact, literally and according to the common understanding, section's 115 compulsory license has no impact or application on subsequent uses of sound recordings that were produced with reliance on section's 115 compulsory license. Similar effects are apparent also in the context of other particular copyright exemptions such as section's 512(c) safe-harbor for hosting services providers. Currently and literally, the safe-harbor that content-sharing platforms benefit from has no impact or application on subsequent uses of user-generated content that was uploaded on the platform. More generally, it would be accurate to argue that most particular copyright exemptions do not apply *equivalently* on cultural products of secondary users who rely and benefit from the

[113] See also part __ *supra*. As a number of courts have held, the DMCA appears to prohibit the distribution of circumvention devices that enable access or copying even where user copying would constitute fair use. *See* Universal City Studios, Inc. v. Reimerdes, 273 F.3d 429 (S.D.N.Y. 2001) (holding that the distribution of software enabling the circumvention of encryption designed to control access and copying of films stored on DVDs contravenes the DMCA even if user copying would constitute fair use); Sony Computer Entm't of America., Inc. v. GameMasters, Inc., 87 F. Supp. 2d 976 (N.D. Cal. 1999) (holding that a copyright holder demonstrated a strong likelihood of success on its claim that the sale of a videogame enhancer violated the DMCA's anti-trafficking provisions even if the enhancer did not give rise to traditional copyright infringement).
[114] See Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988). See also Thomas Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. Legal Stud. 13 (1985).
[115] See also footnote __ and the text accompanying them.

exemption at stake. It is exactly at this point that the notion of reciprocal share-alike exemptions comes into play and supplements what current positive copyright is not able to provide – an extension and application of copyright's particular exemptions on secondary cultural products that were produced in the light of a particular exemption.

B. The Partiality and Limited Impact of Reciprocal Share-Alike Exemptions

Another critique of reciprocal share-alike exemptions is that they govern and cover only the layer of relationships between secondary users and "third-generation" subsequent users. Thus, while originating copyright owners still retain all their exclusive rights and powers visa-vis "third-generation" subsequent users. This observation is indeed correct. Yet, it does not undermine the potential contribution of reciprocal share-alike requirements for resolving and improving failures and disruptions in the manners secondary users manage their own portfolio of cultural works. The relationship between originating copyright owners and "third-generation" subsequent users could and should be resolved according to other elements in copyright law and particularly copyright's exemptions and limitations scheme. In this sense, the notion of reciprocal share-alike exemptions functions as an accumulative component that comes on top, and not instead of, other principles and mechanisms of copyright law.

Moreover, the examples and case-studies that were previously discussed,[116] teach that as a practical matter, there are enough instances in which there is no rivalry between originating copyright owners and "third-generation" subsequent users. One example for such circumstances refers to instances in which the originating copyright owners declared their willingness to enable free use of their works, while it is the layer of "secondary-users" that wishes to impose restrictions and obstacles on "third-generation" subsequent uses. Partial proprietary regimes that content-sharing platforms like Youtube.com attempt to enforce are one example for such circumstances.[117] Another example refers to instances in which the originating copyrighted materials have already fallen to the public domain, or circumstances in which a compulsory licensing scheme governs the use of originating copyrighted materials. In all such circumstances the notion of reciprocal share-alike exemptions becomes fundamental and acute even if it does not govern the relationship between originating copyright owners and "third-generation" subsequent users. The interface of secondary users and third-generation subsequent users thus provides enough potential hedges that require the adoption of reciprocal share-alike exemptions.

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[116] *See* II(C) *supra.*
[117] *See* footnotes __ *supra* and the text accompanying it.

C. Potential Negative Impacts on the Incentive to Produce Secondary Works

A second critique refers to potential negative impacts of reciprocal share-alike requirements on the incentive to produce secondary works. This critique underscores the basic economics of copyright protection and the incentive argument.[118] Without copyright protection and proprietary control, producers of secondary works may lose their incentive to invest resources in the production and distribution of secondary works, even when relying on a copyright exemption in the course of producing the secondary work. In some circumstances, such an impact might indeed occur. Yet, its consideration does not undermine the benefits and contribution of reciprocal share-alike exemptions. Legislators and courts can and should design the scope and contents of reciprocal share-alike requirements in a manner that maintains enough incentives to produce secondary works that rely on a copyright exemption. A task of this kind is of no novelty to copyright law. Legislators and courts are constantly involved in designing both copyright's scope and copyright's exemptions in manner that attempts to maximize ex-post access and use of copyrighted works without undermining the ex-ante incentives to produce copyrighted works. Consider the fourth factor of the fair-use defense, which focuses on the effect of the use on the potential market for or the value of the copyrighted work.[119] This factor is directly aimed to construct the boundaries of authorized fair-use in a manner that maintains enough incentives for ex-ante production of copyrighted works. Yet, the law's consideration of potential negative impacts on ex-ante incentives to produce cultural works does not diminish the law's concurrent consideration of the other side of the equation, that is, the social value of optimizing copyright's exemptions, including in the unique context of "third-generation" subsequent uses of secondary works.

