[NETWORKED] MEMORY INSTITUTIONS: SOCIAL REMEMBERING, PRIVATIZATION AND ITS DISCONTENTS

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INTRODUCTION

Memory institutions are social entities that select, document, contextualize, preserve, index, and thus canonize elements of humanity's culture, historical narratives, individual, and collective memories.[1] Archives, museums, and libraries are paradigmatic examples for *traditional* memory institutions. Content-sharing platforms, social networks, peer-to-peer file-sharing infrastructures, digital images agencies, online music stores, and search engines' utilities represent emerging novel entities with a de facto derivative function as networked memory institutions.[2]

This article conducts an in-depth inquiry regarding the manners in which digitization and networked communication technologies implicate on the identity, structure, and attributes of society's memory institutions. More specifically, I focus on the *privatization processes* that networked memory institutions are increasingly undergoing.[3] My basic hypothesis is that the transformation from tangible or analog preservation to digitized cultural retrieval tends to result in partial and gradual privatization of society's memory institutions.[4] Among other factors, copyright law functions as a focal element that stimulates and supports dynamics of privatization.[5] It does so by making both the *inputs* and the *outputs* of networked memory institutions tradable goods – commodities. Copyright law is also responsible for the dynamics of evolution that may gradually change the cultural DNA of traditional memory institutions while making them more inclined to adopt proprietary practices.[6] Privatization of memory institutions thus marks a shift from the centrality of the political and civic spheres in the construction of cultural/social memories to the centrality of markets in this context.[7]

Current scholarly literature does not include a full and

1 For discussions and analysis of on memory institutions and their social functions see ARCHIVES, DOCUMENTS AND INSTITUTIONS OF SOCIAL MEMORY: ESSAYS FROM THE SAWYER SEMINAR (Francis X. Blouin, Jr. & William G. Rosenberg eds., 2006) (providing a collection of essays surveying and analyzing the history of memory institutions). See also REPRESENTING THE NATION: A READER- HISTORIES, HERITAGE AND MUSEUMS (David Boswell & Jessica Evans eds., 1999) (bringing together key writings on how the nation and its past are constructed and represented through different types of social memory institutions).

2 *See infra* Part II.

3 *See infra* Part III.

4 *See infra* Part III, where my use of the term "privatization" is somewhat broad and refers to *all* instances of transformation from public provision of goods to their private provision through market settings. The term "public provision" encompasses both direct governmental provision of the goods at stake and their provision by other public-oriented and not-for-profit institutions.

5 *See infra* Part III(B).

6 *See infra* Part III(B)(II).

7 See *infra* Part IV(B).

comprehensive discussion of memory institutions.[8] My purpose in this article is to begin filling in this gap. I argue that digitization and networked communication platforms involve two conflicting layers of transformations in the political economy of social remembering. The first layer is one of prospects and hopes that are signified by the transformation from a control paradigm of tangible cultural preservation to a paradigm of digital distribution and redundancy. At least potentially, digitization can decentralize and democratize memory institutions and social remembering practices.[9] This somewhat utopian vision, however, takes a turn once the second layer of transformations, dealing with the gradual privatization of networked memory institutions, are identified.

Commercialization and unequal participation are two elements that characterize the privatization of memory institutions and that may conflict with a democratic vision of social remembering.[10] Privatized memory institutions also avoid institutional separation between the social function of cultural *production* and the social function of cultural *preservation*.[11] The resulting outcome is that groups and sectors with dominant positions in contemporary media are able to reproduce, leverage, and manipulate their social dominance from one generation to another.[12] The power to remember, as well as the power to forget, are thus gradually being concentrated in clusters of commercial enterprises with very particular interests, beliefs, ideologies, and preferences.

In order to fully grasp the consequences of these processes, one must go back to the functions of memory institutions in a democratic culture. I discuss this issue in Part IV(A). Overall, throughout this article, I demonstrate the value and importance of institutional diversity in social remembering practices. I argue that a democratic culture of memory institutions focuses on two key dimensions. The first dimension is intergenerational and it refers to the importance of providing *future* generations with as many landscapes of culture and history as possible. The second dimension refers to the right of individuals to participate in *contemporary* landscaping of culture and history for future generations.

Social remembering has a fundamental role in people's life-hoods and well-being as well as in the formation of beliefs and

8 *See infra* notes 141-152 and accompanying text.
9 *See infra* Part II.
10 *See infra* Part IV(A).
11 *See infra* Part IV(C).
12 *See infra* Part IV(D).

ideas. In their broader meaning, the landscapes of history and social remembering are also major forces in the construction of ideologies and people's preferences. "Knowledge," "information," and "culture" are concepts that influence the future while corresponding with and being influenced by "the past" (or more precisely, narratives of the past). At the end of the day, this is what networked memory institutions are very much about.[13] This is also the reason why processes of privatizing social remembering require special attention by regulators and policy makers. The purpose of this article is to draw such attention and set the grounds for future discussions.

Before commencing, I wish to emphasize two caveats that will continuously reappear throughout this article. First, my following discussion by no means presumes an idealized image of memory institutions in prior decades. To the contrary, both governmental and public-oriented memory institutions may suffer from failures and disruptions, which burden their selection and access policies. Among other elements, my analysis thus attempts to highlight the prospects of networked social remembering when compared to its predecessors. Second, I do not aim to portrait a dystopian collapse and diminishment of public-oriented memory institutions in a networked environment. Even when considering the privatization processes that I will describe in the following parts, in many occasions, traditional public-oriented memory institutions are very likely to continue and reinforce their public-oriented functions also in a networked environment. I do argue, however, that in a long-term perspective, dynamics and developments, such as the ones to be described throughout this article, might have gradual negative impacts on social remembering practices. These impacts are prominent enough to be considered and analyzed. My purpose, therefore, is to offer a framework that enables to endorse the prospects of networked social remembering while overcoming emerging novel pitfalls in this context that require the attention of policy makers.

Structurally, the article consists of five parts. Part II outlines the main paradigm shifts in social remembering for which digitization and networked communication technologies are responsible. My focus here is on the transformation of a paradigm of preservation through controlling authentic tangible cultural objects to a paradigm of preservation through distribution and redundancy of digital artifacts. I then examine the implications of this shift on the attributes of networked memory institutions and

13 *See infra* Part IV(A).

on their relationship with broader contemporary frameworks of cultural production and cultural exchange.

Part III outlines, demonstrates, and analyzes the privatization processes that both traditional and novel memory institutions are undergoing due to digitization and the emergence of networked communication platforms. I particularly focus on the fundamental role of copyright law as a mechanism that facilitates and supports the dynamics of privatization.

Part IV continues by analyzing the consequences of privatizing memory institutions. I begin by highlighting the unique social functions of memory institutions in a democratic culture. I then examine the consequences of commercialization and unequal participation – two elements that unsurprisingly characterize the privatization of social remembering. Part IV also examines the consequences of the gradual convergence between institutions of cultural *production* and institutions of cultural *preservation* for which privatization may be responsible.

Part V concludes with several reform proposals for de-privatizing networked memory institutions. I argue that, as general matter of policy, reduced copyright protection is likely to result in an equilibrium that strengthens the capacities of public-oriented memory institutions while reducing the incentives – and therefore the dominance – of commercial intermediaries entering this field. More specifically, Part V focuses on two distinct types of reform. The first type involves reforming *ex-ante* copyright privileges for networked memory institutions. I argue that copyright law must include a revisited framework of exemptions, limitations, and compulsory licenses that together are able to support independent ubiquitous activity by public-oriented memory institutions. The second type of reform introduces my novel proposal to impose *ex-post* obligations on networked memory institutions. I argue that de-privatization of memory institutions also requires regulation that accounts for and moderates imbalanced proprietary regimes of networked memory institutions. Based on this argument, I offer a complementary set of *reciprocal share-alike* obligations that are in addition to general ex-ante privileges from which memory institutions should benefit.

PART II – PARADIGMS SHIFTS IN THE POLITICAL ECONOMY OF MEMORY INSTITUTIONS

Memory institutions have always been an integral part of societies.[14] Archives, libraries, museums, private collections, and

14 *See* ARCHIVES, DOCUMENTS AND INSTITUTIONS OF SOCIAL MEMORY: ESSAYS FROM THE

cultural artifacts canonize the pasts and presents of individuals and communities. Throughout history, memory institutions have been replicating a social contradiction between an acknowledgement in the value of public access to the remains of the past and a de facto institutional bias toward practices of enclosure, gate-keeping, and manipulations in social remembering practices.[15] Digitization and networked communication technologies represent several paradigm shifts in the social conditions of memory institutions. The purpose of this Part is to provide a brief outline of these paradigm shifts and then to examine their relation to the privatization of networked memory institutions in Part III.[16]

A. *From Control to Distribution*

In tangible realms, traditional memory institutions were governed mostly by a paradigm of control over original authentic tangible cultural objects. Museums gather and preserve art works as well as other types of works with cultural significance.[17] Archives collect and conserve documents.[18] Libraries function similarly with regard to books and manuscripts.[19] Thus, one could go on with the central function of *physical possession and control* as forms of regulation on which traditional memory institutions rely in order to preserve, prevent injuries, and provide confined access to tangible works of cultural and historical significance.[20]

SAWYER SEMINAR, *supra* note 1; REPRESENTING THE NATION: A READER- HISTORIES, HERITAGE AND MUSEUMS, *supra* note 1. See also THE CULTURES OF COLLECTING (John Elsner, Roger Cardinal eds. 1994) (surveying and discussing the aspects of collecting and preserving as a social phenomena); REFIGURING THE ARCHIVE (Carolyn Hamilton, Verne Harris, Jane Taylor, Michele Pickover, Greame Reid & Razia Salen eds. 2002) (unfolding the ways in which archives construct, sanctify, and bury social remembering and human pasts).

