
RECIPROCAL SHARE-ALIKE EXEMPTIONS IN COPYRIGHT LAW

Guy Pessach*

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 scanning of entire copyrighted works are fair use, a similar exemption should apply to the benefit of future third parties who wish to use, for similar socially valuable purposes and under similar limitations, 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 Digital Millennium Copyright Act's (DMCA's) safe harbor for hosting services providers but later on impose proprietary restrictions on third parties who wish to

* Assistant Professor, Faculty of Law, the Hebrew University of Jerusalem, Affiliate Fellow, Information Society Project, Yale Law School. Earlier drafts of the ideas embedded in this work were presented at Yale Law School's Information Society Research Seminar, the Max-Planck Institute for Collective Goods (Young Scholars' Research Seminar on Commons Theory), Haifa University, Faculty of Law and the Center for Transnational Legal Studies, Georgetown University's Law School (London). I am indebted to Katya Assaf, Jack Balkin, Stefan Bechtold, Michael Birnhack, David Cole, Niva Elkin-Koren, Nina Pillard, Michal Shur-Ofry, Steven Wilf, and Tal Zarsky for their insights and comments.

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 a 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 the current theoretical and doctrinal structure of copyright law.

In the last decade, copyright law scholars, policy makers and cultural environmentalists have been 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 schemes³ and contesting the ongoing extension of copyright’s term⁴ are just a few examples of the challenges that have been met in recent years. Overall, the task of striking a balanced equilibrium does not seem to come easy. In the legislative arena, advocates of a public-oriented copyright law confront influential interest groups from the content industries.⁵ The limitations of

¹ The literature on this topic is too vast to fully survey here, but see Symposium, *Cultural Environmentalism* 70 LAW & CONTEMP. PROBS. 1, 10 (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., THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (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 L. Burk & Julie E. 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*, 22 BERKELEY TECH. L.J. 981 (2007).

⁴ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting an attempt to challenge, including on First Amendment grounds, the constitutionality of the Sonny Bono Copyright Term Extension Act). In 1998 Congress passed the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. § 302-04 (1998)), 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) (2006)); 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. Sonny Bono Copyright Term Extension Act. As a result of this retroactive extension, no published works will pass into the public domain during the twenty years after the Act went into effect.

⁵ Apparently this is no coincidence. The legislative process is captured by the content industries. As public choice theorists have shown, small homogeneous 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).

international copyright treaties, including those of the Berne Convention⁶ and the Agreement on Trade-Related Aspects of Intellectual Property Rights⁷ (TRIPS), are another hedge against remedying the deficiencies of copyright law at the domestic level.⁸ In 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 little practical impact.⁹ 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.¹⁰

This article introduces a novel element to copyright's exemptions' scheme—and particularly the fair use doctrine—that is aimed to help 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 obligations* that come with 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 socially beneficial subsequent uses. If Google argues that its *Book Project's*¹¹ scanning of

⁶ Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.

⁷ Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299.

⁸ 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?* (2002); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003).

⁹ See, e.g., Neil. W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) [hereinafter *Locating Copyright*]; *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting an attempt to challenge the constitutionality of the Sonny Bono Copyright Term Extension Act, including based on First Amendment grounds).

¹⁰ See *supra* note 4. See 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).

¹¹ See Google Book Search Library Project, <http://books.google.com/googleprint/library.html> (last visited Nov. 5, 2008). 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

entire copyrighted works for archiving and retrieval are fair use,¹² a similar exemption should apply to the benefit of future third parties who wish to use, for similar purposes, digital copies of books from Google's databases and applications. Thus, just like Google, subsequent third-generation parties would also be required to provide end users with only limited quotations from entire copyrighted books, which would be kept in a database that is not accessible to the general public. Google should also be prohibited from imposing technological protection measures and contractual obligations that revoke its reciprocal share-alike obligations.¹³

Another example is content-sharing platforms that initially rely on the Digital Millennium Copyright Act's¹⁴ (DMCA's) safe harbor¹⁵ 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).¹⁶ According to a reciprocal share-alike requirement, hosting services providers that rely on sections 512(c)'s safe harbor

full text of the books. As for copyrighted books, Google Library would digitize the full texts unless publishers objected 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.

¹² See Google Book Search Publisher Questions, http://books.google.com/googlebooks/publisher_library.html (last visited Nov. 5, 2008), which states:

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.

¹³ After the completion of this article's final version, Google, the Authors' Guild and the Association of American Publishers reached a settlement agreement in a lawsuit that the latter filed against Google regarding the reproduction of their copyrighted works by Google. The settlement agreement is still pending for the court's approval. For more details about the settlement agreement and a copy of the settlement agreement, see <http://books.google.com/booksholders/> (last visited Nov. 22, 2008). Overall, the settlement agreement represents a licensing agreement between Google and copyright owners. Among other things, this agreement means that Google has abandoned its attempt to rely on the fair use defense for its digital library project. A full discussion of the settlement agreement and its implications exceeds the scope and purpose of this article. But it is worth noting that this shift in Google's strategy does not seem to have an impact on the principal argument that this Article presents. Moreover, one could raise the question whether Google itself should still be estopped from denying third parties use of material it had previously argued was protected by fair use.

¹⁴ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

¹⁵ 17 U.S.C. § 512 (2006).

¹⁶ See *infra* Part II(C)(II).

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 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.¹⁷ 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.¹⁸ 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. Cultural production is a joint enterprise of individuals and institutions working together within the social machinery. Copyrighted works are both the inputs and the outputs of creative works. Hence, such a human project should incorporate an element of reciprocity. Those who rely on copyrighted works in the course of their cultural activities should treat alike those who follow them.¹⁹

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 a 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.²⁰ As

¹⁷ See Creative Commons, <http://creativecommons.org> (last visited Nov. 5, 2008). The Creative Commons is a nonprofit U.S. based organization that operates a licensing platform promoting free use of creative works. 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 Perpetuity. The basic idea behind the Creative Commons is to facilitate the release of creative works under standardized, automated and relatively generous licensing schemes that make copyrighted works available for sharing and reuse.

¹⁸ See *infra* Parts II(C)(II)(c), III(B).

¹⁹ For a general discussion regarding reciprocity, see LAWRENCE C. BECKER, RECIPROCITY (1986). For an implementation of reciprocity as a guiding principle in the context of copyright law, see Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 322-24 (2007). My purpose in this article, however, is not to develop a moral theory of reciprocity in copyright law. Rather, I focus on more the pragmatic virtues of introducing an element of reciprocity into copyright law's exemptions scheme.

²⁰ See *infra* Part III(A) for a discussion of copyright's economics and the contribution of a

long as a reciprocal share-alike requirement is structured with a scope that maintains enough incentives to produce secondary works, it represents a social benefit that copyright law should capture. In addition, this 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 III *infra*. Just like other elements and principles of copyright law, a reciprocal share-alike requirement may involve information costs, ambiguity and vagueness that require resolving. If structured too broadly, a reciprocal share-alike requirement may also have a negative impact on the incentive to invest resources in the production of secondary cultural works.²¹ Yet, these difficulties can be addressed, and they need not discourage policy makers from considering the adoption of reciprocal share-alike exemptions. In fact, as this article will further demonstrate, these difficulties do nothing but mirror the general difficulties and tensions between social benefits (incentives to create) and social costs (restrictions on future uses) to which copyright protection gives rise.

