

## REVERSE EXCLUSION IN COPYRIGHT LAW – RECONFIGURING USERS' RIGHTS

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### ABSTRACT

Copyright law allocates entitlements in intangible cultural resources between copyright owners and users. Copyright owners have in-rem exclusive rights to do and authorize certain uses of copyrighted works, or otherwise phrased, the right to exclude the rest of the world from utilizing copyrighted works (for certain uses). Users' rights cover instances in which there is a default presumption according to-: users' free exploitation of cultural works is more beneficial than subordinating such uses to restrictions by copyright owners and by other third parties.

This article proposes to conceptualize users' rights as *reverse exclusion* rights. According to the reverse exclusion paradigm, people other than users hold a duty not to interfere with users' rights and not to impose restrictions that violate users' entitlements over certain uses and certain categories of cultural works. For example, unless authorized by users, technological protection measures that override the fair-use defense should be prohibited and classified as an infringement of users' rights. Similarly to a copyright infringement, a users' rights infringement should also be subjected to remedies of injunction and monetary damages.

The Article begins by establishing the paradigm of reverse exclusion through economic, public-regarding and other rationales. To a large degree, these considerations mirror rationales that traditionally justify copyright owners' exclusive rights. I then offer initial directions for integrating the paradigm of reverse exclusion into contemporary copyright law. The article concludes by demonstrating the contribution and significance of reverse exclusion through several case studies in which current concepts of copyright law and users' rights fail in achieving a socially desired equilibrium-: (1) access and usage restrictions through technological protection measures; (2) content removal in the shadow of notice and takedown procedures; (3) contracting around copyright, and (4) the fair use defense.

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## Introduction

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## INTRODUCTION

In the last decade, copyright law scholars have been obsessed with users' rights and probably for the right reasons. Once capturing the impact of copyright law on society's cultural ecosystem, free speech considerations, distributive concerns and individuals' autonomy, it seems only natural to explore, conceptualize, develop and further enhance the functions, capacities and legal rights of users within copyright law.

This emerging awareness, however, confronts significant barriers when one attempts to translate theoretical recognition into practical rules. Overall, one may identify dialectics of dissonance between justified demands for acknowledging users' capacities, on the one hand, and lacking enforceability of such demands, within contemporary copyright law, on the other hand.

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Consider, for example, actions, which constitute fair-use of copyrighted materials. Such actions are legally defined as socially desirable as well as serving constitutional values such as free speech. Yet, contemporary copyright law fails in regulating technological protection measures that disable fair use of cultural works (both copyrighted works and works, which have already fallen into the public domain). Similarly, copyright law does not provide effective remedies against notice and takedown procedures, which remove non-infringing secondary uses of copyrighted works, or against *copyrightfeaud*, that is, attempts to claim fictitious copyright over public domain works. Lastly, instances of contracting around copyright, through legal structures that undermine users' rights, also raise questions regarding the enforceability and effectiveness of users' rights. Even if such contracts bind their direct parties, they also tend to generate negative externalities that undermine the rights and powers of other (third parties) users. If the Google Library Book Project contractually prohibits users from distributing scanned digital copies of public domain books, for educational purposes, such a restriction infringes third-parties' users' rights and imposes a social cost, which requires treatment.

Regarding such circumstances, current paradigms of copyright law and particularly of users' rights seem to fail. There is no legal paradigm of enforcement against actions, which violate and undermine legitimate uses of copyrighted works. Copyright law aims to promote public-regarding goals through the allocation of entitlements to *both* creators and users. However, there is a disparity between the legal structure of copyright owners' rights and the legal structure of users' rights. Copyright owners benefit from *in-rem* exclusive rights to do and authorize certain uses of copyrighted works; otherwise phrased the right to exclude the rest of the world from utilizing copyrighted works. Thus, whereas the legal structure of users' rights is generally located somewhere in between privileges to liberties. Even when a user's right is classified as a positive right, such a right remains in vein without being conceptualized as a concrete legal entitlement, which is equivalent to the ones that copyright owners possess.

Currently, infringement of users' rights does not entail the same remedies and powers that a copyright infringement entails. The capacities of users in copyright law are therefore undermined; not because of their normative inferiority but because of their conceptual and doctrinal inadequacy.

This article attempts to solve this gap by structuring users' rights as *reverse exclusion* rights. I propose to conceptualize permitted uses of

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copyrighted works as in-rem exclusion rights. A permitted use, within copyright law, should imply a duty of the rest of the world not to take actions that restrict such a use. Users should have an exclusive positive right for certain uses in intangible works. This right cannot be abridged without prior authorization from all relevant users. Particularly, copyright owners are prohibited from leveraging their control, over creative works, as gateways for infringing users' rights.

The in-rem right to exclude, within copyright law, thus becomes dual. It applies both to copyright owners and to users. For example, unless authorized by users, technological protection measures that override the fair-use defense should be prohibited and classified as an infringement of users' rights; and just like in the context of a copyright infringement, those who infringe users' rights should be subjected to remedies of injunction and monetary damages.

My purpose in this article is to justify and further elaborate the paradigm of reverse exclusion in copyright law. Part I begins by justifying the paradigm of reverse exclusion through economic and public-regarding rationales. To a large degree, these considerations mirror the same rationales that justify copyright owners' exclusive rights. Part II examines practical paths to integrate the paradigm of reverse exclusion into positive copyright law and its main doctrinal elements. Part III demonstrates the contribution and significance of reverse exclusion through several case studies in which current concepts of copyright law and users' rights fail in achieving a socially desired equilibrium. Before commencing, I should emphasize one caveat. This article does not deal with the scope and substance of users' rights, but rather with their legal structuring. My estimation is, however, that if structured as in-rem exclusive rights, users' rights would become more enforceable and effective. Hence, regardless of continuing debates over the scope and substance of users' rights, by adopting the paradigm of reverse exclusion, one can anticipate a certain improvement in the enforceability of users' rights. Copyright law would be better situated for achieving an equilibrium between ex-ante, *efficiency in production* (that requires a positive price for producers and creators), and ex-post *efficiency in distribution and secondary production* (that requires users to be burdened and pay as little as possible in order to access and use cultural works).

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## PART I. JUSTIFYING THE PARADIGM OF REVERSE EXCLUSION

### A. ECONOMIC & PUBLIC-REGARDING JUSTIFICATIONS

In order to understand why users' rights should be conceptualized as exclusionary rights, one must recollect the fundamental economic and public-regarding justifications for copyright owners' bundle of exclusive rights. To a large degree, the same explanations that justify copyright owners' exclusive rights are also the underlying reasons for cabining users' rights as imposing a duty not to interfere with uses that are part of users' bundle of exclusive rights.

Copyright protection is significantly based on public and social considerations, and so are its agreeable common presumptions, which are the following. Copyright is a public and socially oriented legal measure. Its goal is to benefit the public by providing an economic incentive for the production and dissemination of “nonexcludable” intangible works. These are works that due to their “public good” nature,<sup>1</sup> would have lacked such an incentive without the recognition of a copyright. Copyright protection enables to internalize *positive externalities* that cultural works tend to generate. The grant of exclusive property rights enables market actors (e.g. producers, corporate media and creators) to internalize and capture social value that is generated by intangible works; thus, without having the risk that their investment would be ripped by third parties. Put shortly, at least within certain boundaries, the grant of an exclusive property right is conceived as an indispensable legal mechanism to prevent free riding and thus provide sufficient incentives for the production of socially valued intangible works.

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<sup>1</sup> Copyright's subject matter—intangible works—are public goods since they are both nonexcludable and nonrivalrous. Because of the abstract nature of intangible works, without the support of any legal protection, once such works are publicly exposed, their creator cannot effectively exclude others from gaining access to the works and utilizing them freely; consequently without rewarding the creator for the efforts and resources invested in the production of such works. This prospective problem of “free riding” reduces the incentive for investing efforts and resources in the production and dissemination of intangible works. Copyright overcomes this problem by granting a legal right of exclusiveness, which enables the copyright owner to exclude others from using the work without authorization, and thus to collect fees for the use of the intangible work and secure a return on the creator's investment.

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The same basic principles also capture the social cost of copyright protection. Copyright burdens and deters the public and future creators from gaining access to copyrighted materials and further using them within their own independent works. This cost derives from restrictions, limitations and financial requirements, which are imposed by copyright owners, regarding certain uses of copyrighted materials. Such burdens are magnified due to the cumulative nature of information and creative works. People tend to build on existing materials in order to make new creative works while adding their own contributions.<sup>2</sup> Copyright protection is a mechanism that increases the costs of borrowing from previous works and thus it weakens the incentive of future authors to create.<sup>3</sup> Additionally, since creative and cultural engagements involve a considerable degree of spillovers and positive externalities, limitations and burdens, on accessing and utilizing copyrighted works, tend to increase the gap between the costs of secondary uses, on the one hand, and users' willingness and ability to bear such costs, on the other hand.