15 *See* ARCHIVES, DOCUMENTS AND INSTITUTIONS OF SOCIAL MEMORY: ESSAYS FROM THE SAWYER SEMINAR , *supra* note 1 (providing a collection of essays surveying and analyzing this tension in the history of archives and memory institutions).

16 *See infra* Part III.

17 See KARL E. MEYER, THE ART MUSEUM: POWER, MONEY, ETHICS, 17-44 (1979) (surveying the origins, history and functions of museums).

18 See the sources cited in *supra* note 14.

19 See Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977 (2006); Howard Besser, *The Next Stage: Moving from Isolated Digital Collections to Interoperable Digital Libraries*, 7 FIRST MONDAY 1 (June 2002), http://www.firstmonday.org/issues/issue76/besser (discussing the social functions of libraries, including the preservation function, with emphasize on the interface of libraries and innovative communication technologies).

20 Indeed, the tragedy of the commons, as well as the Demsetzian argument for property rights, seem to apply quite effectively in the context of tangible cultural preservation, as exclusive control is a prerequisite for both the prevention of harm and the provision of incentives to invest resources in the preservation and the provision of regulated public access to works of cultural significance. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). *See also* YORAM BARZEL, ECONOMIC ANALYSIS

Digital preservation operates in a reverse mode. It is best served through dissemination and distribution. Regarding digital artifacts, preservation and access are carried out by distribution of multiple copies from (and to) different sources rather than through centralized control. Compare, for example, the traditional television archives of the BBC[21] with Flickr,[22] an open-access photo-sharing website, or with YouTube,[23] the popular video-sharing website. The traditional *analog* memory institution functioned as a repository of audio-visual materials by physically securing and preserving them. Newly emerging networked memory institutions are based on a reverse paradigm of distribution. Examples like the Internet Archive[24] and the Google Books Library Project[25] demonstrate how long-term conservation and access are accomplished by distributing and making available digital copies of cultural artifacts. And if one returns now to the example of the BBC, indeed, the BBC represents one of several examples for this paradigm shift. In its novel Creative Archive initiative, the BBC implements new practices of content-sharing and distribution as another path for its long-standing function as a memory institution.[26]

I am not arguing for a full dichotomy between preservation and social remembering practices *before* and *after* the emergence of networked communication platforms. Preservation through reproductions of cultural works existed long before the Internet. Andre Malraux's *Museum Without Walls,*[27] and Walter Benjamin's

OF PROPERTY RIGHTS (James Alt & Douglass North eds., 1989).

21 The British Public Broadcasting Corporation, http://www.bbc.co.uk/info/purpose/what.shtml (last visited Mar. 18, 2008).

22 Flickr, http://www.flickr.com (last visited Feb. 26, 2008).

23 YouTube, http://www.youtube.com (last visited Feb. 26, 2008).

24 The Internet Archive is a non-profit internet library that documents, preserves, and provides access to archived web pages of the entire Internet at any given date. Internet Archive, http://www.archive.org (last visited Feb. 26, 2008).

25 Google Books Library Project, http://books.google.com/googleprint/library.html (last visited Feb. 26, 2008). This initiative, which was announced in cooperation with the University of Michigan, Harvard University, Stanford University, the New York Public Library, and Oxford University, endeavors to digitize and make searchable the contents of millions of books in the libraries' collections, some of which are in the public domain and some that are still under copyright. For books in the public domain, users would have free access to the books' full text. As for copyrighted books, the Google Library would digitize the full text unless publishers object to the digitization of specific works, but searches would only retrieve limited samples, so that the searcher would still need to get a copy of the full book on her own. Helpfully, Google plans to provide links to sites offering books for purchase alongside the search results. For a description of the Google Library Project, see Tushnet, *supra* note 19, at 1018.

26 See the Digital Archives of the BBC, described and presented at: http://www.bbc.co.uk/cult/treasurehunt (last visited Feb. 26, 2008). The recently created Creative Archive License Group makes the BBC's and other institutions' archive materials available for download and secondary use under the Creative Archive License. Creative Archive License Group, http://creativearchive (last visited Feb. 26, 2008).

27 *See* André Malraux, *Museum Without Walls*, *in* VOICES OF SILENCE 12-128 (Stuart

The Work of Art in the Age of Mechanical Reproduction[28] are two examples of canonic scholarly works regarding the influence of photographic reproductions on cultural discourses.[29] The invention of print, photography, sound recording, motion-pictures, and subsequently television all represent landmarks in the continuous evolution of new communication tools for social remembering. I do argue, however, that the scale, scope, easiness, and decreased costs of producing and distributing digital artifacts[30] are radical enough to signify a paradigm shift in cultural preservation – from control to distribution.

B. *Redundancy and Information Flow as New Forms of Cultural Preservation*

The shift toward a paradigm of preservation through distribution emphasizes the fundamental role of *redundancy* and *information flow* in digitized preservation. The nature of information networks and the Internet in particular is such that multiple digital artifacts of cultural works are concurrently being relocated, duplicated, and situated through many different sources – both inputs and outputs – that refer, document, re-contextualize, and provide access to artifacts of cultural works.[31]

Gilbert trans., Princeton Univ. Press 2d ed. 1978) (1953).

[28] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS, 217-252 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955).

[29] Benjamin argues that in the face of photographic reproduction, the original art work can no longer retain the special value and authority it traditionally possessed (its "aura"). *Id.* Two decades later, Malraux took a somehow opposite direction while writing about the "Museum without Walls" and the fact that in the age of reproduction, the ready availability of cultural artifacts in a variety of contexts, styles and mediums far overreaches the limited revelation of tangible art that museums can offer within their physical walls. *Id.* It should be added, however, that along with his observation regarding the decline in the "aura" of the original art work, at least implicitly, Benjamin also acknowledges prospects of democratization. *Id.* In the age of reproduction, copies of art works, as well as other types of content, are now becoming commodities that are traded in mass markets. *Id*; *see also* Hal Foster, *Archives of Modern Art*, *in* DESIGN AND CRIME (AND OTHER DIATRIBES) 81-95 (Verso 2002).

[30] For the radical prospects of digital preservation, see DANIEL J. COHEN & ROY ROSENZWEIG, DIGITAL HISTORY, 3-9 (2006) (mentioning seven qualities of digital media and networks that are responsible for the revolutionary characters of digital preservation: capacity, accessibility, flexibility, diversity, manipulability, interactivity, and hypertextuality (or nonlinearity)). *See also* Jack M. Balkin, Comment, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing that digital technologies alter the social conditions of speech while making possible widespread cultural participation and interactions that previously could not have existed on the same scale). Balkin also emphasizes the fact that the digital revolution has: (1) drastically lowered the costs of copying and distributing information; (2) made it easier for content to cross cultural and geographical borders; and (3) lowered the costs of transmission, distribution, appropriation, and alteration of content while commenting and building upon it. *Id.*

[31] Peer-to-peer file sharing networks, which allow direct exchange of content files among users of compatible applications without any central management and control, are one example of the nature of information flow as a decentralized-distributed form of

Interconnectivity makes each and every end-user's personal computer a potential node for preserving informational works and then making them available to other users.[32] Networks are gradually becoming a dynamic meta-memory institution. Web 2.0[33] infrastructures and applications take this inclination one step further by generating web-based social software that enables mass participation in content production, content distribution and information flow, for the purposes of including preservation, conservation, and social remembering.[34]

C. *The Convergence of Communicative Spheres – Cultural Production and Cultural Exchange as Derivative Memory Institutions:*

The accumulation of the above-mentioned attributes explains why networked memory institutions are no longer prescribed only through clusters of static institutions and organizations. Rather, digitized cultural preservation is becoming more dynamic and multidimensional. Digitized cultural preservation and networked social remembering are both a form and outcome of ongoing discourses, manifestations, and exchanges of information and cultural artifacts between organizations, groups, and individuals. Examples like YouTube, iTunes (Apple's online music store),

cultural retrieval. For an analysis of peer-to-peer file sharing networks and their legal implications see Guy Pessach, *An International-Comparative Analysis of Peer to Peer File-Sharing – Framing Past-Present and Next Generation Questions*, 40 Vanderbilt Journal of Transnational Law, 88-133 (2007).

[32] See generally Mark Lemley & Lawrence Lessig**,** *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001) (discussing the advantages, utility and social benefits of decentralized end-to-end communications platforms).

[33] The term Web 2.0 refers to "second-generation" services available on the World Wide Web that enable people to collaborate and share information online. In contrast to "first generation" Internet utilities, Web 2.0 gives users an experience closer to desktop applications than the traditional, static Web pages. *See* Tim O'Reilly, What Is **Web 2.0,** O'Reilly Network, Sept. 30, 2005, *available at* http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html.

[34] One example is the manner in which individuals use video-sharing platforms to upload old audio-visual materials (such as television programs or films) after these materials were transferred from their initial analog mode to digital formats. A main obstacle for long-term preservation is the problem of *longevity*, that is, retaining the durability of materials that were originally produced in a format that can potentially becomes obsolete in the future (including materials that were either "born digital" or that were transferred from tangible or analog forms into digital modes). In this context, the key challenge is overcoming problems of technological obsolescence and the relatively short life expectancy of digital media. *See, e.g.*, Howard Besser, *Digital Longevity*, *in* HANDBOOK FOR DIGITAL PROJECTS: A MANAGEMENT TOOL FOR PRESERVATION AND ACCESS (Maxine K. Sitts ed., 2000), *available at* http://nedcc.org/oldnedccsite/digital/dighome.htm. The problem of longevity can be solved, at least partially, by individuals' distribution of cultural materials that were transferred from their original format to updated digital formats. This commons-based peer production mechanism by individuals can reduce many of the costs that traditional media institutions face in the course of digitizing their analog archives. In addition, it also enables individuals to function as peer contributors to cultural processes that determine which cultural materials are preserved and then made accessible to the public.

Flickr and social networking websites like MySpace[35] all emphasize one central virtue of digital domains: there are no clear-cut boundaries between the creation of cultural artifacts, their distribution, and their *preservation* between "past" and "present."