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.²² Another advantage of reciprocal share-alike exemptions is their contribution to 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 consumer-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 disadvantageous position by 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

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.

²¹ See *infra* Part III.

²² See *id.*

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, this article consists of four parts. Part I 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; and c) a copyright exemption for digital archiving in relation to current pending reform proposals in section 108 of the Copyright Act.²³ Based on these case studies, Part II 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 to economic analysis. I then analyze the role of reciprocal share-alike exemptions in advancing a broader framework of considerations that wishes to advance users' rights, and democratic and distributive values. Part III discusses several potential critiques and counterarguments against the thesis of this article. Part III also outlines some preliminary guidelines for the scope and nature of reciprocal share-alike exemptions. Part IV summarizes and concludes.

I. 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 who wish to access and use the new expression (which uses the original copyrighted materials) for similar legitimate and socially valuable purposes should be legally entitled to do so freely, and should be 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

²³ See *infra* Part II(C)(1).

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.

The first example is a search engine that produces and displays thumbnail images from websites in its results pages, or a search engine that caches the content of entire websites as part of its information retrieval services.²⁴ According to my proposal, as long as these actions are based on a copyright exemption, such as the fair use defense²⁵ or the DMCA's safe harbor for caching,²⁶ subsequent third parties should be legally entitled to use, for similar socially beneficial purposes, these outputs of search engines, and to overcome technological protection measures and contractual limitations that attempt to impose restrictions in this context.

A second example refers to commercial digital images collections—such as those of Getty Images,²⁷ Corbis²⁸ and the Bridgeman Art Library²⁹—that produce, manage and merchandize digital images of original cultural works. Many of these original cultural works have already fallen 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 arise if the digital images

²⁴ See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006). The *Perfect 10* and *Kelly* cases involved the production and use of thumbnail images. *Field* dealt with caching. "Caching" can be broadly defined as "automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request."

²⁵ 17 U.S.C. § 107 (2006).

²⁶ 17 U.S.C. § 512(b) (2006). This section provides 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 . . ." (emphasis added). In order to obtain 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 who, after the material [was] transmitted . . . , [had requested] access to the material from the person [who had made it available]. Section 512(b)'s 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.

²⁷ See Getty Images, <http://creative.gettyimages.com/source/home/home.aspx> (last visited Nov. 5, 2008).

²⁸ See Corbis, <http://www.corbis.com/corporate/overview/overview.asp> (last visited Nov. 5, 2008).

²⁹ See Bridgeman Art Gallery, http://www.bridgeman.co.uk/about/about_us.asp (last visited Nov. 5, 2008).

are considered to satisfy the requirement of *originality*, which is a prerequisite for copyright protection.³⁰ In some legal systems, such as the European Community, the entire database, as a whole, may qualify for independent *sui generis* intellectual property protection.³¹ According to a reciprocal share-alike requirement, under certain conditions, 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' copyrightability. I will return to this issue in Part I(C)(3) *supra* when discussing the proposal of a compulsory license for digital archiving.

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 a section 115 compulsory license are obliged to treat alike subsequent producers who wish to use extracts from the sound recordings for productive purposes such as sampling, even if such activity does not fall under any other copyright exemption.³²

Another example includes parodies, satires and appropriation art, which are types of secondary works that tend to rely on the fair use defense when using and integrating elements from copyrighted works.³³ According to a reciprocal share-alike requirement, under certain conditions, works of these kinds, which rely on the fair use defense in the course of their production, should be likewise accessible and usable by subsequent third-generation creators and users that add their own contribution. For example, if an episode of "Saturday Night Live"

³⁰ See 17 U.S.C. § 102(a) (2006). 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 that 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" requirement which, according to the Supreme Court's *Feist* decision, was the *sine qua non* of originality. *Id.* at 197. See also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

³¹ See the European Union's Directive on the Legal Protection for Databases, Council Directive 96/9/EC, art. 9, 1996 O.J. (L 77) 20 (EC) (Database Directive). As opposed to the U.S. approach, the Database 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.

³² In the context of sampling, courts have generally ruled that unauthorized sampling should be considered copyright infringement and not fair use. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

³³ 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).

includes a satire on “Sex and the City,” or if the artist Jeff Koons appropriates copyrighted works in the course of his artistic expressions,³⁴ later creators and users should be entitled to access and make additional similar productive uses of these secondary works without limitations other than on slavish copying and direct commercial competition.

* * * *

These are just a few examples, in a nutshell, to be followed in Part I(C) by three detailed case studies of reciprocal share-alike exemptions. My purpose in the following paragraphs is to use these examples as a benchmark for two preliminary observations regarding reciprocal share-alike exemptions. First, reciprocal share-alike exemptions are not intended to govern the relationship between original 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 exemptions focus on the relationship between secondary users and third-generation subsequent users who have 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-version” album and third parties who wish to make use of it. Yet, the relationship between such third parties and the authors of the original 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 original copyright owners, third-generation subsequent users may benefit from exemptions and privileges similar to the ones of their predecessors (the secondary users). Moreover, in Part I(C)(2) I will demonstrate that there are instances in which, while original copyright owners are 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 are in addition to, and not instead of, other copyright exemptions. Returning again to the example of section 115 and its mechanical compulsory

³⁴ See Jeff Koons, <http://jeffkoons.com/> (last visited Nov. 5, 2008). Jeff Koons was also involved in a series of copyright infringement litigations in which he argued for the fair use defense, all of which, except the *Blanch* case, he lost. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055 (RO), 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

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 relies on section 115, his obligations toward future users of his recording may be broader than the general fair use defense and subsequent third-generation users may also enforce a compulsory license scheme for similar uses.

B. *Doctrinal Aspects*

Overall, the current doctrinal structure of copyright law allows the adoption of 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 origins³⁵ make it an appropriate legal mechanism for such a development. Fair use is also considered as a mechanism aimed at advancing efficiency,³⁶ a ubiquitous creative sphere, free speech³⁷ and distributive values in creative activities.³⁸ In Part II *infra* 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*.³⁹ Copyright misuse protects a defendant's use of 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

³⁵ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (applying an "equitable rule of reason" when balancing fair use factors). See also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

³⁶ See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002).

³⁷ 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).

³⁸ See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

³⁹ See *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990); *DSC Commc'ns Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996); *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 792-93 (5th Cir. 1999). See also Ramsey Hanna, Note, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401, 416-19 (1994); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003).

circumstances of anti-competitive conduct by copyright owners. But, based on its equitable background, there is nothing to prevent 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 the advantages of reciprocal share-alike exemptions are acknowledged, there may be circumstances that will justify particular legislative amendments in this direction. I demonstrate such circumstances in Part I(C)(3) *infra* when discussing the case study of a particular exemption for digital archiving.