Finally, although thus far, scholarly works have focused on the social cost of copyright protection, similar observations could be drawn regarding any other type of de-facto private fencing mechanism that restricts people's ability to access and use cultural materials, even when such restrictions are not a product of legal regulation. Consider, for example, a museum, which possess a collection of old masterpiece paintings. This collection is not displayed in public and digital images of the paintings are displayed only within the physical premises of the museum, with no practical option of using the images for educational, research and criticism purposes. Such restrictions do not derive from copyright law but rather from the museum's physical possession of the original paintings. Yet, such restrictions still impose social costs similar to the ones that copyright protection imposes.

The above-mentioned orthodoxy of copyright's in-rem property attributes is subjected to several persuasive critiques. These critiques question both the desirability and the justification for absolute copyright protection that enables copyright owners to capture the full social surplus of their cultural products. According to the critiques, internalization of

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<sup>2</sup> Well known is Chafee's remark that: "The World goes ahead because each of us builds on the world of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself', Zechariah Chafee, *Reflections on the law of Copyright* 45 Columbia Law Review, 503, 511 (1945).

<sup>3</sup> William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 Journal Of Legal Studies, 325, 332-341 (1989).

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positive externalities, through property rights in intangible cultural works, is required only to an extent that captures returns, which are sufficient to recoup the investment in producing intangible cultural works. Additionally, the above-mentioned social costs of copyright protection are another reason to suspect and object any one-sided view of the copyright matrix.

**The Reverse Exclusion Argument:** Nothing of the above-mentioned is novel to copyright law's discourse. In the last decade, legal scholarship developed sophisticated and ubiquitous perspectives on copyright law's impacts. It seems, however, that both supporters and critics of copyright's exclusion (property) paradigm have ignored one central element. Just as initial creators and producers may require certain in-rem exclusionary rights, in order to capture the social value of their creative activity, so may subsequent users and creators (who wish to use existing intangible assets in manners that are part of their bundle of users' rights and that fall outside of copyright owners' domain of exclusive uses).

From a societal perspective, just like copyright owners, initial creators and users face similar scenarios when they confront circumstances that discourage them from investing resources in socially valued cultural engagements. For initial creators it is the risk of someone else free riding on their investment. For users and secondary creators it is the burdens, barriers and costs that they face when accessing and using copyrighted works. Thus, while copyright owners and other third parties are ignorant of the social costs (and negative externalities) that they generate through self-interest and rent seeking restrictions. The lines that delineate the boundaries between users' rights and copyright owners' exclusive uses function, therefore, as pointers to two distinct zones. The first, is a zone in which social value is best captured by copyright owners; that is, by the grant of certain exclusive in rem rights to creators and producers of cultural works. The second zone, is one in which social value is best captured by enabling - for certain purposes - free access and free utilization of cultural works. Capturing this social value requires legal mechanisms that prohibit interference with users' ability to access and use cultural works, or otherwise phrased a reverse exclusion regime. Just like copyright owners' exclusive rights but from a reverse position.

Copyright law is thus bound to regulate conflicting claims over resources, which are its subject matter. The bundle of rights to carry out certain actions with regard to copyright's subject matter is *dual* and *reciprocal*. It applies both to one's capacities as a user and to one's capacities as an owner. The shift from one proposition to another is based

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on the determination, which of the two options better promotes capture of social value. Yet, both alternatives may justify exclusive control over a use, be it in the hands of copyright owners, or in the hand of users.

While copyright owners' exclusiveness means the sole power to make certain uses, users' right to exclude is more complex. It does not mean exclusiveness because each user's right is not exclusive in terms of the fact that it does not preclude other users from making legitimate exempted uses of copyrighted works. Yet, it does entail users with the right to exclude third parties (including copyright owners) from interfering with their privileged uses.

Scholars including Mark Lemley and Bret Frischmann, have convincingly demonstrated the spillovers, positive externalities and social demand for intangible works and their secondary utilization. Their conclusion is that such attributes support a narrowly and carefully crafted scope of copyright protection. Nothing more than is required to incentivize the originating creator. This conclusion, however, does only half of the work, because it ignores restrictions and limitations that come on top of copyright law's formal restrictions and that are a product of private limitations. This is exactly the stage in which the paradigm of reverse exclusion comes into play. It does so by fencing and protecting the same spillovers, positive externalities and social demand, yet from a different direction. The protection is against the rest of the world and particularly against interference by self-interest third parties and copyright owners who wish to leverage such restrictions as a mean to gain additional profits from their portfolio of copyrighted works.

Consider, for example, technological protection measures which are applied on sound recordings and that disable their reproduction for fair-use purposes (e.g. for purposes of research and criticism). Regarding such uses, the law's presumption is that the social value to be recouped by free secondary fair uses is higher than the social value that would be generated if such uses were part of copyright owners' exclusive rights. Such uses embody positive externalities that are worthy of being captured by third parties. Yet, unless users' have in rem reverse exclusion rights, their incentive to capture these positive externalities is fragile. It is very much dependent upon the absence of restrictions that impose barriers and costs on such secondary uses. Thus, whereas without legal regulation, self-interest copyright owners and other third parties are very likely to have reasons and motivation to impose such restrictions, because they bear no liability for their harmful actions.

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Additionally, lacking information and ambiguity regarding what users can, or cannot, do, may add further costs that deter users from secondary uses which are both legitimate and socially benefiting. For example, cultural institutions would be less willing to invest resources in a lawful digitized preservation project, of contemporary music, if they face uncertainty regarding technological barriers that they would have to overcome. Similar observations appear from the perspective of copyright owners and other third parties that consider the imposition of restrictions on users' rights. Unless subordinated to users' reverse exclusion right, copyright owners (and other third parties) have no motivation to internalize social costs and negative externalities that are generated by such restrictions. A deadweight loss is thus, generated to the extent that copyright owners' self-interest restrictions fall outside of copyright's incentive-access equilibrium.

Copyright scholars are well aware of the fact that copyright owners' bundle of exclusive rights should be limited to a scope that captures returns which are sufficient to recoup their investment. Likewise, copyright theory well acknowledges the social costs of broader copyright protection. Yet, what current theory has overlooked is the fact that the same rationales that justify copyright owners' right to exclude, may also justify users' reverse exclusivity. Moreover, if one surveys central notions and explanations that underlie copyright protection, she may find that they all have some reflections within the paradigm of reverse exclusion. This last point requires further elaboration:

### **1. The [Reverse] Tragedy of the Commons in Creative Works**

Consider, as a first example, the well-framed notion in property of *the tragedy of the commons*. According to the tragedy of the commons, joint or public ownership of a piece of property is inefficient, because nonowners who use the property have no incentive to take care of it and will therefore overuse it. The property rights argument is that dividing the common into private property solves this problem, by making each property owner liable for the consequences of her own actions. Property rights facilitate the internalization of externalities (both negative and positive) that are otherwise, caused by the tragedy of the commons.

The move toward intangible works is a little tricky. Indeed, there is no tragedy of the commons in intangible intellectual properties. As opposed to tangible objects, intangible resources cannot be depleted by overuse. Intangible resources are rather what economists call a pure "public good," which are nonrivalrous and therefore they cannot be "used up".

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Nevertheless, in a closer inspection, the rationales that underlie the tragedy of the commons imperatives seem relevant also in the context of reverse exclusion. Here also third parties' usage of intangible resources (and more particularly, their engagement in conducts that impose access and usage restrictions on intangible resources) causes inefficiency. Absent of legal regulation, third parties have no incentive to consider their conducts' effects on diluting and wasting users' capacities. To a considerable degree, such conducts are similar to individuals' self-interest over-consumption that characterizes the tragedy of the commons. Similarly, the reverse exclusion solution is parallel to the private property solution. According to this solution, translating users' rights into "reverse-exclusion rights" solves such problems, by prohibiting and making copyright owners and other third parties liable for the consequences of illegitimate restrictions that they impose.

## 2. [Reverse] Free Riding

Similarly, consider another well-framed notion in copyright law, which is the notion of *free riding*. The problem of free riding is perceived by many as *the* justification for copyright protection, and it includes the following line of argumentation. Free riding occurs whenever people use intangible works without gaining authorization, or paying royalties, to their creators. This in turn reduces people's incentive to invest their time, efforts and resources in the production of intangible works. Given the nature of intangible creative works as non-excludable and non-rival public goods, free riding and its negative impact on incentives, are perceived as the basic problem that copyright protection aims to solve. Third parties' self-interest and ignorant utilization of intangible works is the problem (of free riding) that copyright aims to solve. It does so by providing copyright owners with exclusive right to control uses of the copyrighted work.