It is in this sense that, in a networked environment, cultural production becomes a form of cultural preservation and social remembering. Society's new memory institutions are less isolated and marked from contemporary communicative spheres. The fact that digitized preservation is best served by distribution and diffusion stimulates a reality in which preservation is being merged into people's ongoing cultural engagements – commercial, civic, and private. Indeed, many of these novel frameworks (e.g., content-sharing platforms), do not target cultural preservation, or even archiving, as an explicit area of activity. Yet digitized archiving, knowledge, and cultural retrieval/preservation are integral derivative elements within them.

By making this observation, I am not attempting to portray networked memory institutions as mere digital warehouses for cultural works. Memory institutions select and canonize elements of communities' cultures. By selecting, organizing, indexing, and contextualizing cultural materials, memory institutions function as landscapers of social remembering and architects of historical narratives.[36] Concurrently and derivatively, memory institutions are also gatekeepers that determine and construct the remains of the past for future generations. As Jacques Derrida articulated, "there is no political power without the power to control the archive."[37] Memory institutions are about forgetting just as much as about remembering. Nevertheless, it is exactly at this juncture that digitization invokes a paradigm shift in the political economy of memory institutions. The transformation from a model of preservation attained through control to a model of preservation attained through distribution and the resulting convergence of communicative spheres is fundamental. It potentially decentralizes social processes of individual and collective social

[35] MySpace, http://www.myspace.com (last visited Feb. 26, 2008). MySpace is a social networking website offering an interactive, user-submitted network of blogs, profiles, groups, photos, MP3s, videos, and an internal e-mail system. The "profile" utility enables each user to create its own personal modular web-page in MySpace while corresponding with other profiles. Each profile contains two standard sections: "About Me" and "Who I'd Like to Meet." Profiles can also contain sections about standard interests as well as a blog with standard fields for content, emotion, and media that supports uploading images and video-clips. See also the description of MySpace functions in Wikipedia http://en.wikipedia.org/wiki/MySpace

[36] *See* Eric Ketelaar, *Tacit Narratives: The Meanings of Archives*, 1 ARCHIVAL SCI 131 (2001).

[37] *See* JACQUES DERRIDA, ARCHIVE FEVER: A FREUDIAN IMPRESSION 4 (Eric Prenowitz trans., Chicago Univ. Press 1996).

remembering.[38]

D. *The Decentralized Dynamism of Networked Memory Institutions*

Networked memory institutions carry decentralized, participatory, and dynamic attributes. The power to take part in cultural retrieval and cultural preservation processes is distributed among individuals and organizations of different types: (1) *commercial* (e.g., commercial digital images agencies like Getty Images);[39] (2) *public* (e.g., the Library of Congress's digital cultural heritage projects);[40] (3) *individual-based user-generated* (e.g., Flickr[41]); and (4) *not-for-profit civic-oriented* (e.g. the Internet Archive[42]). The preservation of digital artifacts covers now much more than the scope of tangible preservation by traditional memory institutions (museums, archives, libraries, and private collectors[43]).

Individuals are now taking a more active role in retrieval and distribution of works with cultural and historical significance. To begin with, individuals use networked infrastructures in order to upload and distribute copies of cultural materials, including some that were transferred from other mediums (e.g., chapters of old television programs or scanned copies of old comic books). In addition, content-sharing platforms, social networks and other Web 2.0 applications enable individuals to add one's personal imprint through the organization, selection, reference, adaptation and re-contextualization of cultural materials. When an individual selects and classifies cultural materials (e.g., music, pictures and video-clips), which she then uploads onto her social network's personal web-page (e.g., Facebook), she is engaged in an activity that enables her to take part in the landscaping of history and the formation of cultural memories.[44]

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38 *See* discussion *infra* Part II.C.

39 Getty Images, http://creative.gettyimages.com/source/home.aspx (last visited Feb. 26, 2008) (featuring a commercial agency that collects, digitizes, and then licenses photographs, visual images and stills from audio-visual works for professional, commercial, and private uses).

40 For information about the Library's various projects, see Digital Library Initiatives, http://memory.loc.gov/ammem/dli2/index.html (last visited Feb. 26, 2008).

41 *See supra* note 22.

42 *See supra* note 26.

43 See Maurice Rheims, Art on the market : thirty-five centuries of collecting and collectors from Midas to Paul Getty (1961, translated by David Pryce-Jones).

44 *See* Anita L. Allen, *Dredging-Up the Past: Lifelogging, Memory and Surveillance*, U. CHI. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1010936 (taking these observations one step further by introducing the notion of "lifelog"). The term "lifelog" refers to a comprehensive archive of an individual's quotidian existence, created with the help of pervasive computing technologies. *Id.* Lifelog technologies would record and store everyday conversations, actions, and experiences of their users, enabling future replay and aiding remembrance. Like a traditional diary, journal, or day-book, the lifelog could preserve subjectively noteworthy facts and impressions. And similar to an old-

The resulted outcome is a kaleidoscope of individuals working through culture and creating a bricolage of new paths and directions in social remembering. Just enter YouTube, search a newsworthy entry, or any other type of cultural item, and immediately you will notice the novel frameworks and mechanisms through which the various layers of life and people's experiences are being documented, narrated, situated, contextualized, indexed, classified, and, at least potentially, preserved for future generations. Wars, disasters, political events, public affairs, popular culture, personal items, as well as many other fractions of people's experiences, encounters, and life-hoods, are now being assembled into a *network of networks*, in which individuals are active participants in the construction of future's past.[45]

Finally, networked social remembering practices are decentralized in the sense that they constantly blur the boundaries between *private* and *public* spheres. In many occasions public networked spheres are no longer "just public." Concurrently, they are also extensions of individuals' private experiencing in self-realization and self-manifestation. Take, for example, a personal webpage on a social networking site with one's favorite cultural items "ripped and mixed." It is publicly available, yet it is also a corridor to the personal miscellaneous of one's cultural lives. Networked memory practices are more reflective and transparent of personal materials and narratives that are not filtered through institutional gate-keeping processes. Using collections of personal materials as a form of social remembering is not novel. Memory institutions used this practice long before the emergence of networked communication platforms.[46] Nevertheless, the

fashioned photo album, scrapbook, or home video, it could retain images of childhood, loved ones, and travels. *Id.* at 3-4. Lifelogs are expected to be primary resources for networked memory institutions. Here, also the notion of "memory institutions" takes a turn to a distributed model in which a network of decentralized individual lifelogs would form tomorrow's memory institution.

45 Thus, for example, during the 2006 Israeli-Hezbollah-Lebanese War, people from Israel, Lebanon, and other Arab countries uploaded to content-sharing platforms video-clips regarding the war and its ricochets. These video-clips were either produced by those individuals or were adaptations and transformative works that relied on existing materials (mostly television news). Although the authenticity of these materials may be difficult to verify, they are still invaluable primary sources that provide future generations with scenes, information, perspectives, and reflections regarding people's views of the war that are not fully covered through mainstream mass media institutions. Decentralization, democratization, and multi-dimensional visualizing in social remembering are therefore key elements of networked memory institutions. *See, e.g.*, the following links in YouTube:
http://www.youtube.com/watch?v=kud0FLT7O1w
http://www.youtube.com/watch?v=9juGmjFlUNw&feature=related
http://www.youtube.com/watch?v=OWdkeQod-jI&feature=related
http://www.youtube.com/watch?v=33vHyrafCfI

46 *See* Eric Ketelaar, *Archives of the People, by the People, for the People*, *in* 34 S.A. ARGIEFBLAD, S.A. ARCHIVES JOURNAL 5-16 (1992) repr. in ERIC KETELAAR, THE ARCHIVAL IMAGE. COLLECTED ESSAYS, 15-26 (1997). *See also* JOSEPH L. SAX, PLAYING DARTS WITH A

distributed decentralized characteristics of networked infrastructures seem to make the differences in the scale, scope, and accessibility of such materials quite radical.

E. *Summation*

Together, these paradigm shifts imply a potentially radical transformation in the political economy of memory institutions; that is, the allocation of incentives, resources, and powers to shape the landscapes of history, social remembering, and cultural heritage. Historical truthfulness and social memory, in turn, are elements that influence people's livelihoods and well-being, as well as the formation of beliefs and ideas. In their broader meaning, the landscape of history and social remembering are also major forces in the construction of ideologies and people's preferences.[47] "Knowledge," "information," and "culture" are concepts that influence the future while corresponding with and being influenced by "the past" (or more precisely, narratives of the past). At the end of the day, this is what networked memory institutions are very much about.

As Tessa Morris-Suzuki has sharply articulated, historical truthfulness is also a social matter that is deeply influenced by power relationships.[48] Political, economic, technological, and legal powers are parameters with direct implications on the ability of individuals, groups, and communities to take an effective part in the landscaping of history and the construction of historical narratives.[49] Our preceding discussion, regarding the paradigm shifts in the political economy of networked memory institutions, emphasized the potential prospects of digitized cultural

REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES, 81-150 (Univ. Mich. Press 1999) (analyzing the legal aspects of various types of private materials such as diaries and personal notes).

47 *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001) (presenting a related argument, though not from a perspective that focuses on the interactions between representations of the past and present state of affairs).

48 *See* TESSA MORRIS-SUZUKI, THE PAST WITHIN US: MEDIA, MEMORY, HISTORY 243-44 (2005).

49 *See* TONY BENNET, OUTSIDE LITERATURE (1990) (suggesting that the nature of history is discursive moves by mediated groups of gatherers in public historical spheres, and concluding that the past is simply what is seen). History always is a substitute for a past as it is constructed by the work of historians until it dissolves that very idea of past itself. According to this perspective, history, as well as the past it narrates, is limited by the texts of history. For further development of "historical time" and its semantics, see REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME (Keith Tribe trans., Columbia Univ. Press 2004) (1979). For a discussion of "objective history," as well as the role of contextualization, narratives' construction, and interpretive processes in the work of historians, see HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE (1973) (suggesting that historians establish contexts and narratives which rationalize the past and then identify something as "history").

preservation. My argument in Part III takes a turn as I focus on the complexities of reality where this somewhat utopian vision of digitized cultural preservation confronts dystopian disruptions. One source of these disruptions is partial and gradual privatization processes that both traditional and emerging memory institutions are facing. To this issue I turn.