Reciprocal share-alike exemptions, therefore, are of no uniqueness in the requirement to adjust them in a manner that maintains enough ex-ante incentives for the initial production of secondary works that rely on a copyright exemption. I have discussed this issue in section II(B), section II(C)(I) and section III(A), where I proposed that the scope of a reciprocal share-alike requirement should be proportional to secondary users' benefits from their reliance on a copyright exemption. Overall, the formula in this context is relatively simple: the greater the costs that a secondary user recoups in the course of relying on a copyright exemption, the broader may be the reciprocal share-alike requirement that this secondary user is subordinated to; all without eliminating the incentive to produce the secondary work.

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[118] *See* footnotes __ *infra* and the text accompanying them.
[119] 17 U.S.C. §107 (2000).

More generally, just like other copyright doctrines, reciprocal share-alike exemptions consist of an open-ample standard that courts and legislators will have to develop from one case to another. Hence, I do not think that potential negative impacts on the incentives to produce secondary works should entirely prevent courts and legislators from endorsing the idea of reciprocal share-alike exemptions. Rather, this is a factor that should guide policy makers in determining the boundaries of such exemptions. In addition, as section II(C) *supra* indicated in the context of content-sharing platforms and digital archiving, there may be circumstances in which decreasing the incentives of commercial secondary users would represent legitimate communications policy that wishes to strengthen public-oriented and individual-based creative activities. In such circumstances, reciprocal share-alike exemptions may serve as a regulatory mechanism that deliberately reduces the incentives of market institutions while providing more space and capacities for other social institutions.

I presume that at this point, many readers would still call for more concrete and detailed guiding-lines that would prevent reciprocal share-alike exemptions from disincentivizing the production of secondary works. Here, I should note again that beyond what are relatively generalized statements, just like the fair use exemption, the parameters and considerations for the implementation of reciprocal share-alike requirements could and should be developed on a case to case basis. The three case-studies that were mentioned in part ___ *supra* of an exemption for digital archiving and content-sharing platforms' safe-harbor demonstrate two elements in this context. The first element is that it is feasible and operational to develop particular-detailed guiding-lines for reciprocal share-alike requirements, which may vary from one scenario to another. The second point is that certain circumstances may justify a relatively broad reciprocal share-alike requirement without undermining the incentive to produce the secondary work. For example, I have argued that in the context of a compulsory license for digital archiving, third-generation subsequent users may be entitled to broad access and use rights without undermining the incentive to produce digital images collections. The importance of this example for my current discussion is also in recalling the fact the from a societal viewpoint, "incentive to produce" need not only be commercial incentive, but in can also be the incentive of public-oriented and individual-based frameworks that are able of reaching an economic equilibrium in their cultural activities.

Finally, if one still attempts to develop more concrete guiding-lines for the scope of reciprocal share-alike requirements, there are three directions that may be taken into account. First, reciprocal share-alike exemptions could be based on parameters similar to the four

parameters that apply in the context of fair use.[120] Thus, for example, the fourth factor, which focuses on the effect of the use on the potential market for or the value of the copyrighted work,[121] may preclude a reciprocal share-alike requirement in circumstances of mere slavish commercial copying by a direct competitor to the secondary user. Hence, in the context of content-sharing platforms, a competing platform would not be able to rely on a reciprocal share-alike principle when establishing all of its content on the repositories of other content-sharing platforms, including such that rely on section's 512(c) safe-harbor. Yet, a reciprocal share-alike requirement may apply with regard to digital preservation projects of user-generated content that resides on content-sharing platforms, or with regard to subsequent uses of content-sharing platforms' content that do not amount to mere direct commercial competition by another content provider.

A second guiding-line refers to the costs that secondary users recoup due to their reliance on a copyright exemption, or more generally, the economic investment in the production of secondary works. This parameter is an indicator to the impact of a particular reciprocal share-alike requirement, n ex-ante incentives to produce secondary works. If, for example, a content-sharing platform obtains all of its user-generated content free of charge, as described in section ___*supra*, even a broad reciprocal share-alike requirement may have only a limited impact on the incentive to operate such a platform. The third guiding-line refers to the centrality and the dependence on commercial profit-motivated enterprises as a prerequisite for producing particular types of secondary exempted uses. Whenever public-oriented and civic-engaged institutions are voluntary involved in certain types of exempted secondary uses, the impacts of a reciprocal share-alike requirement, on the incentives to engage in such activities, are likely to be minor, because financial profits are not the underlying goal of the secondary use. Moreover, in such circumstances, "repeat players" public-oriented secondary users may even value the ability to freely access and use secondary works of other producers more highly than their ability to impose proprietary restrictions on subsequent uses of their own secondary works. In such circumstances, reciprocal share-alike exemptions may even have a positive impact on the incentive to produce secondary works. A non-profit public-oriented project like Wikimedia Commons,[122] for example, is likely to support a legal regime that