In a close inspection, one may find a similar (though reverse) problem of free riding regarding unregulated behavior of copyright owners and other third parties who impose restrictions on legitimate uses of intangible cultural works. Such actions, as well, represent scenarios in which self-interest individuals "free-ride" and utilize intangible works in manners that undermine other people's incentives to invest in the production of (additional) intangible works. Furthermore, just like in the context of copyright protection, law's acknowledgment in users' reverse exclusion rights is aimed to solve the problem of [reverse] free riding by securing users' incentives through the prohibition of such actions.

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Indeed, we are accustomed to conjure up free riding mostly with instances of uncompensated consumption of public goods. Yet, in terms of social costs, free riding is essentially reciprocal. One's utilization of a public resource, more than his fair share, in a manner that causes under production, can occur not only through over-consumption but also through the imposition of self-interest barriers and restrictions on public goods (in our context, intangible creative works). There are two reasons why those who impose such restrictions on intangible public goods should be regarded as "free riders". The first reason is that by imposing such restrictions they benefit from the value of the intangible work at the expense of the public. The second reason is that such conducts decrease peoples' incentives to invest in the production of [additional] socially valued public goods. The paradigm of reverse exclusion solves such [reverse] free riding correspondingly to the manner in which copyright protection solves the traditional free-riding problem. It acknowledges in-rem exclusion rights that prevent such [reverse] free riding.

### **3. [Reverse] Exclusion Strategies - Information Cost Theory**

Finally, more sophisticated approaches to property law also have their reflections on the reverse exclusion paradigm. Henry Smith, for example, justifies the exclusionary nature of property and intellectual property rights based on an information cost theory. According to Smith, rights of exclusion are characterized by their simplicity and indirectness. Rights of exclusion overcome coordination problems of investment, appropriation and consumption by defining modular units and clarifying what can, or cannot, be done with them. The exclusion strategy protects rights-holders' interests in the use of resources indirectly. It uses a simple signal for violations, which tells duty holders "to keep of" with no direct reference, which needs to be made to information about either the duty-holder or the owner. The focus on exclusion - for reasons of simplicity and cheapness - is justified mostly because of high positive transaction costs in delineating property rights. Smith supplements the exclusion strategy with a governance strategy (or governance rules), which fine-tune the basic exclusion regime by capturing, at greater cost, the benefits of certain particular uses by multiple parties. For example, a compulsory license would represent a governance rule because it authorizes certain uses of a creative work at some positive compensation.

Smith is very convincing in justifying a core of exclusion strategy both with regard to tangible and intangible resources. Exclusion rights are

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justified when the audience of duty-holders is large and indefinite (in rem), and its simplicity reduces the processing costs, which would otherwise be high for such an extensive audience. The main point for our purposes is that Smith's underlying justifications for a core of exclusion strategy are similarly relevant in the context of users' rights and not only in the context of copyright owners.

Once acknowledging that regarding certain types of uses and regarding certain categories of intangible resources, free access and free uses are economically (or socially) justified, then reverse exclusion seems justified by Smith's argumentation. Reverse exclusion rights are justified when the audience of duty-holders (visa-vi potential users) is large and indefinite. Similarly, under Smith's theory, reverse exclusion rights overcome coordination problems of investment, appropriation and consumption by users, because reverse exclusion clarifies what can, or cannot, be done without the interference of copyright owners and other third parties. It uses simple signals for violations, which tells duty holders "to keep of" from users' domain with no information required about either the duty-holder or the user. The only knowledge required is that the creative work at stake is subjected to certain general exemptions and users' rights.

Utilization of public domain works, reproduction of copyrighted works for preservation purposes and private copying are just several examples for instances in which users confront large-numbers of copyright owners and other third parties who may abridge their rights by imposing limitations on accessing and legitimately using cultural works. Reverse exclusion clarifies both to users and to their duty holders what can or cannot be done with regard to cultural works. Just like copyright protection does but from the reverse (though no less important) direction.

By applying Smith's approach, I do not ignore the fact that certain elements of users' rights are more suitable for a governance strategy (or governance rules). Just like in the context of the traditional exclusion strategy, reverse exclusion should also be complemented by certain governance rules. Such rules fine-tune the basic reverse-exclusion regime by capturing, at greater cost, the benefits of certain particular uses by multiple parties. For example, instances of compulsory licenses or judicial discretion not to issue injunctions (against restrictions) and suffice with monetary rewards to users. I do argue, however, that it would be mistaken to treat - a-priori - the whole range of users' rights as falling within the category of governance rules. To the contrary, since in many instances,

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users may require the use of a large number of cultural works and since violations of users' right may occur by many duty holders, a reverse-exclusion strategy is crucial for reducing coordination and information costs regarding many socially beneficial uses.

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Let me summarize my argument so far. Copyright law allocates entitlements in intangible cultural resources between copyright owners and users. Users' rights cover instances in which there is a default presumption according to users' free exploitation of cultural works is more beneficial than subordinating such uses to restrictions by copyright owners and by other third parties. In Coasian terms, these are circumstances in which users (and society at large through them) gain the most utility from being assigned the right to make certain uses (e.g. fair use), or to freely utilize certain categories of works (e.g. public domain works).

In such instances, users' rights should be framed as reverse exclusion rights. According to the reverse exclusion paradigm, people other than users hold a duty not to interfere with users' rights and not to impose restrictions that violate users' entitlements over certain uses and certain categories of cultural works. Practically, the exclusion element applies not only to one user as such but to indefinite users against the rest of the world. This last point may seem contradictory to typical characteristics of property rights as in-rem rights of *particular right holders*, in a resource, against the rest of the world. However, this dissimilarity does not undermine the value of reverse exclusion. Reverse exclusion remains a powerful concept for framing users' rights in intangible recourses against the rest of the world.

Just like copyright owners can license their exclusive rights, so can users contractually assign or waive certain segments of their users' rights. However, until such an agreement is reached, the default presumption is that each user controls his rights and that they cannot be infringed without prior authorization from her. The preliminary default presumption, behind the paradigm of reverse exclusion, is circumstances in which society benefits more from vesting certain entitlements in the hands of users. Hence, only third parties that value restrictions, on users' rights, higher than users' evaluation (- of their free zones -) should be entitled to impose

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restrictions on users' rights. This requires contractual authorization from relevant users, which will reverse the default allocation of entitlements.<sup>4</sup>

Finally, just like the traditional exclusion strategy, the paradigm of reverse exclusion also raises questions and hurdles. For example, users may voluntarily waive their reverse exclusion rights and thus undermine positive externalities that such rights embrace. Mere existence of a reverse exclusion right does not guarantee that users will always execute such a right in manners that are fully compatible with public-regarding interests and the internalization of positive externalities. Similarly, one must consider also the high transaction costs that copyright owners and third parties face when they attempt to obtain authorization, from an infinite number of users, regarding certain restrictions that they wish to impose on certain uses of cultural works (because they value such restrictions more than users value their rights).

I do not ignore these complications and I will address them in section      *infra*. At this stage, my preliminary response to such complications is twofold: first, although the paradigm of reverse exclusion is not absent of failures, it is still superior to the current state of affairs in which users' rights social value is partially being ignored by copyright law. Copyright law should not disregard circumstances in which users' rights vest more social value than purported restrictions on authorized uses. In such circumstances, one needs to consider not only the costs that copyright owners would bear when attempting to override copyright law's default allocation of entitlements. In addition, one needs to consider also the correlative costs that society bears if such restrictions (by copyright owners and other third parties) are allowed. As long as the latter are higher, the default of reverse exclusion seems justified.

Secondly and more broadly, acknowledging the paradigm of reverse exclusion is only a first step in a much more ambitious and complex task. Just like copyright owners' exclusive rights require structuring the scope, particulars and limitations of such rights, so do users' rights. It is at this stage that governance rules would come into play and structure around users' reverse exclusion rights; exactly the same way in which governance rules are structured around copyright owners' exclusive rights. I will return to these issues in part      *infra* after further supporting the paradigm of

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<sup>4</sup> But see also part      *infra*, for considerations that may override such contractual agreements.

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reverse exclusion through the prisms of broader political, moral and social considerations.

## **B. EXPANDING THE CIRCLE OF JUSTIFICATIONS**

Thus far, my analysis focused on the economic foundations of reverse exclusion. Along side, the paradigm of reverse exclusion relates also to additional aspects of users' rights and their functions within copyright law. In the last decade, much was written about the justifications and roles of users' rights. Yet, contemporary structures and doctrines of copyright law face difficulties in realizing users' rights and their underlying morals into positive copyright law.

As Julie Cohen rightfully mentioned, the user's absence from copyright doctrine is a self-perpetuating phenomenon, which legitimates judicially driven elision and encourages right holders and technology developers to ignore the user as a matter of practice. Cohen's proposal is that the roles, legitimate claims and needs of users should adjust copyright law's baseline rules and not simply its exceptions.