PART III – THE PRIVATIZATION OF MEMORY INSTITUTIONS

My purpose in this part is to describe the manners in which the emergence of networked communication technologies is the catalyst for the privatization of memory institutions. My use of the term "privatization" is broader than some of its common uses in the literature. "Privatization" is commonly used for situations in which a good that was previously provided by government (through public funding) is now being shifted to a model where its financing and provision are through market mechanisms.[50] My analysis essentially follows this definition, although it also includes in the category of "public provision" not only governments (direct public funding), but also other forms of public-oriented and not-for-profit provision of the goods at stake. Privatization of memory institutions, thus, marks a shift from the centrality of the political and civic spheres in the construction of cultural and social memories to the centrality of markets in this context.[51] As I will demonstrate in the following discussion, to some degree, corporate media – both in its traditional and its novel-networked expressions – is now taking over the long-established social functions of public archives, museums, libraries, and cultural patrons. My subsequent analysis by no means predicts the diminishment of traditional memory institutions. I do argue, however, that if the indicated processes of privatization maintain, in the long-term, market institutions will occupy an increasing share in the cultural fields of social remembering.

A. *The Emergence of Cultural Retrieval Markets and Commercial Memory Institutions*

Digitization signifies the emergence of cultural retrieval markets and commercial memory institutions due to two transformations that networked communication platforms give

50 *See, e.g.*, GRAEME A. HODGE, PRIVATIZATION: AN INTERNATIONAL REVIEW OF PERFORMANCE 15 (2000); Richard W. Bauman, *Public Perspectives on Privatization: Foreword*, *in* 63 LAW & CONTEMPORARY PROBLEMS 1, 3-6 (2000); Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 456-62 (1988).

51 For a general understanding and definition of privatization, see also JOHN G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 460 (1975).

rise to: (1) the scale, scope, ease, and decreased costs of producing and distributing digital artifacts of cultural works (including of authentic original tangible cultural works);[52] and (2) the scale, scope, production capacities and audience attention attributes that are generated by networked infrastructures for cultural production and cultural exchange, including user-generated content-sharing platforms. My purpose in the next two subsections is to further elaborate on the relationship between these two transformations and the emergence of commercial memory institutions.

(I) Commercializing Cultural Preservation

Regarding the first transformation, the economics are quite simple and straightforward. Since the invention of print, copies of cultural works are and always were traded commodities.[53] They bear economic value. Consequently, along with the ease and decreased costs of documenting, preserving, and distributing digital artifacts of cultural works, comes the economic value and incentive to commercialize the products of such activities. The creative industries have always rested on this logic, as seen in the markets for copies of printed materials, music, and audio-visual works. Nevertheless, in analog realms, the economic equilibrium did not seem to justify mass production and mass distribution of past cultural collections. The costs of maintaining and managing archives and other repositories of tangible cultural works were high, on one hand, and with relatively small profits, if at all, on the other hand. Overall, this area of activity was not commercially profitable. Archives and collections of cultural works remained, therefore, mostly within the spheres of not-for-profit public-oriented provision of cultural preservation.

Digitization and networked communication technologies transform this economic equilibrium by significantly reducing the costs and facilitating the simplicity of: (1) producing high quality digital artifacts (including of authentic tangible cultural objects); (2) storing and retrieving cultural artifacts through databases; and (3) distributing copies of cultural artifacts to the public.[54] In addition, digitization stimulates the economic phenomena of the "long tail."[55] In a networked environment, products that are in low

53 See e.g. RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996); G.K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 Copyright Law Symposium, 1 (1992).

54 *See* also Balkin, *supra* note 30.

55 *See* CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 19-22 (2006).

demand or have low sales volume can collectively make up a market share that rivals or exceeds the relatively few current bestsellers and blockbusters, as long as the store or distribution channel is large enough. The "long tail" phenomenon is also a factor that increases the efficiency of commercial memory institutions. The storage capacity of databases is constantly increasing, its costs are decreasing, and networked distribution is both interactive and based on an end-to-end principle[56]. Thus, in the last two decades, cultural (and knowledge) retrieval is becoming an emerging economic business. Consider the following examples:

(1) Commercial enterprises that manage digital images collections of cultural works such as Corbis[57] or Getty Images.[58] These agencies collect, digitize, and then license – both for professional-commercial purposes and for private uses – photographs, visual images (including art works), and videos/stills from audio-visual works. Among other activities, both Corbis[59] and Getty Images[60] focus on acquiring digital reproduction rights of museums' art collections and historical photographs archives like the Bettmann Archive,[61] the French Sygma collection, the Hermitage Museum in St. Petersburg, Russia, the Philadelphia Museum of Art, and the National Gallery in London.[62] The Bridgeman Art Library is another prominent digital images agency that represents museums, galleries, and artists around the world.[63]

Digital image agencies of this kind function as commercial memory institutions in two major aspects. First, they commodify and license for use digital images of society's artistic and cultural treasures. Second, these companies also have a stable of professional photographers who generate stock photos for advertising and media clients. These images are also representations with significance to social remembering

56 *See* Lemley & Lessig, *supra* note 32.

57 Corbis Overview, http://www.corbis.com/corporate/overview/overview.asp (last visited Feb. 26, 2008).

58 Getty Images, http://www.gettyimages.com (last visited Feb. 26, 2008).

59 Corbis Overview, http://www.corbis.com/corporate/overview/overview.asp (last visited Feb. 26, 2008).

60 Getty Images, http://www.gettyimages.com (last visited Feb. 26, 2008).

61 Bettmann Archive, http://www.corbis.com/BettMann100/Archive/BettmannArchive.asp (last visited Feb. 26, 2008). The Bettmann Archive collection consists of 11 million photographs and images, some going back to the United States Civil War, and includes some of the best known U.S. historic images. *Id.* The Archive also includes many images from Europe and elsewhere. *Id.*

62 *See* Katie Hafner, *A Photo Trove, a Mounting Challenge*, N.Y. TIMES, Apr. 10, 2007, at C1.

63 Bridgeman Art Library, http://www.bridgeman.co.uk/about/about_us.asp (last visited Feb. 26, 2008).

processes[64];

(2) Google's Library Project, an ambitious attempt to scan and digitize society's major collections of books and thus build the ultimate comprehensive digital library;[65]

(3) Digital archives of newspapers and photographs that license materials for commercial and personal uses;

(4) Online music stores like Apple's iTunes and Rhapsody.[66] Ventures of this kind are essentially focused on selling music to consumers. Nevertheless, they also include a derivative ancillary function of building and managing comprehensive digital archives (databases) of musical recordings. Accordingly, they function also as cultural memory institutions. Even if most of these frameworks do not initially target cultural preservation, or even archiving, as an area of activity, the architecture of such platforms does.

(II) The Impact of Audience Attention and Excess Capacity – Social Networks, Content-Sharing Platforms and Social Remembering

The second networked economic transformation that stimulates the emergence of cultural retrieval markets and commercial memory institutions is more subtle and oblique. Networked infrastructures for cultural production and cultural exchange, and particularly user-generated content-sharing platforms, are characterized by the attributes of scale, scope, and production capacities[66]. These infrastructures generate critical masses of audience attention and excess capacity for the social production of content that are usually channeled to a handful of "winner-takes-all" successful platforms.[67] It is these characteristics that make social production networks (e.g., content-sharing platforms) so attractive to corporate media and commercial intermediaries. As Lior Strahilevitz rightfully observed, where there is excess capacity, there is also profit opportunity and

64 See PAUL FROSH, THE IMAGE FACTORY: CONSUMER CULTURE, PHOTOGRAPHY AND THE VISUAL CONTENT INDUSTRY (2003).

66 See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (presenting the theory the networked communication platforms are characterized by the attributes of scale, scope and production capacity, which in turn empower non-market forms of social production).

67 Cyberspace is characterized by *network effects* and *power distribution laws*. The economics of human behavior are such that information flows tend to concentrate audience attention of people onto a limited number of sources (e.g. web-sites or blogs), which then create path-dependence processes that further increase the centrality of these sources. *See* Clay Shirky's Internet Writings, Power Laws, Weblogs, and Inequality, http://shirky.com/writings/powerlaw_weblog.html (last visited Feb. 26, 2008). *See also* B.A. HUBERMAN, THE LAWS OF THE WEB: PATTERNS IN THE ECOLOGY OF INFORMATION (MIT Press, 2001); DUNCAN J. WATTS, SIX DEGREES: THE SCIENCE OF A CONNECTED AGE (W.W. Norton & Co. 2003).

consequently, the rapid overtaking of social cultural retrieval networks by corporate media.[68]

Recent examples include the acquisition of YouTube by Google for $1.65 billion in stock, the acquisition of the social networking site MySpace for $580 million by Rupert Murdoch's News Corporation (the parent company of Fox Broadcasting and other media enterprises), the acquisition of Flickr (the popular online photo management and sharing application) by Yahoo, and the acquisition of Grouper (a web-video-sharing site) by Sony Corp. Entertainment Unit for $65 million[69]. As all these examples demonstrate, social production of content and cultural retrieval is as likely to become a tool of market production as a competitor to it,[70] and it is exactly at this juncture that the privatization of networked memory institutions may come into play.

Part II described how contemporary networked cultural production has a derivative function of social remembering. The practical outcome of this observation is that, deliberately or not, Flickr, YouTube, Facebook[71] and many other online endeavors are de facto memory institutions. They are meta-archives of cultural representations and private and collective memories. Yet concurrently, proprietary firms are increasingly dominating these infrastructures. This in turn stimulates the privatization of functions that were traditionally performed by public-oriented memory institutions.