[120] See footnote __ and the text accompanying it.
[121] 17 U.S.C. §107 (2000).
[122] See http://commons.wikimedia.org/wiki/Main_Page/ http://commons.wikimedia.org/wiki/Commons:Welcome Wikimedia Commons is a media repository that is created and maintained not by paid-for artists, but by volunteers. Its name "Wikimedia Commons" is derived from that of the umbrella project "Wikimedia" managing all Wikimedia projects and from the plural noun "commons" as its contents are shared by different language versions and different kinds of Wikimedia projects.

subordinates its content to a reciprocal share-alike requirement, if such a regime would enable Wikimedia Commons to access and use freely other third-parties' repositories of secondary exempted works.

D. Information Costs

The final critique on the idea of reciprocal share-alike exemptions refers to the information costs that they involve.[123] The basic argument in this context is that expectedly, "third-generation" subsequent users will confront significant information costs when attempting to determine whether the secondary work that they wish to use is subordinated to a reciprocal share-alike requirement. In order to determine the status of the secondary work, "third-generation" subsequent users would have to obtain information about the circumstances and conditions under which this work was produced. Not only this information is not obviously available at hand-reach, it is also unlikely that proprietary secondary users would be willing to share it voluntarily. Similarly, secondary users, who would now be subordinated to a reciprocal share-alike requirement, may also face non-trivial information costs when attempting to determine *ex-ante* their prospected ex-post exposure to a reciprocal share-alike requirement.

The problem of information costs may indeed impose serious obstacles against full utilization of the prospects that reciprocal share-alike exemptions offer. There are no neat and crystallized solutions to this problem. Yet, there are several elements that can solve, at least partially, this problem. To begin with, there are instances in which secondary users' reliance on a copyright exemption is transparent without involving significant information costs. One category of such circumstances refers to instances in which the secondary user relies on a

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Thus it provides a central repository for freely licensed photographs, diagrams, animations, music, spoken text, video clips, and media of all sorts that are useful for any Wikimedia project.

[123] For a related discussion in the context of the creative commons licensing schemes *See* Shaffer Van Houweling, *supra* note 77, at 40-46. See also Molly Shaffer Van Houweling, *The New Servitudes*, Georgetown Law Journal, Forthcoming 2008, Available at SSRN: http://ssrn.com/abstract=1028947 (describing contemporary practices in the context of software and other intangible goods as servitudes-typed restrictions which may impose information costs and externalities on future users. Van Houweling concludes that in the context of copyrighted works, licensing conditions that are aimed to broaden users' rights and de-facto limit copyright owners' bundle of rights, do not seem to elevate such problems. The main reason for this observation, Van Houweling argues, lies in the fact that the initial burdens and costs that users confront, regarding the utilization of copyright works, may be even broader and more complex (id at 43-64)). In the context of reciprocal share-alike exemptions, the basic scenario is reverse. Reciprocal share-alike exemptions are aimed to broaden the powers and capacities of future users rather than limit them. Moreover, since reciprocal share-alike exemptions are mandatory, they are expected to include an in-rem element that enables all "third-generation" subsequent users to benefit from them. Hence, reciprocal share-alike exemptions do not seem to impose information costs that are considerable than the usual ambiguity that open-ample exemptions. Such as the fair use defense, involve. Moreover, at least to some degree, the mandatory privileges of a reciprocal share-alike requirement may provide more clarity and standardization than the contractual limitations that secondary users might impose on prospected subsequent third-generation users.

statutory compulsory license or a statutory safe-harbor scheme. Section's 115 compulsory license for the making and distribution of sound recordings with musical works that were previously distributed, the proposed compulsory license for digital archiving and section's 512(c) safe-harbor for hosting services providers are three examples of such circumstances. Another category of transparent exempted secondary uses refers to large-scale information and cultural retrieval projects that are well recognized and acknowledged by creative sectors and the public in general. Google's Library Project and its proclaimed reliance on fair-use[124] is one example for this category. In such circumstances there seems to be no actual problem of information costs that third-generation subsequent users confront.