My argument regarding the paradigm of reverse exclusion follows a similar pattern. My purpose in the following subsections is to further elaborate on the interconnections between the paradigm of reverse exclusion and several prominent contemporary [non-economic] perspectives on users' rights. Indeed, similarly to economic analysis of copyright, in itself, the paradigm of reverse exclusion is mostly a vessel, which does not bear its own set of substantial values. Nevertheless, it is an important mechanism for implementing and enforcing the goals and justifications of users' rights. In addition, as set forth in the following paragraphs, there are also substantial reasons why users should benefit from an in-rem right to exclude the rest of the world from their legal entitlements in intangible resources.

### **1. Enforcing & Realizing the Ubiquity of Users' Rights**

Legal scholarship and public advocacy delineate several accumulative sources and justifications for users' rights and their status as equal parties in the assembly of copyright law. One prominent emerging theme attempts to incorporate distributive and democratic values into copyright law. Among other elements, this theme reflects new perspectives on the freedom of speech-copyright interface, including the following perspectives: **(a)** the manners in which copyright law tends to abridge free speech values, both

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in terms of individual speakers' negative liberty of expression and in terms of copyright's adverse impact on the advancement of robust, pluralistic and diversified creative spheres. **(b)** the advancement of *democratic theories* of copyright law, which both justify and attempt to construct copyright's scope according to the central values of a liberal democracy; **(c)** the importance of structuring copyright law around distributive justice considerations that champion broad and equal distribution of expressive opportunities.<sup>5</sup>

Once shifting from theory to practice, however, the incorporation of distributive and democratic values into copyright law confronts several difficulties and hurdles. To begin with, in the legislative arena, interest groups from the content industries are very influential in maintaining proprietary frames for conceptualizing copyright law. Additionally, 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 very little practical impact.<sup>6</sup> Although copyright law's roots are as a governmental regulatory mechanism, the private property right cover of copyright has a strong adverse impact. It locates freedom of speech and distributive concerns as side constraints on the margins of copyright owners' exclusive rights, rather than as equal contenders over the allocation of entitlements in intangible creative resources. Although not justified, this is the current state of affairs in Copyright law.

The notion of reverse exclusion offers a solution, not only because it takes users' rights seriously, but also because it conceives and structures users' rights by using the same terms, frames, concepts and legal structures that define copyright owners' bundle of exclusive rights. The paradigm of reverse exclusion places users and users' rights on a moral and rhetorical level, which is parallel to the one of copyright owners.

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<sup>5</sup> 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); Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1843-1855 (2007).

<sup>6</sup> See e.g., Neil W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); *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).

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In a recent important article, Amy Kapczynski demonstrated the importance of conceptual frames in realizing and mobilizing competing interests in intellectual property law (as well as in many other areas of social mobilization). Kapczynski demonstrates how interests groups and social actors struggle over terms and concepts of law, because such frames are imminent for effective realization of interests and values. Terms like "intellectual property", on the one hand, and "access to knowledge", on the other hand, play a pivotal role in enforcing particular interests, values and goals through legal regulation. Concurrently, such terms also have an essential role in initiating social mobilization, which at the end of the day, influences legal regulation.

More particularly, Kapczynski argues that framing creative resources, through terms such as "property", was imminent in bringing together different industry stakeholders and establishing common base-ground alliances and collective actions frames for advancing their private interests. This in turn, had a prominent impact on copyright law and its leaning toward copyright owners. Other scholars, like Mark Lemley and Debora Halbert, also demonstrate the interplay between legal constructs and narratives, which at the of the day, shape the allocation of powers, rights, liberties and entitlements through copyright law.

Once taking into account these background factors, one may understand the difficulties of contemporary copyright law in internalizing freedom of speech and distributive values. Regardless of its public origins, copyright law is structured and organized through private law proprietary modules. Within such modules, the domination of notions such as *property* and *exclusion* leaves little breathing space for free speech, cultural and distributive concerns. As a result, attempts to reconstruct copyright law, as a public law regulatory regime, may have attracted the support of academics, but they have had limited influence on lawmakers and courts. Although such attempts have strong normative grounds, the differentiated treatment of copyright owners' rights and users' rights makes it hard to reconstruct copyright law as a true regulatory public law.

The paradigm of reverse exclusion can reduce such instabilities, because it frames and defines users' rights through the same concepts and terms that define copyright owners' exclusive rights. It speaks the language of private law and posits users and copyright owners on the same level, as equal contenders over entitlements in intangible resources.

Defining users' rights as reverse exclusion rights removes complexities and hurdles that currently exist within copyright law, such as whether the

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fair use defense is a right or just an affirmative defense, or the manners in which property rights can be subordinated, through general private law mechanisms, to constitutional and distributive values. The paradigm of reverse exclusion enables better incorporation of public-regarding values into copyright law; not because it necessarily bears important normative imperatives of its own, but because it is compatible with copyright law's other terms and components.

Thus far, my focus was on functional advantages of reverse exclusion. Additionally, one may argue that there are good substantial reasons why users' rights should benefit from an in-rem right to exclude the rest of the world from their legal entitlements in intangible resources. In fact, absent of prevailing efficiency considerations that oppose this default option, it seems only natural to shield users' rights through an exclusion strategy.

The fact that users' rights' subject matter are intangible non-rival goods tends to mitigate tensions and conflicts with competing claims. Outside of copyright owners' domain of exclusive rights, users' rights, by definition, cannot conflict with competing claims over resources that are intangible public goods. Additionally, if one seeks a positive rights-based argumentation, there are several roots that justify a rights-based view of users' rights and taking users' right seriously. Some scholars establish users' rights on a Kantian claim for users' equal rights to authorship. Another branch of scholars focuses on the inherent link between individuals' capacities as users and their basic [human] rights for self-fulfillment and well-being. Others would attach users' rights to political freedoms. My purpose here is not to choose one, or more, of these or other approaches. Nor do I wish to advance proposals regarding the particulars of users' rights. I do argue, however, that once determining the legitimate boundaries of users' rights, it is normatively justified to structure them as reverse exclusion rights, because of the interests and values that underlie users' rights.

Additional support for the above-mentioned approach can be found in copyright's theoretical justifications as well as in recent developments regarding the status of exemptions and limitations in copyright law. I will begin with the second point and then return to the issue of copyright law's theoretical justifications:

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## **I. A2K and the Status of Users' Rights**

Through out the new millennium, the traditional contours of copyright law are challenged by a series of reform proposals. Many of these reform proposals are associated with the access to knowledge movement and the emergence of the development agenda in intellectual property law. These proposals aim to restructure copyright law by acknowledging new exemptions and limitations to copyright, as well as by making certain exemptions and limitations cogent and non-waivable.

While focusing on freedom, equality and human rights, the A2K movement seeks to enhance participation in cultural, civic and educational affairs. It recognizes the relationship between knowledge and development, and the opportunities arising from technological progress particularly the Internet. It also recognizes the powers and domination that are occupied by intellectual property rights in cultural works. To these ends, A2K proposes significant reforms in copyright law's exemptions and limitations, including, for example, in the context of disabled people or in the context of educational activities. Overall, the A2K movement attempts to work on two levels. The first level is substantial modifications to copyright law in manners that would make copyright law more attentive to the values and goals of A2K. The second related level is legal formalization of such modifications through domestic and international copyright law.

The A2K movement seeks to make users' rights binding in manners similar to manners in which intellectual property rights are binding. According to this approach, international copyright treaties should determine not only a minimum level of copyright protection and copyright owners' rights but also a minimum level of protection for users and users' rights. Additionally, certain exemptions and limitations should be inalienable. In the international level, these initiatives are being processed and considered by WIPO – the World Intellectual Property Organization. Similar directions can be found in particular proposals. One example is a recent proposal for a European Copyright Code by the Wittem Project – a collaboration of copyright scholars across the European Union concerned with the future development of European Copyright Law. As part of the proposed code, article 5.8 determines that in cases where the use of copyright protected works is controlled by technical measures, the right holder shall have an obligation to make available means of benefiting from legitimate uses that benefit from a copyright exemption.

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The A2K movement corresponds well with the paradigm of reverse exclusion, because it emphasizes the shortcoming of existing copyright law in two levels. One level is the inadequacy of contemporary copyright law in enforcing users' rights and the goals that underlie them. The second level is the dissonance and imbalance between the strength and comprehensiveness of copyright owners' protection, on one hand, and the fragileness, insufficiency and shortage of users' rights on the other hand. If adopted, the paradigm of reverse exclusion would improve copyright law in both levels. Hence, the A2K movement and its goals both support and are being supported by the paradigm of reverse exclusion. A2K demonstrate why reverse exclusion is an essential element, which is currently missing in copyright law.