* * * *

Just like other copyright doctrines (e.g. fair use and the idea-expression dichotomy), the implementation of 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 secondary work that was created based on a copyright exemption without undermining *ex ante* incentives for the production of the secondary work. Just like fair use, reciprocal share-alike exemptions consist of an open-ample standard that courts, and at times legislators, will have to develop on a case by case basis. In Part I(C) *infra* I will make the 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 exemptions are aimed at providing their beneficiaries with something more than copyright's general framework of exemptions. Copyright's general exemption scheme is unilateral. Reciprocal share-alike exemptions are broader because they are multilateral. 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. As Jim Gibson demonstrated recently,⁴⁰ open-ample copyright exemptions involve a

⁴⁰ See Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007).

considerable degree of vagueness. Therefore, when copyright defendants are risk-averse, open-ample copyright exemptions also involve a chilling effect. In such circumstances, market practices tend to create a feedback loop in which risk aversion induces “small-pocket” users to buy licenses out of excess caution. Users may take licenses even when they would have had a good claim for a copyright exemption. Reciprocal share-alike exemptions provide a mechanism that helps to reduce 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 spillover 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 scanning of entire copyrighted works for archiving and retrieval purposes.⁴¹ In such circumstances, the imperative of a reciprocal share-alike requirement would be that, *vis-à-vis* 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 capacity 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 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 original 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 Wikipedia⁴² article on an artist or art related aspects, or an artist, would now be able to produce and use digital images from the museum’s collection of art works that the museum has made available online.

⁴¹ See *supra* note 12.

⁴² Wikipedia is a collaborative commons-based peer-production open-content encyclopedia project. See <http://www.wikipedia.org> (last visited Nov. 5, 2008).

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.⁴³ 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 crucial 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 the section 512 "notice and take-down" safe harbor. Yet, the flipside of content-sharing platforms' reliance on section 512(c)'s 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 also apply to 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 also covers 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 "mere conduits," imposes a *quid 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 to which it applies. One alternative is to limit the applicability of a reciprocal share-alike requirement to only the original 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 its use of copyrighted materials. The question here would be whether the reciprocal share-alike requirement would also enable free use of the *novel* creative elements within the fan fiction work. Similarly, regarding sound recordings that were produced based on section 115's compulsory license scheme, the question would be whether and to what extent the reciprocal share-alike requirement

⁴³ See *infra* Part II(C)(2).

applies to the new sound recording that was produced.

The justifications set forth in Part II *infra* may justify a broad implementation of the reciprocal share-alike requirement and its extension 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. As in the context of fair use, courts will have to develop, on a case by case basis, a codex for considerations and instances that justify the imposition of the reciprocal share-alike requirement with a scope and to a 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

The purpose of 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 exemptions into copyright law's exemptions scheme. My second purpose with this section 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 II then includes a theoretical analysis regarding the justifications and potential objections for reciprocal share-alike copyright exemptions.

1. Fair Use

Fair Use is an affirmative defense for what would otherwise be an infringing act.⁴⁴ Fair use allows "others than the owner of the copyright" to use, without permission, copyrighted work when it is "reasonable,"⁴⁵ in order to promote "science and the useful arts."⁴⁶

⁴⁴ See 17 U.S.C. § 107 (2006); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Harper & Row Publ'g., Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

⁴⁵ *Harper & Row*, 471 U.S. at 549 (quoting HORACE G. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

⁴⁶ *Id.* See U.S. CONST. art. 1, § 8, cl. 8.

There is no bright line rule to distinguish what is reasonable fair use from what is actionable infringement.⁴⁷ 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.”⁴⁸ 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 value of the copyrighted work.”⁴⁹ This case by case analysis facilitates the balancing of various competing interests, but by its nature, fails to offer guidelines that are both clear and certain.

My proposal imposes 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. One main condition is that such subsequent uses will carry productive or otherwise socially valuable attributes similar to those of the original secondary uses. Consider the following examples.

If a broadcasting station considers a parody, embedded in a television program, to be fair use, a similar rule should apply to future transformative uses of the broadcasting station’s own creative materials. Thus, the broadcasting station should be prohibited from preventing public access to or secondary uses of its parodic television program. If Google claims that its Book Library project’s⁵⁰ scanning of entire copyrighted books for archiving and retrieval purposes is fair use, a similar rule should apply to the use of materials from Google’s databases for similar purposes. Similarly, consider Google’s claim that the creation of reduced-size “thumbnail” images from websites’ visual content is fair use.⁵¹ According to a reciprocal share-alike requirement, once establishing the production of thumbnail images as fair use, subordinated to some limitations that are aimed to prevent mere free riding by a direct commercial competitor, Google should enable free

⁴⁷ *Campbell*, 510 U.S. at 577; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31.

⁴⁸ *Sony*, 464 U.S. at 448-50.

⁴⁹ 17 U.S.C. § 107 (2006).

⁵⁰ *See supra* notes 11-12.

⁵¹ *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007).

access and free use of its entire thumbnail image database for similar transformative and otherwise socially valuable purposes by subsequent third parties.

There are two categories of materials with which a reciprocal share-alike fair use may deal. The first category includes copies of the original 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, a reciprocal share-alike requirement would allow subsequent users to freely access and use the new copyrighted work up to a similar extent and degree as the original secondary user when the secondary user relied on the fair use defense. There is no requirement of exact resemblance 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.⁵² But in the long run, this ambiguity and uncertainty will gradually be resolved. Overall, this ambiguity also seems slighter than the usual vagueness users face when considering whether to rely on the fair use defense. The reason for this lies in the fact that third-generation subsequent users who rely on the reciprocal share-alike requirement have the preceding secondary use as a relatively detailed benchmark for defining the nature and scope of their legitimate free use.

There is still at least 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 can be achieved through the following, simpler, 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 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 answer to this challenge covers

⁵² See Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007).

several layers.

I entirely agree that one of many possible ways to implement a reciprocal share-alike requirement would be the use of fair use arguments by future third-generation subsequent users. Nevertheless, this fact does not undermine the value of developing reciprocal share-alike exemptions and making such exemptions a condition of the fair use defense. To begin with, as already mentioned, a reciprocal share-alike requirement may trump technological and contractual restrictions. In such circumstances, the general traditional fair use defense from which third-generation subsequent users may benefit 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 adverse copyright users often seek a license when none is needed. This in turn causes a “doctrinal feedback” that expands copyright boundaries.⁵³ A reciprocal share-alike requirement mitigates this tendency by gradually creating “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 conduct of major market players who are able and more inclined to insist on fair use in disputed and marginal cases.⁵⁴

Additionally, the reciprocal share-alike requirement would shift 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.⁵⁵ 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 original 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 those of the original secondary use, a presumption of legitimacy arises. The power of a reciprocal share-alike fair use, therefore, is also in creating a codex of instances that are presumed to be legitimate privileged uses because they were treated as such by their predecessors.

⁵³ See Gibson, *supra* note 40.

⁵⁴ See *supra* note 40 and accompanying text.

⁵⁵ See *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 defendant had met burden of proving absence of harm to potential derivative work markets for plaintiff's song).

2. 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 infringement with regard to materials that were uploaded to the platform by third parties. The main question in this context is whether and under what conditions content-sharing platforms may have shelter under the safe harbor of section 512(c) of the Federal Copyright Act as added by the DMCA.⁵⁶ The most recent example illustrating the centrality of section 512(c) in this context is a lawsuit filed by the entertainment conglomerate Viacom against YouTube.com for nearly 160,000 unauthorized clips of Viacom's entertainment programming that were made available on YouTube.⁵⁷ Several scholars, including Timothy Wu⁵⁸ and Lawrence Lessig⁵⁹ expressed the view that section 512(c)'s safe harbor also applies to the activity of content-sharing platforms and other types of

⁵⁶ 17 U.S.C. § 512 (2006). Section 512(c), which deals with "[i]nformation 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 provider 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 of the applicability of the safe harbor "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." On the other hand, material not covered includes 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 H.R. REP. NO. 105-551(II), at 53 (1998). The question still remains whether and under what conditions the section 512(c) safe harbor will shelter a content-sharing platform such as YouTube.com regarding copyright infringements that took place on the content-sharing platform.