By making these observations, I am not arguing that commercial taking-over of cultural retrieval platforms diminishes their focus on user-generated content. Nor do I ignore the fact that many of these ventures were originally initiated by profit-motivated entrepreneurs. I do argue, however, that commons-based peer production is an emerging phenomenon with an embodied *social contradiction.*[72] Its basic characteristics empower

68 Lior Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1497-98 (2007) (reviewing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)). *See also* Paul R. La Monica, *Google to Buy YouTube for $1.65 Billion*, CNN MONEY, Oct. 9, 2006, http://money.cnn.*com*/2006/10/09/technology/googleyoutube_deal; Wikipedia, MySpace, http://en.wikipedia.org/wiki/MySpace (last visited Feb. 26, 2008); *Sony Pays $65 Million for Web-Video-Sharing Site Grouper.com*, FOX NEWS, Aug. 23, 2006, http://www.foxnews.com/story/0,2933,210043,00.html.

69 See the report in < http://www.foxnews.com/story/0,2933,210043,00.html>

70 Strahilevitz, *supra* note 68, at 1503.

71 YouTube, http://www.youtube.com (last visited Feb. 26, 2008); Flickr, http://www.flickr.com (last visited Feb. 26, 2008).
Facebook, http://www.facebook.com (last visited Feb. 26, 2008). Facebook is a social networking site that enables users to construct their own personal web pages while corresponding with other users through a range of unique communication tools and applications.

72 *See* Balkin, *supra* note 30, at 13-15 (emphasizing the social contradictions of the

individuals in their capacities as landscapers of culture and history.[73] Yet, the same attributes of scale, scope and excess capacity tend to make these novel collaborative frameworks a source of massive profit opportunities. As a result, these novel collaborative frameworks are rapidly being commercialized and thus becoming an integral part of corporate media. Corporate media, however, follows a political economy which, at the end of the day, is bound to influence the conducts and outputs of cultural production networks, including their derivative capacity as memory institutions.

More specifically, attention should be drawn to the regular failures and disruptions that corporate media is subordinated to,[74] including: (1) excessive reliance on advertisements (revenues) and a consequent trend toward content that captures a wide share of the audience and follows the appropriate mood that is required for promoting advertisers' products;[75] (2) potential acts of private censorship;[76] and (3) alliances between content-sharing platforms and corporate content owners that limit, including through technological protection measures, the incorporation of creative content (e.g., popular music, films and television programs) into user-generated content.[77]

In Part V, I will make several detailed proposals that are intended to mitigate these inclinations. There are two points that I wish to emphasize at this stage. The first refers to the positive externalities that are lost in the course of commercializing cultural

digital revolution in two conflicting crucial trends: the democratization of digital content and the increasing importance of digital content as a source of wealth and economic power).

73 BENKLER, *supra* note 65, (using economic, political, and technological analyses to explain how new information technologies make it easier for individuals to collaborate in producing cultural content, knowledge, and other information goods)

74 *See generally* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002) (focusing on the special nature of media products as public goods and, hence, the embodied failure of a market-oriented media system to provide the public with the array of media products that are socially desired).

75 *See id.* at 24-30, 182-83.

76 *See* C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2098 (1992) (arguing that, "despite the potential danger and occasional occurrence of governmental censorship, private entities in general and advertisers in particular constitute the most consistent and the most pernicious 'censors' of media content").

77 *See* Principles for User Generated Content Services, http://www.ugcprinciples.com (last visited Feb. 26, 2008) (explaining principles supported by CBS, Dailymotion, Fox Entertainment, Microsoft, MySpace, NBC Universal, Veoh Networks, Viacom, and Disney). Another recent example is the plan of record companies and YouTube – the most popular Internet video-sharing site – to offer current and archived music videos clips of record companies' artists. *See* YouTube Aims to Sell Music Videos, BBC NEWS, Aug. 16, 2006, http://news.bbc.co.uk/2/hi/entertainment/4798133.stm. The current plan is to offer the videos free of charge and to use advertisements as the main revenue source. *Id.* In addition, YouTube plans to implement technological tracking mechanisms for identifying, and, under certain circumstances, preventing the use of copyrighted materials (including home videos derivatively using such materials). Id.

retrieval networks. [78] Decentralized, individual participation in cultural production has a collective significance that exceeds its importance to individual participants. It is the value of a bricolage of perspectives on culture, historical truthfulness and social remembering.[79] This variety may be lost when corporate media takes over networks of cultural production.

The second point refers to the *multisided nature* of user-generated content platforms. In a networked environment, contemporary cultural production and cultural exchange are also "past cultural memories. This imposes a regulatory challenge. Any regulation of the *cultural production function* also involves regulation of social remembering and vice versa. In this situation, a tension arises between the breathing space that decentralized memory institutions require and the conflicting operating rules of corporate media that demands proprietary control over its content[80]. This social contradiction is also a regulatory contradiction. It is a contradiction between a need to provide regulatory responses to the commercialization of social remembering, and the intuitive hesitation to regulate cultural production and cultural exchange.[81] The following section adds the key impact of copyright law on the privatization of networked memory institutions.

B. *The Key Impact of Copyright Law on the Privatization of Networked Memory Institutions*

My discussion thus far has omitted one very important factor, which is the impact of copyright law on the privatization of networked memory institutions. The transformation from

78 In economics, an externality is an impact (positive or negative) on any party not involved in a given economic transaction. Positive externalities occur when the positive impacts of a product overreach the interests of the direct sides to its production and consumption. See A. OGUS, REGULATION - LEGAL FORMS AND ECONOMIC THEORY, 33 (1994), 33; A.M. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY, 107 (1980).

79 See infra Part IV(A).

80 See also *infra* Part III(B) and *infra* Part IV(B).

81 Free speech jurisprudence reflects an embodied distrust of governmental involvement in the regulation of cultural production and other related speech activities (see e.g. Frank I. Michelman, Liberties, *Fair Values, and Constitutional Method*, 59 University of Chicago Law Review, 91, 106 (1992); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 University of Chicago Law Review, 41 (1992)). Indeed, free speech jurisprudence includes also accounts for the necessity of state regulation due to the fact that concentrated private power, as in the hands of corporate mass media, regulates and implicates the public discourse, the free flow of information, and the effective speech rights of individuals no less, and even more, than state regulation. Yet, the tension described in the above-mentioned text remain persistent and unresolved (see Guy Pessach, *Media, Markets, and Democracy: Revisiting an Eternal Triangle, Critical Notice:* Media, Markets and Democracy *by Edwin C. Baker"*, 17 The Canadian Journal of Law and Jurisprudence, 209-226 (2004).

tangible cultural preservation to digitized cultural retrieval also signifies the increasing dominance of copyright law over the activity of networked memory institutions. Once transformed into digital domains, reproduction – an act that is exclusively reserved to copyright owners[82] – becomes an integral element – a prerequisite – in almost any form of digital communication, creation, documentation, archival, or preservation activities. The fact that digitized cultural retrieval deals with intangible goods that are governed by copyright law stimulates the privatization of networked memory institutions through two accumulative tracks: (1) the commodification of digital cultural artifacts, including buyouts of copyright portfolios with cultural significance by commercial enterprises; (2) copyright law's pressure on traditional public-oriented memory institutions (e.g., museums and libraries) to change their policies toward third parties who wish to access and use copyrighted, cultural works that such institutions posses and manage.

(I) Commodification, Mergers and Acquisitions of Intangible Cultural Portfolios

Part III(A) described the emergence of cultural retrieval markets and commercial memory institutions. Copyright law is the bedrock that supports and induces commercial forms of cultural preservation. It does so by legally establishing and facilitating a proprietary market-based system that enables producers and institutions to profit from the production and distribution of intangible cultural artifacts.[83] Copyright law is the force behind the economic equilibrium that makes digitized cultural retrieval an economically viable business, and thus stimulates the emergence of commercial memory institutions. The broader the scope and extent of copyright protection, the greater the inclination toward privatization of networked memory institutions because of the economic value of selling, licensing and providing access to digital copies of cultural works.

Practically, this means that with the current extensive scope of copyright protection[84] digitized cultural preservation activities may gradually undergo intense privatization. At this point, one

82 *See* 17 U.S.C. § 106(1) (2008). *See also* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999).

83 *See generally* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (Westview Press 1996).

84 For a survey, discussion and examples of the expansion of copyright protection in the last century, and especially in the last decade, see Guy Pessach, *Copyright Law as a Silencing Restriction on Non-Infringing Materials: Unveiling the Scope of Copyright Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1069-70 n.2 (2003).

should also take into account two additional developments. On one side, copyright protection is now being supported by additional layers of legal protection against the circumvention of technological protection measures (TPMs) that restrict access to and use of digital copyrighted content.[85] On the other side, copyright's current scheme of exemptions and limitations does not seem to enable effective and sustainable digitized cultural preservation and retrieval activities outside of commercial market settings. For example, the current scope, interpretation, and application of the fair use exemption,[86] seem to make it almost obsolete in the context of digital retrieval and preservation activities, especially those activities that involve large scale and large scope reproductions of entire copyrighted works.[87] Similar outcomes are apparent in the context of specific exemptions that deal with reproduction for preservation purposes such as Section 108 of the Copyright Act),[88] As a result of this existing legal regime, licensing and market transactions become the principal practical option for networked memory institutions.

Another element in the development of commercial memory institutions refers to transactions in copyright portfolios of cultural works and the acquisition of such portfolios by commercial enterprises. Once digital cultural artifacts become tradable goods they will be traded and reallocated according to the economic principles that guide media markets. The economics of databases and networked knowledge intermediaries are based on several cumulative – and sometimes conflicting – principles: (1) comprehensiveness;[89] (2) exclusivity;[90] (3) focus on a handful of blockbuster works that attract much of consumers' attention surplus;[91] and finally, (4) a tendency toward concentration and

85 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863-65 (1998) (codified as amended at 17 U.S.C. §§ 103, 1201 (2008)) [hereinafter DMCA].