## **II. Copyright Law's Theoretical Justifications**

Lastly, and seemingly unexpectedly, the paradigm of reverse exclusion corresponds well with copyright's theoretical justifications. A variety of theoretical justifications underlie copyright law. Some justifications focus on utilitarian and efficiency considerations. Other justifications focus on authors and creators as subjects of rights, which stem from different interests ranging from autonomy-based and personhood rights to justice and fairness considerations. Additionally, in the last decade, copyright law is also being considered through more sophisticated public-regarding, democratic and cultural theories. Each one of these justifications and theories has its shortcomings. None of these theories and justifications seems to provide an irrefutable argument for copyright protection as an unbounded absolute trump. Some of these theories are more convincing in justifying certain aspects of copyright protection whereas other theories seem more fragile in terms of their strength.

My point here is not to justify copyright protection as such but rather to stress the fact that along with justifying copyright, each of these theories also tends to justify and establish users' rights. This element is prominent in the context of economic justifications of copyright law. It is also prominent in the context of democratic, cultural and public-regarding theories that treat copyright protection as a mean rather than as an end to itself. Semiotic democracy, cultural environmentalism and even more simplified public-oriented theories of copyright perceive the public and individuals, in their capacities, as users, as their true beneficiaries. These theories also tend to capture the fact that creators and authors require users' rights no less than they require copyright protection.

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Moreover, even authorship theories and Lockean labor and desert arguments are Janus-faced. In addition to their focus on authors as proprietors, these theories also focus and derive their justificatory power from considering and relying on the needs and functions of users and the public. Thus, for example, as Wendy Gordon demonstrated, an integral and imminent element in John Lock's labor theory is the proviso of "enough and as good left in the common for others". In the context of creative spheres, the Lockean proviso establishes a strong argument for subordinating copyright to the requirements of robust creative commons, which satisfy the needs and legitimate claims of the public and other creators. Additional theories, such as authorship theories, or the personality theory, also focus on the centrality of access and effective ability to use existing creative works for the fulfillment of values and goals that underlie such theories.

Returning now to the paradigm of reverse exclusion, the point to be emphasized is that copyright's justifications and underlying theories do not support the current gap between the manner in which copyright owners' rights are cabined, through exclusion strategy, and the more loosed protection of users' rights.

To the contrary, on its surface, the status of users within most copyright law's justifications and theories seems to require equal legal conceptualization of both copyright owners' rights and users' rights. The main point to be emphasized is that elements and values such as personhood, authorship and creativity are attached to activities and processes rather than to intangible objects. Their subjects usually function concurrently both as creators and as users of existing cultural works. People's status as creators is implicated by their status as users. As a result, legal formalization of their rights and powers should also be bilateral. It has to enhance their capacities both as users and as copyright owners. The strategy of reverse exclusion enables such adjustment of copyright law and its better repositioning against copyright's underlying justifications.

## **2. Code and other Laws of Cyberspace**

The paradigm of reverse exclusion is also supported by the emergence of digital content and the unique transformations that it imposes. Digital content is different from traditional creative products. It is particularly different in terms of the fact that it may be governed by code and technological protection measures, which establish private fencing mechanisms. Those who control the digital packaging of content and

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information also control the terms, conditions and boundaries of accessing and using the embedded content. In many circumstances, code and technological measures would restrict uses that fall within the domain of users' rights and which as such, were intended to be free from control by copyright owners or other third parties. Prominent examples include limitations on private copying and secondary uses of digital content, automated expiration and self-demolition of content, access and transfer limitations.

In the last decade, both scholars and public advocacy have dealt extensively with problems arising from technological protection measures that restrict legitimate uses of copyrighted materials (e.g. fair uses of copyrighted materials). Much of this work focuses on the tension between the illegitimacy of such restrictions and the fact that concurrently, copyright law not only legitimizes technological protection of copyrighted works but also prohibits the circumvention of technological protection measures that protect copyrighted works. Based on the presumption that in principle, technologically protecting copyrighted works is legitimate, the literature seeks paths for concurrent embalmment of legitimate (exempted uses) of such locked digital content. Several proposals have been made in different directions, including: a proposal to acknowledge users' right to hack; implementing a "reverse notice and takedown regime"; or even the creation of an administrative agency to oversee the enforcement of fair use with regard to digital content that is technologically protected. Other scholars are more optimistic in their anticipation that with limited regulatory intervention, digital markets would gradually develop their own systems of "user privileges" that will "dramatically increase the range of permissible uses of copyrighted content in digital media".

Overall, these proposals echo two aspects, which relate to the paradigm of reverse exclusion. To begin with, these proposals emphasize the fact that in digital domains, the scale and scope of copyright owners and third parties' abilities to disrupt and trespass users' rights are more significant than in prior periods. The second aspect is that none of the approaches and proposals thus far is fully able of overcoming the costs and harms that code and technological protection measures cause when they abridge and undermine users' rights.

The main reason for this current state of affairs is that these proposals presume that law both authorizes and protects copyright owners' reliance on technological protection measures. Only then, as a second-order layer, there are different proposals how to reconcile this presumption with users'

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continuous effective ability to benefit from exempted uses. Such an approach, therefore, includes an inherent bias against users' rights. It takes for granted the legitimacy of wide-ranging technological limitations on digital content. Thus, even though there is no justification for limitations that exceed copyright owners' bundle of exclusive uses. Another related reason for the insufficiency of current proposals lies in their presumption that one needs to justify lawful access and uses of locked content, as if there is no concrete concept of users' rights that imposes duties and obligations on copyright owners and other third parties. Otherwise phrased, all current proposals ignore the question of legal liability for locking content regarding uses that fall within users' rights.

The paradigm of reverse exclusion overcomes these hurdles because it treats users' rights as equal to copyright owners' rights. Under the paradigm of reverse exclusion, technological restrictions that block and prohibit permitted uses of copyrighted materials are a *primary infringement of users' rights*. Those who are responsible for such restrictions should be legally liable. Such actions are perceived as no less harmful than infringement of copyright owners' bundle of exclusive rights. The paradigm of reverse exclusion thus both clarifies and provides a solution to illegitimate harms of code and technological protection measures.

Instead of shielding circumvention of technological protection measures, for purposes of legitimate uses, the paradigm of reverse exclusion functions as a sword. It clarifies why the imposition of such limitations should be liable for infringement of users' rights. It is in this respect that the paradigm of reverse exclusion succeeds in confronting the challenges that code and digital domains raise.

Indeed, here also, reverse exclusion is not absent of potential failures and costs, which are similar to the costs of overbroad copyright protection for technological protection measures. For example, a requirement not to disable legitimate lawful uses of digital content may have spillovers toward lack of technological protection measures against illegitimate infringing uses. The costs of distinguishing between legitimate uses and infringing uses may drive copyright owners to abandon the implementation of technological protection measures, or alternatively, narrow their scope of applicability, even when they are justified. Nevertheless, a-priori, there is no evidence that such potential failures and costs are greater than those of a copyright system with no legal regulation of code and technological protection measures that infringe users' rights.

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Potential chilling effects may exist on both sides of the equation. Additionally, one must recall that regardless of the technological protection measures that copyright owners may implement, copyright owners are always entitled to enforce their rights against copyright infringements. Hence, the paradigm of reverse exclusion sets default rules that are more balanced than contemporary copyright law. Instead of providing one side of the equation (copyright owners) full immunity from imbalanced actions that infringe users' rights, the paradigm of reverse exclusion allocates imperfections between both sides of the equation. At the end of the day, the costs of tailoring technological protection measures to the contours of users' rights would be allocated between copyright owners and the public who pays for copyrighted digital content. Such a result seems to achieve outcomes, which are more socially desirable than de-facto prohibition on legitimate lawful - and socially beneficial - uses of digital content.

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To summarize, my purpose, thus far, was to present the paradigm of reverse exclusion and its underlying justifications. I outlined several accumulative justifications for structuring users' rights as in-rem rights that impose a duty of non-interference on the rest of the world. The paradigm of reverse exclusion is justified by economic rationales similar to the ones that underlie the structuring of copyright owners' interests as in rem property rights to exclude. Additional support, for the paradigm of reverse exclusion, derives from broader prisms of political, moral and social considerations. Finally, reverse exclusion mitigates and solves imbalances and failures that are caused by code and aggressive technological protection measures, which are implemented by content providers. In this context, the paradigm of reverse exclusion seems indispensable in order to tailor code and technological protection measures according to the substantial contours of copyright law. My purpose in the next section is to address several prominent counterarguments and critiques against the paradigm of reverse exclusion.

### C. COUNTERARGUMENTS

The paradigm of reverse exclusion is exposed to potential critiques and counterarguments. My purpose in this section is to mention [redacted] potential disadvantages of my proposal. Although I agree with the basic argumentation and reasoning of all [redacted] disadvantages, I do not think that these counterarguments undermine and make redundant the introduction of

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reverse exclusion to copyright law. Moreover, most of the disadvantages and counterarguments to be discussed in the following paragraphs represent general difficulties that are associated with a copyright regime. Arguably, one may come up with a general critique over the desirability of a copyright system and within it also the concept of reverse exclusion. My discussion in the following paragraphs, however, is less ambitious. I presume, as given, the existence of a copyright system and within this framework, I examine the arguments against the paradigm of reverse exclusion.