⁵⁷ See Greg Sandoval, *Viacom Sues Google over YouTube Clips* (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> (last visited Nov. 5, 2008).

⁵⁸ Tim Wu, *Does YouTube Really Have Legal Problems?*, SLATE (2006), <http://slate.com/id/2152264>. As Wu writes: "In 1998, [information residing on systems or networks at direction of users in 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.'"

⁵⁹ Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, §4, at 12, available at <http://www.nytimes.com/2007/03/18/opinion/18lessig.html?ex=1331870400&en=a376e7886d4b62&ei=5088&partner=rssnyt>.

web 2.0 applications. Overall, the approach of Wu and Lessig seems both fundamental and justified. It is fundamental to the 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-providers were part of a quid pro quo for the enactment of anti-circumvention prohibitions. Copyright owners were given much more (and maybe even too much) control over their portfolio of copyrighted works; but Congress simultaneously complementarily reduced the liability of content intermediaries and service-providers by shifting from an *opting-in* strict liability regime to an *opting-out* “notice and take down” regime.⁶⁰

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 512(c)’s safe harbor can and should be conditioned upon a reciprocal share-alike requirement. Content-sharing platforms that rely on section 512(c)’s safe harbor should not limit—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. According to this view, the flip-side of content-sharing platforms’ reliance on section 512(c)’s 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 taking shelter under section 512(c)’s exemption, content-sharing platforms cannot “lock”—either technologically or legally—third parties’ materials that they are hosting on the platform.

The proposal to implement a reciprocal share-alike requirement in the context of section 512(c) does not rest on hypothetical scenarios regarding the manner in which 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

⁶⁰ See Wu, *supra* note 58. 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 512(c)’s notice and take down regime with regard to hosting service providers).

copyright to all content on the website, except user submissions,⁶¹ and including, without limitation, the text, software, scripts, graphics, photos, sounds, music, videos, and interactive features.⁶²

The purpose of a reciprocal share-alike requirement is to prevent the imposition of proprietary restrictions on user-generated content and, particularly, content for which 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.”⁶³ Section 512(c)’s safe harbor is based on the social benefits that are derived from the ubiquitous free flow of content, as well as on the social costs, including chilling and deterrent effects, that a strict liability regime would impose on content-sharing platforms.⁶⁴ 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.⁶⁵ In many circumstances, this model operates under a framework in which the platform obtains user-generated content free of payment.

The combination of these two features of content-sharing platforms supports a reciprocal share-alike requirement in the context of section 512(c)’s safe harbor. A reciprocal share-alike requirement promotes the same public interests that justify originally entailing content-sharing platforms with a safe harbor. In addition, such a requirement seems to correspond well with 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 provides a good example with three elements that are associated with reciprocal share-alike exemptions: a) economic efficiency; b) potential contribution to copyright’s

⁶¹ User-submissions are subordinated to a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license. See YouTube.com Terms of Use, § 6(c), <http://www.youtube.com/t/terms> (last visited Nov. 5, 2008).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ 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 15 (2006); Assaf Hamdani, *Who’s Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901 (2002).

⁶⁵ See Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) [hereinafter *Coase’s Penguin*]; 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 requiring monetary incentives*).

communications policy; and c) distributive and democratic values.

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 on and costs of 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 instances, these restrictions are barely 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 future access to the platform's content and the use of the platform's content for 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, effort and resources in producing and distributing content. Nevertheless, the exposure of users to restrictions and costs is likely to undermine their incentives for and dedication to 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 content-sharing platforms and prevents them from imposing such restrictions after glomming on the contribution of end-users while benefiting from the safe harbor of section 512(c). This in turn facilitates further uses of materials that have been uploaded to content-sharing platforms. As long as the reciprocal share-alike requirement is not too broad and does not undermine the incentives 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 original 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 main legal mechanism for regulating media and communications platforms.⁶⁶ The content layer, which is a central component of speech and communicative activities, is basically governed by copyright law.⁶⁷ Moreover, any regulation of the content layer has direct implications on the identity and conduct of media and communications entities, as well as on the advancement of goals such as diversity and competitiveness.⁶⁸

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 to the platform. Presumably, a reciprocal share-alike requirement would 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 to those of "common carriers."⁶⁹ This regulation would

⁶⁶ See Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

⁶⁷ 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).

⁶⁸ See Wu, *supra* note 66; Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001); Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002).

⁶⁹ 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." James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 227 (2002). 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

operate by conditioning the safe harbor for content-sharing platforms upon a requirement that the content be 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 movement of copyright law. This development reflects new perspectives on the freedom of speech-copyright interface⁷⁰ at 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 adverse impact on the advancement of robust, pluralistic and diversified creative spheres;⁷¹ 2) the advancement of *democratic theories* of copyright law,

in a particular manner. *See id.* (surveying the history of common carriers and arguing that the same reasons that justify the rules for common carriers also justify a general interconnection obligation for Internet carriers).

⁷⁰ 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?*, 19 COPYRIGHT L. SYMP. 43 (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: "[T]he conflict between copyright and free speech is generally ameliorated by copyright's role in incentivizing new expression and by copyright's 'internal safety valves'—the copyright law doctrines that limit the scope and duration of copyright holder rights." *Locating Copyright*, *supra* note 9, at 4, 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"). For an excellent critical analysis of the copyright and free speech conflict and the various narratives that have developed with regard to this conflict, see Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233 (2003); Michael D. Birnhack, *Copyright Law and Free Speech after Eldred v. Ashcroft*, 76 S. CAL. L.R. 1275 (2003).

⁷¹ *See, e.g.,* *Locating Copyright*, *supra* note 9; 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) [hereinafter *Free as the Air*]; Yochai Benkler, *Siren Songs and Amish Children:*

which both justify and attempt to construct copyright's scope according to the central values of a liberal democracy;⁷² and 3) the importance of structuring copyright law around distributive justice considerations that champion broad and equal distribution of expressive opportunities.⁷³

As a practical matter, the implementation of distributive and democratic values as part of copyright law faces many difficulties and hurdles.⁷⁴ At this juncture, one may notice again the virtues of reciprocal share-alike exemptions—both overall and in the unique context of content-sharing platforms. A reciprocal share-alike requirement promotes distributive and democratic values by advancing free and equal access to, as well as the ability to use, materials that have been uploaded to content-sharing platforms. It does so while bypassing some of the usual obstacles that copyright legislation and the political process tend to impose in this context. By making this observation I am not arguing that a reciprocal share-alike requirement is likely to democratize and decentralize media markets overnight. I do argue, however, that there is a practical solution within reach that can improve the functioning of content-sharing platforms and their correspondence to democratic and distributive values.

3. A Reciprocal Share-Alike Exemption for Digital Archiving

The last case study is more particular and 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 owners⁷⁵—becomes an integral element—a prerequisite—of almost any

Autonomy, Information, and Law, 76 N.Y.U. L. REV. 23 (2001).

⁷² 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 79 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) [hereinafter *Copyright and a Democratic Civil Society*]; 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.