86 *See* 17 U.S.C. § 107. For further discussion *See* Part V(B)(II) *infra*. *See also* Guy Pessach, *Museums, Digitization and Copyright Law: Taking Stock and Looking Ahead*, 1 J. INT'L MEDIA & ENT. L. 253 (forthcoming 2008).

87 *See* Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989, 1012-26 (2007).

88 17 U.S.C. § 108.

89 By "*comprehensiveness*," I mean the value of the most up-to-date and complete set of materials available in their relevant context. Knowledge intermediaries and databases are valued prominently for their capacities to provide access to *comprehensive* sets of materials. Zimmerman, *supra* note 87 at 1004, 1007, 1018 (discussing this in the context of digitized cultural preservation).

90 In many instances, cultural and informational materials that are provided through databases and archives are complementary goods. Consequently, and in direct relation to the parameter of comprehensiveness, those who get exclusive control over some materials are able to obtain a competitive edge over other commercial players in the field of knowledge and cultural retrieval.

91 The literature tends to identify media products as a classic example of solidarity goods. People value media products significantly for the value that is created through

vertical integration in order to fully use advantages of scale and scope with regard to the production and distribution of media products.[92]

Together, these parameters explain why commercial players in cultural retrieval markets are continuously involved in transactions that provide them with rights and licenses – preferably exclusive – in portfolios of digitized cultural works. The previously described acquisitions by digital images agencies like Getty Images and Corbis,[93] Google's exclusive contracts with major universities' libraries and publishers regarding the scanning of their collections as part of the Google Library Project,[94] and the acquisition of YouTube by Google, are only a few examples of commercial transactions in portfolios of cultural works. Some of these deals focus on extracting direct revenues from utilization and licensing of copyrighted cultural works. Others focus on extracting revenues from audience attention that is generated by clusters of content. In both circumstances, there are two important points to be made.

First, transactions of this kind are very much responsible for the partial privatization that networked memory institutions are undergoing. Mergers and acquisitions of content portfolios, by corporate media, tend to lead to concentrated commercial media markets, whereas the financial investment in purchasing copyrights in cultural works puts more pressure on extracting revenues from their commercial utilization. The second point refers to copyright's crucial role in facilitating and enabling commercial dynamics of this kind. As demonstrated by the neoclassicist economic approach to copyright,[95] copyright's function, as an exclusive property right, does not only serve to generate incentives for cultural production. Copyright law also

joint or simultaneous enjoyment by other individuals. *See* RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 178-82 (Harvard Press 2000); Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1026 (2000). *See also* LEO BOGART, COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST 221-24 (Oxford Press 1995) (focusing more on the appeal to the familiar in the manufacturing of cultural preferences and tastes); ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 191-92 (Free Press 1995).

92 See Guy Pessach, *Copyright Law as a Silencing Restriction on Non-Infringing Materials: Unveiling the Scope of Copyright Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1088-1089 (2003); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 400-12 (1999).

93 *See supra* note 54-67 and accompanying text.

94 *See supra* note 25. *See also* Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207, 1215-17 (2007).

95 For a critical analysis of the neoclassical theory in the context of copyright law, see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 311-36 (1996). For a general discussion of the neoclassical theory of property rights, see Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347 (1967).

establishes and facilitates a market system for trading and licensing intangible works. It is fundamental to market formation and market operation, and is the driving force behind the above-mentioned dynamics.

Before moving on to the next section, a final caveat is required. By making these observations, I am not ignoring the fact that many networked intermediaries, including several of those previously mentioned (such as the content-sharing websites and Google's library project) are partially based on a free access model. According to this model, users are not required to pay directly money for accessing archived cultural materials. Nor do I ignore the fact that to a very large extent, this model represents an improvement in comparison to prior decades. Until the emergence of the Internet, commercial enterprises were generally reluctant to make their content available to users without direct payment.[96] Nevertheless, there are several reasons why on its own, embracing a free access model does not rebut copyright's above-mentioned responsibility for the partial privatization of networked memory institutions.

To begin with a free access model does not necessarily contradict – and in many instances may even integrate well – with a commercial model of digitized cultural retrieval. One prominent example refers to commercial enterprises that provide free access to their content, but still make their profits from advertising revenues. Additionally, one need not confuse a free access model with a *true* open-access model.[97] A free access model might still include proprietary restrictions that control and limit the "free –movement" and further utilization of its contents.

One example of a free access (but not an open-access) model is Google's Library Project's treatment of public domain materials. Google provides free access to full copies of public domain materials that are archived in its databases. Nevertheless, Google still imposes several proprietary restrictions on the use of such materials. One restriction is that Google prohibits other people from "scanning its scans" and creating additional web services that

[96] This last statement should be clarified to some extent, because commercial television and radio were and still are considerably based on a model that provides content free of direct charge from recipients while profiting from selling advertisements. Similarly, newspapers do not charge consumers with the full price of their production costs but rather rely heavily on revenues from advertisements. See generally C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (providing factual evidence and analyzing the prominent influence that advertisers have on the content of media products within advertisement-supported media entities).

[97] *See also* Lawrence Lessig, *The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, blip.tv, and Even Google*, http://lessig.org/blog/archives/003570.shtml (last visited Feb. 26, 2008).

are based on its scanned public domain materials. Users cannot access and browse the content of Google's databases; likewise, users cannot apply their own search and retrieval utilities on Google's database.[98] Users are only allowed to download copies of particular public domain works from Google's library after using Google's search engine. In addition to these technological proprietary restrictions, Google also contractually limits the use of its public domain materials to "personal non-commercial use" while prohibiting automated searching and harvesting of public domain materials from Google's databases.[99]

Another example of proprietary restrictions embodied in free commercial content platforms appears on YouTube. Users can access the content on YouTube free. However, YouTube still imposes several proprietary restrictions on its users. First, technically, the system does not allow users to actually receive a copy of content that someone else has uploaded, but can only view the content or link to it. Users cannot download content and use it in other platforms or settings. Second, YouTube claims copyright in all of the content on the website, except user submissions,[100] including the text, software, scripts, graphics, photos, sounds, music, videos, and interactive features.[101] Finally, recently, YouTube began the implementation of a video filtering system that will give owners of copyrighted videos the choice of blocking or promoting (against revenues from advertisements) their content on YouTube. With the implementation of this mechanism, YouTube users will not only be restricted from secondary uses of content that was uploaded on the platform, but will also be prevented from uploading certain materials to the platform.[102]

A free access model does not, therefore, bar the potential privatization of networked memory institutions. Moreover, as Rebecca Tushnet clearly reminded us.[103] at the end of the day, commercial intermediaries like Google are "for-profit

98 *See* Andrew Richard Albanese, *Scan This Book!*, LIBR. J., Aug. 15, 2007, http://www.libraryjournal.com/index.asp?layout=articlePrint&articleID=CA6466634 (last visited Feb. 26, 2008).

99 Such a notice appears on all of the PDF files of public domain books that are part of Google's library.

100 User submissions are subordinated to a worldwide, non-exclusive, royalty-free, sub-licenseable and transferable license. YouTube Terms of Use, § 6(c), http://www.youtube.com/t/terms (last visited Feb. 26, 2008).

101 See id.

102 *See* Elise Ackerman, *Google Releases Video Filtering System*, http://www.siliconvalley.com:80/news/ci_7185168. See also http://www.sccba.com/lawpractice/view_newsitem.cfm?id=8464

103 *See* Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1023 (2006).

organizations." Hence, no matter how benign these intermediaries have been thus far, one cannot ignore the chance that, in the long run, current business models of free access might be replaced with a movement toward enclosure and pay-per-use models.[104]

(II) Transforming the *Cultural DNA* of Traditional Memory Institutions

So far my discussion focused on copyright's direct effect on the incentives and practices of commercial enterprises. Yet, copyright law's impact on the privatization of memory institutions has another aspect. Copyright law transforms operation and the cultural DNA of traditional memory institutions. In a networked environment, copyright law and its underlying licensing regimes tend to generate "bottleneck" pressures on traditional public-oriented memory institutions (e.g. museums, libraries and archives) to adopt proprietary restrictive policies toward third parties. As a result, networked activities of traditional public-oriented memory institutions are may become closer to those of commercial enterprises, thus in part neglecting their long-standing legacy as "public trusts" with unique social responsibilities toward the audiences that they are serving.[105] Copyright's impact on transforming the cultural DNA of traditional public-oriented memory institutions may occur through two main channels: coercion and evolution.

(a) Coercion

By using the term "coercion" I am aiming at the intellectual property, contractual, and technological protection measures that traditional public-oriented memory institutions are compelled to adopt in networked domains. In tangible realms, possession and ownership of cultural objects gave cultural institutions adequate

104 In fact, web-applications like Google Book Search, Google News Archive Search and Google Music Trends are already being based partially on business models that concentrate on directing users to commercial sites in which the searched content could be bought. See http://scholar.google.com/intl/en/scholar/about.html/; http://video.google.com/http://video.google.com/; http://www.google.com/trends/music; http://books.google.com/googleprint/library.html.