### **1. The Perils of "Property Talk"**

One critique against the paradigm of reverse exclusion refers to the disadvantages of following and elevating notions of property and the right to exclude within copyright law. This approach begins with the well-established critique against the proprietarization of copyright law and the commodification of intangible cultural works. Throughout the last decade, scholars have criticized both the justifications and outcomes of cabining copyright as an in-rem property right. This critique spans across several arguments: (a) copyright law is a public-regarding regulatory mechanism, which does not justify proprietary protection of intangible resources. (b) The nature of property rights as in-rem exclusionary rights impairs our ability to design a legal regime that seriously takes into account competing and no less important values such as free speech, cultural environmentalism, cultural democracy and distributive values. (c) In addition to its direct negative implications, the conceptualization of copyright protection, as a property right, carries undesirable expressive elements. It shapes individuals' attitudes toward creative works and creative processes in manners that weaken dialogic virtues and strengthen the perception of culture as a commodity. The paradigm of property enforces social practices of control and exclusion, which are both unnecessary and harmful in the context of cultural and creative activities.

Returning now to the paradigm of reverse exclusion, the argument is that the structuring of users' rights as in-rem exclusion rights also carries and amplifies many of the disadvantages that are associated with "property talk". To some degree, this argument relies and parallels with recent critique against the Creative Commons movement and its reliance on proprietary licensing strategies as means to enhance the public domain. According to this line of argument, even if formally, reverse exclusion empowers users, its prominent reliance on the functionality and morality of

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property is misguided. It is misguided because it is also a paradigm that further frames and empowers copyright owners' reliance, rhetoric and legal formalization of their private proprietary rights in cultural and creative artifacts. Property talk, so it is argued, is destructive on both sides of the equation. Another related argument is that if the source of the problem lies in copyright's proprietary characteristics, then the appropriate remedy is to narrow and reconfigure the nature and scope of copyright protection. Instead of making an affirmative move, toward elevating and reconfiguring users' rights (-as reverse exclusion rights-), what the law should do is limit the scope and scale of copyright protection.

My response to these counter-arguments is twofold. To begin with, I agree that one need not underestimate the disadvantages and fragileness of justifications that call for the propertization of intangible creative works. Similarly, metaphors and rhetoric of property may indeed undermine democratic, distributive and cultural values that copyright law must consider. I also agree that the formalization and structuring of users' rights, as reverse exclusion rights, may reinforce elements and characteristics of property within copyright law. Reliance on concepts of property as instruments to craft freedoms may seem as a risky strategy, at least at first sight.

Nevertheless, overall and particularly as a matter of practice, I do not think that these observations and counterarguments prevail over the contribution of introducing the paradigm of reverse exclusion to copyright law. To begin with, policymaking and legal regulation, in the area of copyright, are not merely a theoretical issue. There is already a baseline, strongly biased toward rights' owners, which was influenced by realpolitik, public-choice and the power of interest groups. With or without the paradigm of reverse exclusion, copyright law, the rhetoric and metaphors of property are here to stay. Hence, it seems naïve and imprudent to reject the paradigm of reverse exclusion just because it relies on the concept of in-rem exclusion rights. The need to provide effective remedies against infringement of users' rights seems much more compelling than the risk of strengthening the already well-established concept of property within copyright law.

For similar practical reasons, it seems unrealistic to abandon the paradigm of reverse exclusion with anticipation to the abolishment, or narrowing, of copyright protection. Even if such dynamics would take place, it seems that then the role of reverse exclusion may even be more significant. Narrowing the scope of copyright protection means expansion

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of users' rights and expansion of users' rights would be ineffective unless users obtain effectual tools of enforcement against violation of their rights. This is exactly the role of reverse exclusion.

Consider, for example, a reform that enhances the role of liability rules within copyright law. Under such a reform, the range of circumstances in which copyright owners are eligible only for a monetary compensation, without ex-ante ability to prohibit a secondary use, would expand (e.g. for educational purposes, or as part of a secondary parody or satire). Such a reform expands users' rights. However, in itself, it says nothing and provides no remedy against instances in which copyright owners and other third parties would use self-help mechanisms that impose restrictions against such secondary uses. Hence, the broader the substantial range of users' rights is, the more we would need reverse exclusion as a mechanism to ensure effective enforcement of users' rights.

In addition, it seems that the above-mentioned critique misses something in its static perception of property and in-rem exclusion rights as social and legal institutions. Legal instruments such as the paradigm of reverse exclusion, or the creative commons licenses, may have dynamic consequences that stimulate ideological drifts in people's perception of copyright law and the political valence that underlies it. This observation relates and relies on Jack Balkin's insights regarding the notion of *ideological drift*, that is instances by which ideas and concepts change their political valence as they are introduced into new social and political contexts over time.

Balkin demonstrated how struggles over the meaning of legal notions stimulate drifts in their common understanding and utilization. Ideas or symbols may appear to change their political valence over time because groups have adopted competing interpretations of relatively abstract ideas or symbols used in previous debates. For Balkin, the theory of ideological drift was not simply a theory about the changing valence of political and legal ideas. It was also a theory of cultural meaning and cultural power. Individuals and groups struggle over the meaning and content of abstract symbols and ideas. Through this process, they re-create the tools of understanding that they use to make sense of the social world that constitute them as members of a culture. The creation and re-creation of the tools of understanding, the meanings of words, and the boundaries of the reasonable and the unreasonable, are the ultimate sources of ideological drift.

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Returning now to the paradigm of reverse exclusion, one may argue that instead of merely strengthening traditional notions of property and proprietary interests, the paradigm of reverse exclusion works in a more sophisticated manner. It transforms the role and political valance of "property" and the right to exclude within copyright law. Now, the right to exclude "belongs" not only to copyright owners but also to users. Now, the right to exclude may be associated with freedoms and rights of users no less than with proprietary interest of rights owners. To some degree, this also means that the ability of copyright owners to rely on notions of property, as a leverage to broaden and shield their rights, becomes more limited. Now exclusion and in rem rights become notions that are associated and support users' rights no less then copyright owners. This blurring and emerging Janus-faced nature of exclusion may weaken prior concrete, homogenous and to some degree, unilateral perceptions regarding the functions of property, exclusion and in rem rights in copyright law. This in itself may be a process that empowers users' rights.

To conclude, I do not think that there is something eminent in "property talk" that justifies the rejection of conceptualizing users' rights as reverse exclusion rights. Indeed, exclusion is only one out of several – at times conflicting - elements that together may come up with what is commonly perceived as property law. In itself, exclusion, as a concept, does not reflect the complexities of property law as well as the fact that in many instances, there are values, concepts and paradigms that may overcome and mitigate one's right to exclude. As outlined in the next part, similar patterns may appear also in the context of users' rights. However, just like in the context of copyright protection, the component of exclusion should be salient also in the context of conceptualizing and structuring users' rights.

## **2. Economic Queries**

A second line of arguments against the paradigm of reverse exclusion challenges its economic reasoning and the presumption that the paradigm of reverse exclusion better promotes social and public goals that underlie copyright law. This critique is composed out of several components.

### **I. Non-Recouped Positive Externalities**

The first component focuses on non-recouped positive externalities. The argument is that even with the endorsement of reverse exclusion, there is

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still no assurance that users will internalize positive externalities that are vested in lawful uses of copyrighted materials. Mere existence of a reverse exclusion right does not guarantee that users will always enforce their rights. For example, users may voluntarily (& contractually) waive their reverse exclusion rights and thus ignore positive externalities that such rights embrace. Similarly, users may decide that they are not interested in investing the resources that are required for suing over infringement of their users' rights. In some circumstances, even though a certain use encompasses significant social benefits, the costs of enforcement would be higher than the value of the prohibited use for a particular user.

Consider, for example, an amateur creator who wishes to use existing audio-visual materials in his self-created video-clips but is technologically restricted from doing so. Under a reverse exclusion model, such a user should be legally entitled to sue – for a user's rights infringement - those who imposed the technological protection measures. Nevertheless, such a user's right is not very likely to be enforced, if the costs of enforcement outweigh the value of the secondary work for our particular amateur creator (a value which may be lower than the social value of the secondary work).