⁷³ See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Jack M. Balkin, *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) [hereinafter *Digital Speech*]; Oren Bracha, *Standing Copyright Law on Its Head?: The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1843-55 (2007).

⁷⁴ See *supra* notes 5-8 and *infra* notes 92-96, and accompanying text.

⁷⁵ 17 U.S.C. § 106(1) (2006).

form of digital communication, creation, documentation, archiving or preservation activity.⁷⁶ 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. The current scope, interpretation and application of the fair use defense,⁷⁷ as well as of other particular exemptions that deal with reproduction for preservation purposes (e.g. section 108 of the Copyright Act⁷⁸), seem to make the exceptions and limitations almost obsolete in the context of digital archiving, and especially in the context of activities that involve large-scale reproductions of entire copyrighted works.⁷⁹

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 that accords with 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.⁸⁰ Similar proposals have been outlined by Peter Menell⁸¹ and to some degree by Section 108's Study Group.⁸² A full discussion of this topic exceeds the scope and purpose of this article. The relevant points for our purposes are the justifications for a copyright exemption for digital archiving and the manner in which a copyright exemption for digital archiving should incorporate a reciprocal share-alike requirement.

⁷⁶ See *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).

⁷⁷ See 17 U.S.C. § 107 (2006). See also Guy Pessach, *Museums, Digitization and Copyright Law - Taking Stock and Looking Ahead*, J. INT'L MEDIA AND ENT. L. (2007).

⁷⁸ 17 U.S.C. § 108 (2006). See Pessach, *supra* note 77.

⁷⁹ See Diane L. Zimmerman, *Can our Culture be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989, 1012-26 (2007).

⁸⁰ See *id.* at 1027-40.

⁸¹ See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, (Univ. Cal. Berkeley Public Law Research Paper No. 999801, 2007), available at <http://ssrn.com/abstract=999801>.

⁸² The Section 108 Study Group examined the exemptions and limitations applicable to libraries and archives under the Federal Copyright Act, specifically in light of the changes brought about by digital media. See Section 108 Study Group: Information for the March 2006 Public Roundtables and Request for Written Comments (2006), <http://www.section108.gov/docs/FRbackground2-10-06.pdf>. On March 2008, the Section 108 Study Group issued their final report. See The Section 108 Study Group Report (2008), <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

In its final report, the Section 108 Study Group does not recommend the implementation of a compulsory license scheme for digital archiving, but rather proposes several particular reforms that would make Section 108 of the Federal Copyright Act more applicable to and relevant in the context of digital preservation and the preservation of publicly available online content. *Id.*

In her proposal, Zimmerman mentions two requirements to which beneficiaries of the compulsory licensing scheme should be subjected. First, the database should 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.⁸³ 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, subordinate to some restrictions and limitations similar to those of the compulsory license, the *entire* content of a digital archive that benefits from the proposed compulsory licensing scheme should be made accessible by the secondary user to the general public. Thus, no technological or contractual limitations would be imposed on third parties who wish to access and use the archive.⁸⁴

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, an effective ability to access and use digital archives, including archives that benefit from the proposed compulsory licensing scheme, is no less compelling than an effective ability to use original copyrighted cultural materials for preservation purposes. The same justifications that underlie the proposed compulsory licensing scheme also apply to the contents of digital archives. Therefore, materials that were obtained and archived based on a compulsory licensing scheme should also be accessible to third parties and their subsequent uses.

The compulsory licensing scheme may include, in appropriate circumstances, compensation to copyright owners for third parties' subsequent uses of original copyrighted materials. Nevertheless, as opposed to original copyright owners, digital archives, which obtain their archived materials based on a digital archiving exemption, seem to have limited justification for either controlling or being compensated for the use of their materials.⁸⁵ Commercial digital archives may use a

⁸³ See Zimmerman, *supra* note 79, at 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).

⁸⁴ For a related discussion, see generally Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROB. 23 (2007) [hereinafter *Cultural Environmentalism*] (making an analogy between land conservation easements and "share-alike" requirements that are included within the general public license and creative commons licenses). My proposed scheme is also based on an easement model, but in the reciprocal share-alike context, the easement is mandatory and is based upon the grant of a privilege (exemption) for using copyrighted materials.

⁸⁵ One analogy in this context refers to the issue of database protection and the United States 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).

variety of ways, such as subscription fees or indirect revenues from advertising, to recover their costs and make a reasonable profit. Yet, they seem to have less justification for imposing a proprietary regime on digital artifacts that were obtained and produced based on a copyright exemption for digital archiving.

More generally, a reciprocal share-alike requirement identifies and keeps track 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 to future generations.⁸⁶ 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).⁸⁷

At this juncture, there is one counterargument that calls for attention: the potential negative impact that a reciprocal share-alike requirement might have on the incentive to invest resources 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. But even without obtaining this data, I can suggest several reasons why a reciprocal share-alike regime is unlikely to destabilize commercial cultural retrieval databases or otherwise diminish this area of social activity. One reason is 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 is that, even without proprietary protection, commercial digital archives may use a variety of methods, such as subscription fees or indirect revenues from advertising, to recover their costs and make a reasonable profit. Indeed, the general analogy that comes to mind in this context is of databases and their lack of copyrightability.⁸⁸ Since producers of databases focus on accumulating existing cultural materials and knowledge, they do not

⁸⁶ 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 AM. J. INT'L L. 831 (1986); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. R. 339 (1989).

⁸⁷ See Guy Pessach, *[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents*, 26 CARDOZO ARTS & ENT. L.J. 71 (2008).

⁸⁸ See Bitton, *supra* note 85 and the sources cited therein. For another approach, see the Database Directive, *supra* note 31.

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 from which database producers would now benefit.

Finally, even if a reciprocal share-alike requirement does decrease the incentives of commercial cultural retrieval intermediaries, this fact may be a potential regulatory virtue. As Zimmerman and others argue, in the unique context of digitized cultural preservation, a public-oriented provision may have many advantages over a market provision.⁸⁹ Public-oriented and not-for-profit archives are less concerned with financial gains and are more committed to the goal of public access. Therefore, as opposed to commercial enterprises, they are likely to be less influenced by the imposition of a reciprocal share-alike requirement. 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 two-fold: first, enabling all types of players, including commercial enterprises and public-oriented institutions, to benefit from an exemption for digital archiving; and 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.⁹⁰ As opposed to the context of the originality requirement and its application to digital archives, here, the focus shifts from the creative contribution of the databases’ producers to the imposition of obligations that “run with” exempted digital archiving.

II. JUSTIFYING RECIPROCAL SHARE-ALIKE EXEMPTIONS

Based on the preceding discussion, the purpose of this part is to

⁸⁹ See Zimmerman, *supra* note 79, at 1004-11; see also Pessach, *supra* note 87.

⁹⁰ See *supra* note 30 and accompanying text.

further elaborate the theoretical justifications for making copyright's exemptions reciprocal. The three case studies that were analyzed in Part I *supra* mentioned several justifications, all in conjunction with 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.⁹¹ The pragmatic virtue of reciprocal 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 Berne Convention and the TRIPS agreement impose on the adjustment of new copyright exemptions. Article 9(2) of the Berne Convention and Article 13 of the TRIPS agreement both authorize an exemption to copyright only in "certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." 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.⁹² Domestic copyright legislators and courts are thus chained to the very restrictive limitations of the three-step test. Reciprocal share-alike exemptions bypass and overcome the rigid limitations of international copyright law and the three-step test. They do so by crafting 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 original copyright owners and third-generation subsequent users. It also covers only instances in which a copyright owner initially relied on a

⁹¹ Copyright protection has expanded significantly in the last century, and especially in the last decade. For a detailed critical survey of this expansion, see *Locating Copyright*, *supra* note 9, at 13-30.