105 *See, e.g.*, WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST (James Cuno ed., 2004) (discussing the social responsibilities of museums and their long-standing function as public-trusts); CHARLES R. MCCLURE ET AL., PLANNING AND ROLE SETTING FOR PUBLIC LIBRARIES (1987); Howard Besser, *The Next Stage: Moving from Isolated Digital Collections to Interoperable Digital Libraries*, 7 FIRST MONDAY 1 (June 2002), http://www.firstmonday.org/issues/issue7_6/besser; Guy Pessach, *The Role of Libraries in A2K: Taking Stock and Looking Ahead*, MICH. ST. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=961332 (discussing the public functions of libraries).

control over the utilization of these objects. Libraries were able to lend books on an equal basis and in many occasions also to subsidize their provision and charge minimum fees for subscribers.[106] Access policies of museums and other cultural institutions were largely based on similar principles. And lastly, as a matter of *law in action*, in most circumstances, traditional memory institutions did not restrict or track the uses of their materials by end-users.[107]

This state of affairs no longer exists in a digital-networked environment. Here, unless the copyrighted work has fallen into the public domain, memory institutions are increasingly subordinated to copyright owners' strategies that alter memory institutions' traditional policies toward their audiences. More specifically, the main restriction appears to be in contractual limitations and technological protection measures that come with licenses of digitized cultural works. According to many licensing regimes, traditional memory institutions are compelled to adopt restrictive terms and practices regarding the ability of individual users to access and use the licensed cultural materials. In addition, memory institutions may also be restricted in their powers to *permanently* preserve digital copies of licensed cultural works in their collections. Examples in this context include: (a) requirements by publishers of scholarly journals (as well as other types of content) that limit access and use of their digitized content either to libraries' physical premises or to enrolled students in the libraries' parent academic institutions; (b)

106 See American Library Association, Article 1.3 Priority Areas and Goals, The Policy Manual,http://www.ala.org/ala/ourassociation/governingdocs/policymanual/mission.htm . Priority Area A states: "ALA will promote efforts to ensure that every individual has access to needed information at the time needed and in a format the individual can utilize, through provision of library and information services. Goals: 1. All individuals have equal access to libraries and information services. 2. Instruction in information use is available to all. 3. Government information is widely and easily available. 4. Library collections are developed, managed, and preserved to provide access for users to the full range of available knowledge and information. 5. Access to information is facilitated by bibliographic organization. 6. Library use is high. .Fees are not a barrier to library access and service."

107 Indeed, historically, archives and particularly historical societies were both private and exclusive in their beginnings. Historical societies, even those collecting government records, were also restrictive in their access policy (*See* SALLY F. GRIFFITH. PHILADELPHIA: HISTORICAL SOCIETY OF PHILADELPHIA (2001); KEVIN GUTHRIE, THE NEW-YORK HISTORICAL SOCIETY: LESSONS FROM ONE NONPROFIT'S LONG STRUGGLE FOR SURVIVAL (1996)). In this sense, current privatization dynamics of memory institutions have parallels with the origins of some traditional memory institutions. Yet, as part IV *infra* further elaborates, regarding networked memory institutions, concerns over the consequences of privatization have several aspects other than restrictive access to the repositories of networked memory institutions. In addition, regarding networked memory institutions, the source of restricted access derives mostly from copyright law rather than from control and ownership over originating authentic and tangible documents and cultural materials.

contractual limitations that prohibit preservation and further use of licensed materials after the licensing agreement has come to an end; (c) adhesion licenses by digital images agencies like Corbis.com, which practically prevent public-oriented not-for profit cultural institutions from including Corbis' materials in their public collections; [108] d) terms of sale, such as iTunes Music Store's, which arguably forbid libraries from using the Store, since they authorize only "personal, non-commercial use;"[109] and (e) contractual terms, such as the terms of Audible (a website supplying audio book content to iTunes) and Google's Library Project,[110] which limit their offers to individuals making "personal, non-commercial use."[111]

As these examples demonstrate, by departing from the preservation and provision of access to tangible cultural works, and moving to the realms of digital copies, traditional memory institutions have lost much of their independence and freedom in carrying out their public role. In networked, digital realms, copyright owners hold a floating servitude over the activity of memory institutions. In turn, this leads to a viral effect of privatization because public-oriented memory institutions are pushed toward practices and policies that are closer to those of commercial entities. I am not arguing that traditional memory institutions' attributes and legacies are diminishing. I do argue, however, that the pressure of the copyright' licensing scheme on the activities of public-oriented memory institutions may have a noticeable impact on their performances and practices.

A related, yet more discreet effect refers to *barriers of entry* that traditional memory institutions now face due to copyright's licensing regime. Once commercial players enter the field of digitized cultural retrieval, competition arises between commercial intermediaries and traditional public-oriented cultural institutions. One element is competition over potential audiences. Another element is competition over authorizations, and particularly exclusive licenses, from copyright owners to produce and then use digital artifacts of cultural works. Corbis, Getty

[108] Corbis Education Terms and Conditions, http://education.corbis.com/termsandconditions.aspx (last visited Feb. 26, 2008).

[109] iTunes Store Terms of Sale, http://www.apple.com/support/itunes/legal/policies.html (last visited Feb. 26, 2008). *See also* iTunes Store Terms of Service, http://www.apple.com/support/itunes/legal/terms.html (last visited Feb. 26, 2008) (containing "personal, noncommercial use" limitation).

[110] *See supra* note 98-99 and accompanying text.

[111] Audible, Legal Notices, http://www.audible.com/adbl/faqs/terms.jsp?BV_UseBVCookie=Yes (last visited Feb. 26, 2008).

Images, and the Bridgman Art Library are in the businesses of selling digital images of art works. Therefore, practically, at least in some circumstances, they are competitors to museums who may wish to take upon themselves similar functions. Similarly, Google's Library Project competes with the public-oriented, not-for-profit Open Content Alliance venture for building a universal open-access digital library.[112]

More generally, whenever public-oriented memory institutions attempt to operate in fields that provide either direct or indirect substitutes to products and services of commercial intermediaries, they are expected to confront additional costs and barriers in the course of obtaining licenses for building their online collections.[113] Market settings are likely to dictate pricing schemes that many public-oriented memory institutions are unable to comply with. In addition, in some cases, commercial intermediaries may manage to obtain long-term exclusive intellectual property rights in digital artifacts, including works of cultural significance.[114] In such circumstances, public-oriented cultural institutions might be totally deprived of the ability to include cultural materials in their databases, regardless of the importance that these materials have for the comprehensives of their collections.

Competitive pressures of this kind require public-oriented memory institutions to adjust their supply curve (as content providers) to their external limitations as consumers of licensed content. Nevertheless, this implies a transformation in the cultural DNA of traditional public-oriented memory institutions. If a university library exhibition on Leonardo da Vinci wishes to use digital images of da Vinci's manuscripts that are owned by

112 The Open Content Alliance (OCA) represents the collaborative efforts of a group of cultural, technological, nonprofit, and governmental organizations from around the world that will help build a permanent archive of multilingual digitized text and multimedia content. *See* Open Content Alliance, http://www.opencontentalliance.org (last visited Feb. 26, 2008). The OCA was conceived by the Internet Archive and Yahoo! in early 2005 as a way to offer broad, public access to a rich panorama of world culture. *Id.*

113 *See* Molly A. Torsen, *Fine Art Online: Digital Imagery and Current International Interpretations of Ethical Considerations in Copyright Law* pg# (Berkeley Electronic Press, Working Paper No. 265, 2004), *available at* http://www.law.bepress.com/expresso/eps/265; Alan Cane & Steve Davis, *Images You Can Count On: Interview With Steve Davis, Corbis*, FIN. TIMES, Sept. 16, 2003, at 15 (describing how Corbis initially targeted museums and art galleries as one of its major markets).

114 *See* Babette Aalberts & Annemarie Beunen, *Exploiting Museum Images*, *in* COPYRIGHT IN THE CULTURAL INDUSTRIES 221, 224-25 (Ruth Towse ed., 2002) (describing the negotiations that took place in 1993 and 1995 between the Deutsches Museum in Munich and Corbis, and detailing both the exclusive licensing scheme that Corbis insisted on as a condition for contracting with the museum and Corbis's demand to be the sole copyright owner of the digital scanned images).

Corbis,[115] it will be bound to impose some of Corbis's financial demands and contractual restrictions on its audience. As I will show in the next subsection, the interface of copyright law and the privatization of traditional memory institutions also have an *evolutionary aspect*. This aspect refers to copyright's influence on memory institutions' increasing inclination to voluntarily adopt commercial practices in their networked activities.

(b) Evolution

Memory institutions are not just consumers-users of cultural materials. They are also possessors and providers of cultural materials. Occasionally, memory institutions are also potential copyright owners of cultural materials.[116] Regarding these capacities of memory institutions, there is another dimension to copyright law's increasing networked dominance. Copyright law may induce public-oriented memory institutions to adopt proprietary regimes. The following examples demonstrate this dimension of privatization.

(1) On March, 2006, the Smithsonian Institution (one of United State's most prominent public memory institutions)[117] and Showtime Networks Inc. (a commercial cable television network) announced the creation of "Smithsonian Networks,"[118] a joint venture to develop television programming. According to the agreement, the joint venture has the right of first refusal to commercial documentaries that rely heavily on Smithsonian collections. Those works would first have to be offered to

115 In 1994, Corbis acquired the Codex Leicester (a collection of 36 folios penned by Leonardo da Vinci sometime between 1506 and 1510). *See* Gary L. Wolfstone, *Digitizing Leonardo Da Vinci*, http://www.wolfstonelaw.com/leonardo_essay.html (last visited Feb. 26, 2008).

116 One major question in this context is whether and to what extent digital images of existing cultural works should benefit from an independent copyright protection that is accumulative to the copyrights in the originating cultural works. At least one federal court was of the opinion that the mere reproductions of existing cultural works (in that case photographs of art works) do not consist of a creative original work that entails copyright protection. Bridgeman Art Library Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999). Nevertheless, it is still an open question how far courts will go with this approach, and whether setting conditions for the production of digital images (e.g. angles, lighting, and shades of producing a digital image) will be considered as generating an "original work" that deserves copyright protection. For further discussion see Guy Pessach, *The Legacy of Feist Revisited—A Critical Analysis of the Creativity Requirement*, 36 Israel Law Review, 19-102 (2002).

117 The Smithsonian is an educational and research institute and associated museum complex, administered and funded by the government of the United States and by funds from the institute's endowment, contributions, and profits from its shops and its magazine. *See* About the Smithsonian, http://www.si.edu/about (last visited Feb. 26, 2008).