More generally, the problem of information costs can be partially solved by a default rule that requires secondary users to reveal their licensing agreements, with originating copyright owners, as a precondition for suing "third-generation" subsequent users. Unless a secondary user provides evidence that its use of originating copyrighted materials was based on a license, the default presumption should be that it was an exempted-privileged use with all the derivative consequences regarding the imposition of a reciprocal share-alike requirement. This proposal can be further improved and broadened by imposing a statutory requirement of notice and registration of licensed secondary uses. Unless a licensed secondary use is registered and published publicly, the presumption should be that is was an exempted-privileged use.[125]

These are just initial proposals that require further elaboration and thinking. For my current purposes, the main point to be made is that in many occasions, the problem of information costs can be resolved. It is not a problem that eliminates the advantages and practicability of making copyright's exemptions reciprocal. In addition, one must take into account the fact that similar, if not parallel, information costs are apparent regarding *licensed use* of copyrighted works. Secondary works that include licensed embedded elements from copyrighted works impose similar information costs. Here also, "third-generation" subsequent users might face significant information costs when attempting to identify the parties from which they need to obtain licenses in order to use a secondary work. The more general point is by their basic intangible attributes, copyrighted works, as well as other types of legally protected intellectual goods, tend to involve significant information costs.[126] Yet, just like this

[124] See footnotes 10-11 *supra.*
[125] A registration system for copyright licenses is likely to have other general advantages, such as improving legal and economic certainty and the prevention of conflicting transactions. A full discussion of these issues exceeds the scope of this article.
[126] See Clarisa Long, *Information Costs in Patent and* Copyright, 90 Va. L. Rev. 465 (2004).

problem does not impose absolute barriers against the recognition of copyright protection, it should not impose absolute barriers against the recognition of reciprocal share-alike exemptions. In both aspects, the solution rather lies in developing legal institutions that overcome the problem of information costs while benefiting from the advantages of copyright and reciprocal share-alike exemptions.[127]

Summation

This article introduced, for the first time, the notion of *reciprocal share-alike copyright exemptions*. According to my 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. Thus, whenever a party that uses copyrighted materials relies on a copyright exemption, subsequent users should be granted with similar privileges to access and use the secondary work. Just like the traditional fair-use defense, the scope of reciprocal share-alike exemptions may vary from one scenario to another. The general anticipation is that with time, courts will develop, on a case to case basis, a codex of circumstances that delineate the boundaries and contents of reciprocal share-alike copyright exemptions. In addition, there may be particular instances in which the implementation of a reciprocal share-alike requirement would call for legislative amendments to current copyright law doctrines.

My discussion demonstrated that making of copyright's exemptions reciprocal corresponds well and improves the economics of copyright and public-welfare considerations. Overall, reciprocal share-alike exemptions structure copyright law in manner that strikes a better balance between copyright's contribution (incentive) to cultural production and copyright's social cost – the burdens that it imposes on future users and creators. As long as a reciprocal share-alike requirement is structured in a scope that maintains enough incentives to produce secondary works, it represents a social benefit that

[127] There are some signs that copyright policy makers are beginning to grapple with these costs. The Copyright Office's 2006 Report on Orphan Works recognizes that copyright can unduly constrain desirable uses of creative works because of transaction costs and notice problems. The Report observes that "a productive and beneficial use" of a copyrighted work can be forestalled "not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license - but merely because the user cannot locate the owner." The Report thus acknowledges that the problems traditionally associated with conservation easements and other unconventional servitudes - namely, the problems of assuring notice, minimizing information costs, and retaining flexibility for future generations to make their own choices about resource exploitation - are also problems for copyright. See generally United States Copyright Office, Register of Copyrights, Report on Orphan Works 15 (January 2006), available at http://www.copyright.gov/orphan/orphan-report-full.pdf;

copyright law should capture. Delineating reciprocal share-alike requirements in such boundaries is at hand reach of courts and legislators. Copyright law is well accustomed for carrying out such tasks through the interpretation and application of doctrines such as the fair use defense. Reciprocal share-alike exemptions also further enhance democratic, autonomy and distributive values that underlie a public-oriented vision of copyright law. Similarly, the idea of reciprocal share-alike exemptions corresponds well with the role that the notion of reciprocity should have in the structuring and shaping copyright law. And finally, reciprocal share-alike exemptions provide an effective track for a copyright reform while bypassing the regular deadlock in the domestic and international legislative arenas.

Reciprocal share-alike copyright exemptions are not indented to solve all the problems and challenges that current copyright law faces. The development and crafting of particular reciprocal share-alike exemptions are also likely to confront the regular dilemmas that policy makers and courts face when attempting to strike the right balance in an incentive-access copyright equilibrium. Yet, these are the same dilemmas that policy makers have always dealt with in the context of copyright law and they do not undermine the advantages of making copyright's exemptions reciprocal.

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