⁹² See MARTIN SENFLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW, 133, 209, 218-19 (2004); Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 267, 322-24 (2007). It is worth adding that the reproduction exception in article 9(2) of the Berne Convention does not cover reproduction of *audio-visual works*. Therefore, according to the Berne Convention, domestic copyright law legislation is prohibited from adjusting an exemption that would authorize reproduction of copyrighted *audio-visual works* for preservation purposes, including through a compulsory licensing scheme.

copyright exemption. Yet, as my preceding examples and case studies demonstrate, there are still a number of instances in which reciprocal share-alike exemptions can potentially improve copyright law's equilibrium of incentive and access.⁹³

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 legislation according to their needs.⁹⁴ These attributes leave little hope for a conclusive and in-depth legislative reform of 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.⁹⁵ Nevertheless, in comparison to the legislative arena, and when operating within an open "standards-oriented" framework, at least in some instances, the judiciary still seems more attentive to public-oriented considerations than the legislative branch. Thus, in the judiciary, the concept of reciprocal share-alike exemptions may be helpful.⁹⁶

⁹³ See *supra* Part I.

⁹⁴ See generally Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); *Locating Copyright*, *supra* note 9, at 67-69; Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

⁹⁵ See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L. J. 355 (1999). Thus, some of the advantages that small powerful interest groups are likely to benefit from in legislative matters are also expected to have their impact within court proceedings. Such advantages include financial resources to invest in legal proceedings and "precedent purchasing," interest group influence over judicial appointments, and problems of collective action. 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 *Locating Copyright*, *supra* note 9, at 12-30; *Harper & Row*, 471 U.S. at 549-550, 559 n.9, 561, 568.

⁹⁶ In addition, when one considers the counterclaim that the judiciary itself is also suspected of being subordinated to 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; only later had legislators either adopted these limitations and exemptions, or 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* 6-17 (2d ed., 1995) (reviewing early English cases); *id.* at 19-25 (reviewing the case of *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)—the first

Finally, reciprocal share-alike exemptions also have 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 has demonstrated,⁹⁷ courts and commentators increasingly adopt—explicitly or implicitly—the economic logic of real property in the context of intellectual property cases.⁹⁸ 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 exemptionsglom 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 also apparent in the context of technological protection measures (“TPMs”) and excessive contractual limitations that copyright owners tend to impose in standard digital users’ licenses. Overall, copyright law has very few effective mechanisms for responding to abridgements of copyright’s exemptions and limitations through the enforcement of TPMs and contractual limitations.⁹⁹

fair use case to be decided in the United States). Another prominent example is the idea-expression dichotomy. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). Only in 1976 was this basic principle codified into the Federal Copyright Law. See 17 U.S.C. § 102(b) (2006) (“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.”). Other examples include 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 (1962); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). See also Note, *Clarifying the Copyright Misuse Defense*, 104 HARVARD L. REV. (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 another legal tool to be developed and advanced by courts.

⁹⁷ See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

⁹⁸ *Id.* at 1036-46.

⁹⁹ Several proposals have been made in an attempt to overcome this imbalanced outcome to which TPMs and the anti-circumvention prohibitions give rise. Some proposals focus on enforcing fair use privileges against TPMs 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, 374-75 (2004), or through legalizing “the right to hack” TPMs. See Dan L. Burk & Julie E. 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 Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007). 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 TPMs or otherwise enable these lawful uses. My proposal comes on top of and along-

Reciprocal share-alike copyright exemptions provide a legal mechanism for scrutinizing TPMs 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.¹⁰⁰ 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.¹⁰¹ Thus, 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.¹⁰² 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

side these proposals. One advantage of my proposal is that it imposes an obligation—a duty—on those who rely on a copyright exemption and then attempt to enforce TPMs 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.

¹⁰⁰ 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 Glynn S. Lunney, Jr., *Reexamining Copyright Incentives—Access Paradigm*, 49 VAND. L. REV. 483 (1996); Sterk, *supra* note 94; *Copyright and a Democratic Civil Society*, *supra* note 72; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

¹⁰¹ The initial works in this context were Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934) and Robert M. Hurt & N. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECO. REV. 421 (1966). In a later period, 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.

¹⁰² See Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853 (1992).

least without paying).¹⁰³

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 creative activity that attempts to rely on and use existing copyrighted materials.¹⁰⁴ 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.¹⁰⁵ 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 *efficiency in production* which has a positive price for producers and creators, and *efficiency in distribution and future creative activity*, which has a zero price for users.

For these reasons, one central task of positive copyright law has been to reach an equilibrium that both maximizes incentives to create and minimizes burdens and costs to further non-rival creative activity that seeks access to and relies on existing copyrighted works. This equilibrium is usually achieved by implementing exemptions and limitations on 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 incentives and burdens is applied, while defining circumstances and scenarios in which free use of copyrighted materials is permitted.¹⁰⁶ Another prominent example of such a mechanism is the *idea-expression dichotomy*, which is the rule that copyright protects only fixated expressions and not mere abstract ideas and facts.¹⁰⁷

¹⁰³ See *id.* 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. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). Recently, 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 Coase's Penguin, *supra* note 65.

¹⁰⁴ Landes & Posner, *supra* note 100.

¹⁰⁵ 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, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

¹⁰⁶ See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

¹⁰⁷ 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) excessive monopolization costs regarding

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 *outputs* of cultural materials,¹⁰⁸ the category of copyrighted works that have been produced with reliance on a copyright exemption is relatively broad. Accordingly, creators and producers face a dissonance between their ex-ante position as consumers-users of third parties' copyrighted works and their ex-post position as owners and proprietary managers of their own copyrighted works. Before their own cultural work is produced, secondary users may seek broad access and exploitation privileges for their creative inputs. But once their secondary works have been 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. Yet current copyright law doctrine and theory tend to ignore 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; and 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 some degree of 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 externality¹⁰⁹ on third-generation subsequent users

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 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 copyrighting of facts; 6) and the assumption that limiting copyright protection to only fixated expressions would provide sufficient incentives for the production of creative works, thus avoiding the significant costs of copyrighting isolated facts.

¹⁰⁸ See *Free as the Air*, *supra* note 71, at 401-02.

¹⁰⁹ 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

and the public in general, who now suffer from less capacity to access and use secondary works.

Subordinating secondary users to a reciprocal share-alike requirement solves these problems. 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 modulate 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, at least up to a certain degree, 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 the reciprocal share-alike requirement to which the secondary user should be subordinated, all without eliminating the incentive for producing the secondary work.

Returning to the case study of content-sharing platforms, one can now better understand the broad reciprocal share-alike requirement to which content-sharing platforms should be subordinated. 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-users 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, reciprocal share-alike exemptions can also advance other values and goals that liberal democracies may wish to endorse and promote within their copyright system. In Part I(C)(2)(c) *supra*, I mentioned the role of free speech values, and particularly, the equal distribution of expressive opportunities, in structuring copyright law and its underlying doctrines.

society at large. A related instance of positive and negative externalities occurs in 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.