Such scenarios are quite common. They were common before the introduction of reverse exclusion and they are most likely to continue after the introduction of reverse exclusion. Copyright law is very much about constant dynamic attempts to improve the conditions for internalizing spillovers and positive externalities. The paradigm of reverse exclusion does not provide a full comprehensive solution for such scenarios, yet, it still considerably improves the current state of affairs, which was described in part [\[redacted\]](#) *supra*:

To begin with, there are still many instances, in which users would have the incentive to enforce their reverse exclusion rights; not always, but enough to make the paradigm of reverse exclusion valuable. Additionally, as set forth in part *infra* [\[redacted\]](#), by reverse implementing copyright schemes, such as statutory damages, in the context of users' rights infringement, the law can improve users' incentives to sue over infringement of their rights. Similarly, one must take into account the fact that just like copyright enforcement, users' rights enforcement has two prongs. One prong deals with users' active enforcement of their rights. The other prong deals with deterring copyright owners and other third parties from infringing users' rights. Both prongs assist in internalizing spillovers and positive externalities. One prong does so by providing users with remedies to enforce their entitlements. The other prong does so by sanctioning

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infringers (of users' rights). The paradigm of reverse exclusion, thus, includes an element of deterrence. Exposure to potential legal liability may be enough in order to generate a certain degree of deterrence effect on infringers of users' rights. Deterrence does not require enforcement in all circumstances, but only in selective unpredicted instances that expose infringers to the risks of enforcement.

Finally, even if particular users lack the economic incentive to sue over infringement of their users' right, one can anticipate public advocacy, including class actions, in this regard. The last decade demonstrates growing public awareness and involvement, of non-governmental organizations, in the area of copyright law, including in the context of judicial proceedings. The introduction of reverse exclusion to copyright law will provide public advocacy with a novel efficient tool in their representation of public-regarding goals. To conclude, there may be circumstances in which particular users would lack economic incentives to enforce their reverse exclusion rights. Nevertheless, there are still several efficient paths in which enforcement against infringement of users' rights would still take place.

## **II. Contractual Waivers**

A second related issue is the matter of *contractual waivers*. The argument here is that even if users are granted with reverse exclusion rights, they are most likely to waive their rights, particularly in an online digital environment where there is no practical ability to negotiate over the terms of acquiring digital content. Here also, although this basic observation seems accurate, it does not negate the potential contribution of reverse exclusion to copyright law. To begin with, there are many circumstances in which users' rights are unilaterally infringed either by copyright owners, or by third parties, with no contractual relationship at stake. Consider, for example, the imposition of technological protection measures and block-access mechanisms on public domain works. For example, circumstances in which the Google book library project, or a digital images agency, use such mechanisms on public domain works. In addition to the direct sides of the contract, such restrictions are applicable also on the public as a whole. Hence, in such circumstances, the effectiveness of reverse exclusion remains salient.

Indeed, in digital domains, access and usage of content is more dependent upon digital licensing encounters, which ordinary may require users to waive some of their rights. Licenses are frequently attached to

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digital content and so are contractual waivers that are imposed on users. Yet, even this tendency does not negate the virtue of reverse exclusion. One reason is that based on public policy and contractual grounds, at least some of such waivers may not be binding. A second reason is that even if some waivers are binding, there is still significance for changing the default rules through the paradigm of reverse exclusion. Under the paradigm of reverse exclusion, copyright owners and other third parties are now required to negotiate over the terms of contracting around users' rights and buy their ability to restrict users' rights.

To conclude, just like copyright owners' rights, under certain conditions, users' rights, as well, may also be contractually waived. Such waivers, however, do not undermine the potential contribution of reverse exclusion. It remains an open question to what degree should the law enable contracting around both copyright and users' rights. This question, however, is separate and distinct from the question of acknowledging the paradigm of reverse exclusion.<sup>7</sup>

### **III. Transaction Costs**

Another related economic argument deals with the issue of transaction costs. The argument is that if copyright owners and third parties are required to obtain users' permission in order to contract around users' rights, then high transaction costs would practically impede such maneuvers. Hence, if one presumes that for the right price it may be efficient to contract around users' rights, one cannot ignore the issue of high transaction costs (leading to market failures).

The reason for high transaction costs is that seemingly, any contracting around users' rights requires obtainment of authorization from an infinite number of users. Otherwise, those who impose restrictions on users' rights would still be exposed to legal liability from certain remaining individuals operate under their capacity as users. Reverse exclusion, so goes the argument, is practically a regime of *inalienable* users' rights. It is a regime of inalienable users' rights because, it is impossible (in terms of transaction costs) to obtain authorization from all users. Thus, whereas any remaining exposure to legal liability (visa vi certain users) makes users' rights inalienable.

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<sup>7</sup> See also part   *infra*.

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The final step in the transaction costs argument focuses on the observation that the main utility of reverse exclusion is in setting default rules. These are default rules that users can "reverse license" to copyright owners and other third parties. Otherwise phrased, in terms of efficiency, the law should facilitate circumstances in which copyright owners, or other third parties, value restrictions over a certain use more than users' evaluation of their freedom to engage in such a use. This is particularly the situation if contracting around users' rights serves as a mechanism to implement efficient price discrimination mechanisms and tailor licensing schemes, which may be narrower than copyright law's defaults, yet also less costly to users. If the accumulation of reverse exclusion rights and high transaction costs obstruct such possibilities, then the utility of reverse exclusion becomes susceptible.

The problem of transaction costs is indeed acute. One may also argue that this is what makes the whole difference between the nature of copyright owners' exclusion rights and users' rights. Copyright owners' exclusion rights are efficient because there is only one entitlement holder from which the rest of the world is required to obtain authorization; thus, whereas users' reverse exclusion rights impose a reverse inefficient structure. In order to obtain the entitlement – that is, a users' right - copyright owners, or other third parties, are required to obtain authorization from an infinite number of users.

These are serious arguments that need to be addressed. Nevertheless, here also, there are several reasons why the problem of high transaction costs does not negate the contribution and value of introducing the paradigm of reverse exclusion to copyright. This last point requires further elaboration:

The first point is that at least to some degree, the problem of high transaction costs would exist even if copyright law does not structure users' rights as reverse exclusion rights. Even within current copyright law in which users' exemptions and limitations are structured as *soft* privileges, copyright owners seemingly face the same high transaction costs whenever they attempt to contract around users' rights. Indeed, whenever a user intends to do something that requires authorization from a copyright owner, there will be a juncture in which the copyright owner and the user meet. This juncture may also facilitate bargaining that deals with contracting around users' rights. The remaining zone of uses, however, is of uses, which are fully outside of copyright owners' domain. Regarding such uses - with or without the paradigm of reverse exclusion - there is no juncture in

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which copyright owners cross paths with users. Here, the law has to choose between a de-facto inalienable default rule, which is in favor of users, or a de-facto inalienable default rule, which provides copyright owners and other third parties the ability to unilaterally, take users' rights.

This means that to the degree that there is a de facto element of inalienability, it exists on both sides of the equation. Users as well, face high transaction costs when they attempt to buy out unilateral restrictions that copyright owners and other third parties impose on digital content; particularly, in circumstances when users require access and utilization of many copyrighted works. These are all problems, which are not unique to copyright law. They arise in many settings that require initial allocation of entitlements between competing parties. The point to be emphasized is that with regard to the domain of users' rights, the defaults of reverse exclusion are presumed to be more efficient. The presumption is that regarding users' rights, a default rule, which places the entitlement with the user, is more efficient than a default rule that places the entitlement in the hands of copyright owners and other third parties. Thus, whereas, both copyright owners and users would face high transaction costs when attempting to overrule law's defaults. High transaction costs, therefore, are a symptom that is prominently solved by determinations regarding initial allocation of entitlements, including entitlements such as the ones that are vested in users' rights.

The second point is that just like in the context of copyright owners, there are market and voluntary mechanisms that may overcome, at least partially, the problem of high transaction costs in the context of users' reverse exclusion rights. As Robert Mergers demonstrated, in many cases, *repeat players*, have an incentive to develop institutional voluntary market mechanisms that decrease and mitigate high transaction costs. Merges' basic argument is that repeat players do so by concentrating a portfolio of copyrights in the hands of one single entity, such as a collecting society.

Merges focuses his analysis on copyright owners. However, similar dynamics may evolve in the context of users' reverse exclusion rights. If users' entitlements attain economic value for copyright owners, for third parties and for users, then contracting into liability rules is likely (just like in the context of copyright owners' rights). For example, consortiums of academic institutions may collectively bargain with rights owners' over their terms of use, including contracting around users' rights; and when it is efficient for both sides, also reach an agreement on such issues. At least to some degree, another example is the settlement, which was not approved

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by the court, in the lawsuit regarding the Google Book Library Project. This case as well demonstrates the potential of class settlements in which users bargain over their rights. Hence, with the right substantial checks applied (as they were in the case of the Google Book Library Project Settlement), there are procedural paths for users' collective bargaining in manners that overcome the problem of high transaction costs.

Additionally, as set forth in the next part, just like in the context of copyright owners, when required, the laws of users' reverse exclusion rights may suffice in a remedy that is less significant than an injunction (e.g. a liability rule instead of a [reverse] property rule). Determining such instances requires a scrutinized inspection. At the end of the day, there may be few instances that would fall under this category. However, the point that I wish to emphasize at this stage is that just like in the context of copyright owners, there are both market-voluntary and legal paths to overcome the problem of high transaction costs.