Additionally, recent scholarship reflects increasing awareness of the centrality of users' rights within copyright law.¹¹⁰ My purpose here is not to provide an in-depth discussion of these notions and their correspondence to copyright law. The important point for our purposes is that, according to these concepts, pluralism, active participation and creative autonomy are considered to be the features that determine what it means for a society to be democratic.¹¹¹

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.¹¹² Active participation means that all members of society, irrespective of status or financial ability, should be able to experience and consume 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.¹¹³ 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, decentralized and equal distribution of creative opportunities. In addition, copyright law should be attentive to 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.¹¹⁴

Reciprocal share-alike exemptions take copyright law one step further 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. Further, the *categories of users* and *creative activities* that are more likely to benefit from a reciprocal share-alike requirement are broadened. 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 subject of commercial entities' proprietary regimes, including where the commercial entities' works are

¹¹⁰ See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004); *Digital Speech*, *supra* note 73, at 7-16; Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

¹¹¹ See Bracha, *supra* note 73, at 1846.

¹¹² BENKLER, *supra* note 65, at 133-42.

¹¹³ See Bracha, *supra* note 72, at 1847-48; *Digital Speech*, *supra* note 73, at 4-5.

¹¹⁴ See Anupam Chander and Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257 (2006).

products of exempted secondary uses of originating copyrighted materials. The examples and case studies previously discussed all demonstrate the dissonance between the privileges that search engines, content-sharing platforms and corporate media in general benefit from, and the restrictions and limitations to which their users are subjected. 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 the robust proliferation of information and content flow. It has a similar effect to Moore's law,¹¹⁵ since 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 more equally allocates creative and expressive opportunities. In addition, reciprocal share-alike exemptions have the more oblique function of overcoming particular distributional biases in copyright law. Recall my discussion in Part I(C)(2) *supra* regarding content-sharing platforms. Content-sharing platforms represent a paradigmatic example of a new type of *hybrid* media entity.¹¹⁶ Hybrid media entities tend to use communities and user-generated content as the inputs and outputs of their content portfolios. Yet, as my preceding discussion indicates,¹¹⁷ 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, while concurrently overcoming these entities' inclinations 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

¹¹⁵ 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 increases exponentially, doubling approximately every two years. See Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, 38(8) ELECTRONICS (1965).

¹¹⁶ See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY, 177-224 (2008) (analyzing and discussing hybrid media and content entities). See also Lawrence Lessig, *Lucasfilm's Phantom Menace*, THE WASHINGTON POST, July 12, 2007, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/11/AR2007071101996.html>. For an example of a hybrid media entity, see Lawrence Lessig, *The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, blip.tv, and even Google*, <http://lessig.org/blog/archives/003570.shtml> (Oct. 20, 2006 at 5:12 AM).

¹¹⁷ See *supra* Part I(C)(2).

parties might need to confront when relying on the content portfolios of the hybrid media entities.

III. 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. Moreover, all the disadvantages and counterarguments to be discussed in the following paragraphs represent general difficulties that are associated with a copyright regime. By their basic intangible attributes, copyrighted works, as well as other types of legally protected intellectual goods, involve information costs, a certain degree of vagueness and a continuous effort to balance ex-ante incentives with ex-post social costs. Just as these difficulties do not nullify the value of copyright protection, they do not nullify the value of introducing reciprocal share-alike exemptions to copyright law. Rather, these difficulties emphasize certain aspects that should be considered when crafting the substance and boundaries of reciprocal share-alike exemptions.

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 also apply to the interface between 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 reciprocal share-alike exemptions, it may be easier and more efficient to adopt a general principle that any reliance on copyright exemptions results in prohibiting the use of conflicting technological and contractual restrictions. Similarly, as my

preceding discussion regarding the fair use exemption indicates,¹¹⁸ 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 with regard to secondary users.¹¹⁹

I do not deny the possibility that, theoretically, an optimal regime of general exemptions and limitations for copyright may be superior to 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 has already been discussed in Part II *supra*, is the political deadlock in copyright law and the de facto impediments to improving copyright's exemptions and limitations scheme through legislative reforms. Technological protection measures and contractual limitations¹²⁰ are examples of instances in which reciprocal share-alike exemptions may reach better outcomes than those feasible through legislative reform and judicial interpretation of the fair use defense. Indeed, a general principle that sustains the superiority of copyright's exemptions over technological protection measures and contractual limitations may solve most of the problems in this context. Yet, pragmatically, such a solution does not seem within reach. Thus, the narrower proposal of reciprocal share-alike exemptions rests on grounds that may make it easier for courts to adopt such exemptions.¹²¹

A second related reason is the "muddy" attributes of many copyright exemptions. By using the term "muddy," I draw an analogy from Carol Rose's famous observation about the "muddy" attributes of many entitlements in real property.¹²² 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

¹¹⁸ See *supra* Part I(C)(1).

¹¹⁹ See *id.* and my answers to this argument as set forth there.

¹²⁰ See *supra* Part II.

¹²¹ See *id.* 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 (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).

¹²² See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); see also Thomas N. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

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, possessory interests, adverse possession, and the like. A similar observation could be made with regard to copyright law's exemptions. Putting 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 115's compulsory license regarding the making and distribution of sound recordings of musical works that were previously distributed with the authority of their copyright owner.¹²³ The current structure of section 115 makes no determinations regarding or references to the relationship between section 115's original beneficiaries and later third-generation subsequent users. In fact, literally and according to the common understanding, section 115's compulsory license has no impact on or application to subsequent uses of sound recordings that were produced with reliance on section 115's compulsory license. Similar effects are also apparent in the context of other particular copyright exemptions such as section 512(c)'s safe harbor for hosting services providers. Under current law and literally, the safe harbor that content-sharing platforms benefit from has no impact on or application to subsequent uses of user-generated content that was uploaded to the platform. More generally, it would be fair to argue that most particular copyright exemptions do not apply *equivalently* to cultural products of secondary users who rely and benefit from the exemption at stake. It is exactly at this point that reciprocal share-alike exemptions come into play and supplement what current positive copyright is not able to provide—an extension and application of copyright's particular exemptions to secondary cultural products that were produced in the light of those particular exemptions.

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, originating copyright owners still retain all their exclusive rights and powers vis-à-vis third-generation subsequent users. This observation is indeed correct. Yet, it does not undermine the potential contribution of reciprocal share-alike exemptions to resolving and improving failures

¹²³ See *supra* note 32 and accompanying text.

and disruptions in the manners in which 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, reciprocal share-alike exemptions function as an accumulative component that comes in addition to, and not instead of, other principles and mechanisms of copyright law.

Moreover, the examples and case studies that have been previously discussed¹²⁴ 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 occurs when the originating copyright owners declare 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 such example.¹²⁵ Another example arises when the originating copyrighted materials have already fallen into the public domain, or when a compulsory licensing scheme governs the use of originating copyrighted materials. In all such circumstances, reciprocal share-alike exemptions become fundamental and acute even if they do not govern the relationship between originating copyright owners and third-generation subsequent users. The interface between secondary users and third-generation subsequent users thus provides enough potential hedges that require the adoption of reciprocal share-alike exemptions.

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

A third critique refers to potential negative impacts of reciprocal share-alike exemptions on the incentive to produce secondary works. This critique underscores the basic economics of copyright protection and the incentive argument.¹²⁶ Without copyright protection and proprietary control, producers of secondary works may have no incentive to invest resources in the production and distribution of secondary works when relying on a copyright exemption in the course of producing the secondary work. Similarly, one can speculate that a too broad reciprocal share-alike requirement might deter secondary users from relying on copyright exemptions while channeling secondary

¹²⁴ See *supra* Part I(C).

¹²⁵ See *supra* notes 61-62 and accompanying text.

¹²⁶ See *supra* notes 100-103 and accompanying text.

users to prefer the option of licensing, or utilizing unprotected materials.¹²⁷ In some circumstances, such an impact might indeed occur. Yet, its consideration does not undermine the benefits and contributions of reciprocal share-alike exemptions. Legislators and courts can and should determine the scope and contents of reciprocal share-alike exemptions in a manner that maintains enough incentives to produce secondary works that rely on a copyright exemption. A task of this kind is not novel to copyright law. Legislators and courts are constantly involved in determining both copyright's scope and copyright's exemptions in a 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.¹²⁸ This factor is directly aimed at constructing 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 those in the unique context of third-generation subsequent uses of secondary works.

Reciprocal share-alike exemptions, therefore, are not unique in the requirement that they adjust 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 Parts I(B), I(C)(1) and II(A) *supra*, 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 the reciprocal share-alike requirement to which this secondary user is subordinated; all without eliminating the incentive to produce the secondary work.

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 on a case by case basis. Hence, I do not think that potential negative impacts on the incentives to produce

¹²⁷ Although this matter exceeds the scope of this article, it should be mentioned that the notion of reciprocal share-alike obligations may also be applicable in the context of secondary users who rely on unprotected materials such as public domain works. Here also, the ability of secondary users to freely use existing cultural works should have some implications on the extent and degree that third-generation subsequent users may access and use secondary works. I leave the full elaboration of this issue for future research.

¹²⁸ 17 U.S.C. § 107 (2006).

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 Part I(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 capacity for other social institutions.

I presume that, at this point, many readers would still call for more concrete and detailed guidelines 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 exemptions could and should be developed on a case by case basis. The case studies describing exemptions for digital archiving and the content-sharing platforms' safe harbor that were mentioned in Part I(C) *supra* demonstrate two points in this regard. The first point is that it is feasible to develop particular manageable detailed guidelines for reciprocal share-alike exemptions that 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 image collections. The importance of this example for my current discussion is also in recalling the fact that, from a societal viewpoint, "incentive to produce" need not only be a commercial incentive, but can also be an incentive for public-oriented and individual-based frameworks that are able to reach an economic equilibrium in their cultural activities.

Finally, if one still attempts to develop more concrete guidelines for the scope of reciprocal share-alike exemptions, there are three directions that may be taken. First, reciprocal share-alike exemptions could be based on parameters similar to the four parameters that apply in the context of fair use.¹²⁹ 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,¹³⁰ may preclude a reciprocal share-alike

¹²⁹ See *supra* notes 48-49 and accompanying text.

¹³⁰ 17 U.S.C. § 107 (2006).

requirement for 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 exemption when establishing all of its content on the repositories of other content-sharing platforms, including those that rely on section 512(c)'s safe harbor. Yet, a reciprocal share-alike requirement may apply to digital preservation projects of user-generated content that resides on content-sharing platforms, or to subsequent uses of content-sharing platforms' content that do not amount to mere direct commercial competition by another content provider.

A second guideline to consider is the costs that secondary users recoup by their reliance on a copyright exemption, or more generally, the scope of economic investment in the production of secondary works. This parameter—the impact of a copyright exemption on the ex-ante incentive to produce secondary works—is an indicator of the breadth of a particular reciprocal share-alike requirement. If, for example, a content-sharing platform obtains all of its user-generated content free of charge, as described in Part I(C)(2) *supra*, even a broad reciprocal share-alike requirement may have only a limited impact on the incentive to operate such a platform.

The third guideline is the centrality of and 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 voluntarily involved in certain types of exempted secondary uses, the impact of a reciprocal share-alike requirement on the incentives to engage in such activities is likely to be minor because financial profits are not the underlying goal of the secondary user. Moreover, in such circumstances, “repeat-player” public-oriented secondary users may even value more highly their ability to freely access and use secondary works of other producers 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,¹³¹ for example, is likely to support a legal regime

¹³¹ See Wikimedia Commons, <http://commons.wikimedia.org/wiki/Commons:Welcome> (last visited Nov. 5, 2008).

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. 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.

Id.

that 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 of reciprocal share-alike exemptions is the information costs that they involve.¹³² 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 is this information not obviously readily available, 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 prospective *ex post* exposure to a reciprocal share-alike requirement.

The problem of information costs may indeed impose serious obstacles for obtaining the advantages that reciprocal share-alike exemptions offer. There are no neat and crystallized solutions to this problem, but there are several ways to address, at least partially, this problem. To begin with, there are instances in which secondary users' reliance on a copyright exemption is transparent, and thus significant

¹³² For a related discussion in the context of the creative commons licensing schemes, see *Cultural Environmentalism*, *supra* note 84, at 40-46; see also Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008) (describing contemporary practices in the context of software and other intangible goods as servitude-like restrictions that 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' bundles 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 reversed. 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 greater information costs than the usual ambiguity involved in open-ample exemptions such as the fair use defense. Moreover, to at least 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 prospective subsequent third-generation users.

information costs would not be involved. One category includes instances in which the secondary user relies on a statutory compulsory license or a statutory safe harbor scheme. Section 115's 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 512(c)'s safe harbor for hosting services providers are three examples of such circumstances. Another category of transparent exempted secondary uses includes 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 use¹³³ is one example in this category. Thus, in these cases, there seems to be no actual problem of information costs for third-generation subsequent users to 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, the presumption should be that it was an exempted privileged use.¹³⁴

These are just initial proposals that require further elaboration and thought. 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 practicality of making copyright's exemptions reciprocal. In addition, one must take into account the fact that similar, if not parallel, information costs are apparent in the *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 whom 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

¹³³ See *supra* notes 11-12.

¹³⁴ 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.

information costs.¹³⁵ Yet, just as this problem does not impose absolute barriers against the recognition of copyright protection, it should not impose absolute barriers to 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.¹³⁶

IV. SUMMATION

This article introduces 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 with the exemption that they benefit from. Thus, whenever a party that uses copyrighted materials relies on a copyright exemption, subsequent users should be granted 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 by case basis, a codex of circumstances and parameters 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.

My discussion demonstrates that the making of copyright's exemptions reciprocal corresponds well with and improves the economics of copyright and public welfare considerations. Overall, reciprocal share-alike exemptions structure copyright law in a 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-

¹³⁵ See Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465 (2004).

¹³⁶ There are some signs that copyright policymakers 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 UNITED STATES COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 17 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

alike requirement is structured with a scope that maintains enough incentives to produce secondary works, it represents a social benefit that copyright law should capture. Delineating reciprocal share-alike exemptions with such boundaries is within reach of courts and legislators. Copyright law is well accustomed to 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 reciprocity should have in the structuring and shaping copyright law. And finally, reciprocal share-alike exemptions provide an effective track for copyright reform while bypassing deadlocks in the domestic and international legislative arenas.

Reciprocal share-alike copyright exemptions are not intended 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.