To conclude, although highly relevant, the problem of high transaction costs in the context of contracting around users' rights does not negate the contribution of introducing the paradigm of reverse exclusion to copyright law. Finally, one must recall that as set forth in part   *infra*, the paradigm of reverse exclusion is also based on several political, cultural, moral and distributive arguments that come on top of efficiency and economic argumentations. From this overall perspective, even if high transaction costs impose significant barriers to contract around users' rights, there are counter considerations that still support law's recognition of users' reverse exclusion rights. Once users' rights are conceived as embodying constitutional, distributive, democratic and autonomy-based values, their partial inalienable de-facto nature is not necessarily a disadvantage that is strong enough to outweigh their value and morality.

### **3. Other Alternatives?**

One last category of criticism focuses on potential alternatives to the paradigm of reverse exclusion. The argument is that there are other alternatives at hand reach, which are less pretentious and complex to accomplish than the paradigm of reverse exclusion. Among the potential alternatives are liability rules, strategies of constructing cultural commons (such as the creative commons movement) and finally, arguments that property law – as a form of regulating copyright owners' rights, limitations and obligations - suffices for incorporating the goals and values that underlie users' rights. Property law, so goes the argument, is not only about

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exclusion but also about inclusion. Property law is not only about the rights of copyright owners, but also about their obligations. Hence, the traditional contours of copyright law are ubiquitous enough to incorporate the goals and values that underlie users' rights even without reconfiguring users' rights as exclusionary rights. More generally, the argument is that there is no justification for radical reconfiguration of users' rights as exclusionary rights. The accumulation of contemporary copyright law schemes together with structural licensing arrangements may suffice in striking the right equilibrium between users' rights and copyright owners' proprietary interests.

My answer to such criticism covers two layers. One layer focuses on the particular insufficiency of the various alternatives at stake. The second layer focuses on the general role of reverse exclusion as a complementary component that should come along and not instead of other elements within copyright law. As for the second layer, the main point to be emphasized is the following: the role of reverse exclusion is not to replace or transform substantial elements within users' rights but rather to work together with such elements. In fact, the main role of the paradigm of reverse exclusion is to provide effective remedies against actions that destabilize users' rights and privileges as they are already recognized by copyright law. From this perspective, when one examines the proclaimed alternatives to the paradigm of reverse exclusion, the question to begin with is the nature of the alternative and its role within copyright law. If the component at stake is substantial, then reverse exclusion is most likely to be a supplement rather than a competing alternative.

As for the first layer, each of the various alternatives seems insufficient. Consider the alternative of *liability rules*. In the last decade, several scholars, as well as the Supreme Court, have emphasized the advantages of shifting, at least parts of copyright owners' entitlements, from a regime of property rules to a regime of liability rules. According to these proposals, certain uses of copyrighted works should be enabled without a need for ex-ante authorization from copyright owners. Ex-post monetary compensation, rather than exclusive control, should be the governing rule in such circumstances. Shifting segments of copyright law toward liability rules may be both justified and empowering in terms of users' rights. It can overcome markets failures, such as high transaction costs, solve illegitimate private censorship by copyright owners and mitigate other circumstances in which a property rule does not strike a

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socially desirable balance between various competing interests that are implicated by copyright protection.

A liability rule, however, does not solve any of the problems that the paradigm of reverse exclusion is intended to solve. In itself, it does not provide a solution for unilateral restrictions that are imposed by copyright owners and other third parties. Here one must make a distinction between proposals to adjust copyright owners' entitlements as liability rules and the different issue of how to adjust and enforce users' entitlements. The mirror face of subordinating copyright owners' certain entitlements to liability rules is providing users with certain partial privileges ("pay as you play"). Yet, just like in the context of users' full (strict immunity) exemptions, these partial exemptions are also vulnerable. The paradigm of reverse exclusion solves this vulnerability just as it does with other segments of users' rights.

Similar observations are apparent also in the context of contemporary proposals and strategies of *constructing cultural commons*. Constructed commons strategies are aimed at utilizing large-scale and multi-participants voluntary, contractual and customary mechanisms as means to make cultural materials more accessible and usable by creators and the public. Such strategies utilize statutory copyright law, as their baseline to contractually and voluntary license privileges to access and use cultural materials.

One prominent example in this context is the creative commons movement. The Creative Commons 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. The underlying goal and logic of the Creative Commons is to advance cultural environmentalism and users' rights by the construction of accessible and usable creative commons. More particularly, the share-alike option in the Creative Commons licenses creates viral licensing schemes, which require creators of derivative works to subject subsequent users of their derivatives to the same license that governs their own creative [re]sources.

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Commons strategies are indeed an important component in expanding users' breathing space. In addition to their direct impact on making more content freely available to secondary uses, commons strategies also have an expressive and strategic impact. Commons strategies provide an alternative to traditional contours of content provision within commercial-industrial domains of corporate media. Along side, however, commons strategies operate through a constant dissonance. They rely on contemporary proprietary copyright law as means to initiate long-term social and legal mobilization toward a public-regarding vision of cultural production. For this reason and others, it seems that commons strategies cannot replace the functions and goals of reverse exclusion. Moreover, at least to some degree, the paradigm of reverse exclusion mitigates some of the problems and hurdles that constructed commons give rise to. These last points require further elaboration:

The first point is that commons strategies and constructed commons [should] come on top – and not instead - of users' statutory rights. As opposed to the entire content that is subordinated to users' rights, content that is part of constructed commons is not very likely to cover the entire range of existing content. Alongside, constructed commons tend to provide users with powers that under copyright law's defaults would have required authorization from copyright owners. Such an authorization is granted by the contractual legal regime of constructed commons. This explains why voluntary commons-based strategies cannot substitute the essentiality of reverse exclusion in structuring and shielding statutory users' rights. Commons-based strategies are workable in zones that extend statutory users' rights. Constructed commons strategies are not intended to weaken statutory users' rights by shifting them to contractual regimes.

From this perspective, the paradigm of reverse exclusion may be seen in the following way. It is a mechanism, which is aimed to enhance zones of commons within the boundaries of statutory users' rights. This inconclusive zone may be limited in its scope. However, it does not suffer from certain inherent limitations that tag along proprietary-based constructed commons, such as notice and information costs, or the burdens that contracted commons may impose on future generations. As Molly Shaffer rightfully demonstrated, constructed commons, such as the ones introduced by the creative commons licenses, may be Pareto optimal when compared to copyright law's defaults. Nevertheless, they still involve the traditional problems that come with easements and servitudes.

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The paradigm of reverse exclusion operates within boundaries that are much narrower than the requirements and needs of cultural environmentalism. However, regarding these boundaries, the paradigm of reverse exclusion provides users with powers that are much more effective, simple and efficient than those associated with constructed commons. Hence, since the paradigm of reverse exclusion does not come instead of constructed commons initiatives, it seems justified to treat it as an accumulative mechanism that works together and further contributes to commons strategies.

Finally, one must take into account the fact that at times, initiatives, such as the creative commons licenses, might function in manners that prohibit and burden, users' privileges under statutory copyright law. As Niva Elkin-Koren demonstrated, certain combinations and particularly viral share-alike options of the Creative Commons licenses may prohibit secondary uses that otherwise would have fallen under one of copyright's exemptions and limitations (e.g. the fair use defense). For example, a non-commercial, no-derivative uses share-alike license. Such a license may significantly limit transformative uses, which bear important social and cultural values and which probably would be classified as fair-use. Similarly, there may be other instances in which commons strategies are Janus-faced. While advancing public access and utilization of cultural works, such strategies may also limit certain uses that otherwise would have fallen within copyright's statutory exemptions and limitations. In such circumstances, the paradigm of reverse exclusion may significantly contribute to the functioning of constructed commons. Just like in many other circumstances, it would invalidate restrictions and limitations that constructed commons strategies indirectly impose on users' rights of third parties. I will return to this point in part [\[redacted\]](#) *infra*, which discusses the interface of contracting around copyright and the paradigm of reverse exclusion.

To conclude, it seems that the paradigm of reverse exclusion provides certain unique elements and attributes that are not entirely achieved by other schemes and mechanisms that are aimed to support users' rights. The next part focuses on doctrinal and practical paths of incorporating the paradigm of reverse exclusion into copyright law. I will begin this part by explaining why even advanced and multidimensional notions of property law and copyright owners' property rights do not provide an alternative to the paradigm of reverse exclusion.

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**April 2011. This is a Partial Draft of a Work in Progress. Remarks and Comments are welcomed at [mस्पेस@mस्के.हूजी.ए.ई](mailto:mस्पेस@mस्के.हूजी.ए.ई)**