118 See Showtime Networks and the Smithsonian Institution Announce a Joint Venture to Create a New On Demand Service, http://www.sho.com/site/announcements/060310smith.do (last visited Feb. 26, 2008).

"Smithsonian on Demand," the cable channel that is expected to be the venture's first programming service.[119] Thus, the Smithsonian may earn payments from cable operators that offered the on-demand service to subscribers. Yet, concurrently, the Smithsonian is obliged to restrict the access of other creators and documentary film producers to significant portions of its archived materials. Or in the words of Ken Burns, an acclaimed documentary film maker: "It feels like the Smithsonian has essentially optioned America's attic to one company, and to have access to that attic, we would have to be signed off with, and perhaps co-opted by, that entity."[120]

(2) The second example refers to the already mentioned Google Library Project. Google's major source for book collections is university libraries that provide Google the right to access and scan their collections. The agreements between Google and the participating universities reveal the proprietary regime that Google enforces on its academic partners. Universities libraries and their audiences are left with very few options with regard to the use of scanned copies. Thus, for example, the agreement between Google and University of California includes the following restrictions:[121] the university can offer the digital copy, whole or in parts, "as part of services offered to the university library patrons" but the university must prevent users from downloading portions of the digital copies and stop automated scanning of the copies, for example, by other search engines. Entire works not covered under copyright can be distributed only to scholars and students for research purposes. Finally, the university can distribute only up 10% of the collection to other libraries and educational institutions for noncommercial research.[122] Similar provisions are included in the agreement

119 *See* Edward Wyatt, *Smithsonian-Showtime TV Deal Raises Concerns*, N.Y. TIMES, Mar. 31, 2006, http://www.nytimes.com/2006/03/31/washington/31smithsonian.html?n=Top/Reference/Times%20Topics/Organizations/S/Smithsonian%20Institution&_r=1&oref=slogin&pagewanted=print; Edward Wyatt, *Smithsonian Agreement Angers Filmmakers*, N.Y. TIMES, Apr. 1, 2006, http://www.nytimes.com/2006/04/01/arts/television/01smit.html?ei=5090&en=8293d567dfc155d7&ex=1301547600&partner=rssuserland&emc=rss&pagewanted=print.

120 *See* Eric Bangeman, *Smithsonian Deal with Showtime Draws Fire*, ARS TECHNICA, Apr. 4, 2006, http://arstechnica.com/news.ars/post/20060404-6523.html.

121 *See* University of California Agreement with Google, §§ 4.3, 4.7-10, *available at* http://www.google-watch.org/foia/ucfoia.html (last visited Feb. 26, 2008). *See also* Scott Carlton, *U. of California Will Provide Up to 3,000 Books a Day to Google for Scanning, Contract States*, CHRON. OF HIGHER EDUC., Aug. 25, 2006, *available at* http://chronicle.com/free/2006/08/2006082501t.htm.

122 Before receiving the digital copies of works, other institutions usually have to enter a written agreement with Google regarding the use of the copies and provide indemnity to Google. Id.

between Google and University of Michigan.[123]

(3) The Bridgeman Art Library[124] already represents over a hundred museums and cultural institutions around the world.[125] The Bridgeman Art Library then licenses a variety of commercial and private uses in digital images of cultural works from the collections of these museums (as well as selling print copies of art works). As a practical matter, museums and other cultural institutions outsource to The Bridgeman Art Library the function of commercializing their collections. The scope and growth in the activity of The Bridgeman Art Library is therefore an evidence of the increasing implementation of commercial practices by traditional public-oriented memory institutions.

(4) The fourth example refers to ARTstor,.org[126] a non-profit initiative, with a declared mission of creating and providing digital images for scholarly use. ARTstor, with a collection of more than 500,000 images of art works from major museums, is available for access and use non-profit institutions exclusively, which pay an annual subscription fee. The general public and individuals are unable to access, view and use the database unless they are affiliated and authorized to do so by a non-profit institution that has subscribed to ARTstor.[127] In addition, ARTstor permits only the downloading and printing of low resolution images by its subscribers, and it also prohibits any online utilization of downloaded images, including for non-commercial purposes. These policies are being implemented both on digital images of copyrighted cultural materials and on digital images of cultural materials that have already fallen into the public domain. ARTstor is a paradigmatic example for a public-oriented not-for-profit institution that implements licensing schemes and technological protection measures as part of its networked presence.

(5) In 2003, the Louvre Museum in Paris announced that by using digital technology it will make it's collection of Leonardo da Vinci's works accessible "as never before."[128] The museum digitally

123 *See* University of Michigan Agreement with Google, §§ 4.4.1-2, *available at* http://www.lib.umich.edu/mdp/umgooglecooperativeagreement.html (last visited Feb. 26, 2008).

124 *See supra* note 63 and accompanying text.

125 *See, e.g.*, The Bridgeman Art Library, About Us, http://www.bridgeman.co.uk/about/collections.asp?type=aMuseums+and+Art+Galleries%2C+UK (last visited Feb. 26, 2008).

126 *See* Welcome to ARTstor, http://www.artstor.org/info (last visited Feb. 26, 2008).

127 *See* Frequently Asked Questions, ARTstor, http://www.artstor.org/what-is-artstor/w-html/faqs.shtml (last visited Feb. 26, 2008).

128 See the report of John Leicster, "Digital Technology Used On da Vinci Works," Posted on: Sunday, 4 May 2003, 06:00 CDT, available at http://www.redorbit.com/news/technology/1496/digital_technology_used_on_da_vinci_works/

photographed twelve of da Vinci's notebooks and made them available to museum visitors through computer terminals placed on the museum's premises as part of an exhibition of Leonardo da Vinci's works. For the rest of the world (other than visitors to the Louvre) and for uses other than a "one-time experience of viewing," this important digital images collection is practically useless. In a later stage, after the exhibition ends, the Louvre may produce and sell a CD-ROM with digital images from the collection. Eventually, parts of the digital images collection may also find their way to the Museum's website. The important point for our purposes is that the Louvre treats this public-domain cultural treasure as a proprietary asset with financial upsides to be fully utilized rather than as a cultural treasure that was placed in the hands of the Louvre as custodian of the public.

(6) Finally, the increasing inclination of traditional public-oriented memory institutions to adopt copyright-based commercial practices is also reflected in new conceptions and strategies by people within the community of museums, archives and other related cultural institutions. For example, the Canadian Heritage Information Network – a Special Operating Agency of Canada's Department of Canadian Heritage[129] – issued several reports and papers related to intellectual property and licensing strategies.[130] Although one must be cautious with generalizations, overall, these reports signify a paradigm that encourages cultural institutions to use copyright licensing schemes as a strategic business tool. Similar notions are reflected in other reports such as WIPO's recent *Guide on Managing Intellectual Property for Museums*[131] and King's College Digital Consultancy Service's *Report on Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums.*[132]

Together, these examples demonstrate that copyright owners are not the only ones pressing for the commercialization of digital representations by memory institutions. Commercialization is also

129 *See* Overview, Canadian Heritage Information Network, http://www.chin.gc.ca/English/About_Chin/overview.html (last visited Feb. 26, 2008).

130 *See, e.g.*, Intellectual Property, Canadian Heritage Information Network, http://www.chin.gc.ca/English/Intellectual_Property/index.html (last visited Feb. 12, 2008) (providing links to the following reports: "A Canadian Museum's Guide to Developing a Licensing Strategy;" "Developing Intellectual Property Policies: A How-To Guide for Museums;" "Illustrating Options: Collective Administration of Intellectual Property for Canadian Cultural Heritage Institutions;" and "Like Light Through a Prism: Analyzing Commercial Markets for Cultural Heritage Content").

131 *See* RINA ELSTER PANTALONY, WIPO GUIDE ON MANAGING INTELLECTUAL PROPERTY FOR MUSEUMS (2007), *available at* http://www.wipo.int/copyright/en/museums_ip/guide.html.

132 *See* Simon Tanner, Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums (2004), *available at* http://www.digitalconsultancy.net/USart/index.html.

being independently considered and implemented by traditional public-oriented cultural institutions. It is true that to some degree, traditional public-oriented memory institutions were always engaged in commercial activities (e.g., museum shops that sell posters, coffee-table books, catalogues and other souvenirs)[133]. Nevertheless, these activities were relatively minor in scope, and more importantly, they were distinct and separated from the cultural function of memory institutions. The privatization of networked memory institutions is different. First, it is different in its scale and scope. Second, it is different in the fact that it refers to the core public cultural function of memory institutions – the preservation and provision of public access to cultural works.

I am not arguing that at present, there is already an instantaneous radical transformation in the nature, attributes and legacy of traditional public-oriented memory institutions. Initiatives like the Open Content Alliance[134] demonstrate that networked involvement of public-oriented memory institutions is multidimensional and heterogenic. Many libraries, museums and archives are not part of the drift toward market-oriented schemes.[135] Still, there are evolutionary dynamics in which at least some memory institutions are adopting networked policies that bring them much closer to market settings. There may be legitimate reasons at the back of this transformation, such as the budgetary constraints of cultural institutions. Yet, even so, this development represents another brick in the proprietary walled-gardens that are gradually being built around the spheres of social remembering.

C. *Summation – Privatized Networked Memory Institutions – Practices of Convergence, Mergers and Acquisitions*

Let me summarize my argument thus far. The emergence of networked communications platforms signifies partial and gradual privatization processes with regard to memory institutions. When analyzing these processes, it is helpful to make a distinction between two categories of memory institutions. The first category refers to "traditional" activities of memory institutions, such as the selection, documentation, archiving, indexing, preservation and

133 See Hunter Summerford, *De-sanctified Novelties: The Museum Gift Shops After Bridgeman* (2007) ExpressO, available at, http://works.bepress.com/j_summerford/1

134 *See supra* note 112.

135 *See* Kenneth Hamma, *Public Domain Art in an Age of Easier Mechanical Reproducibility*, 11 D-LIB MAG., Nov., 2005, *available at* http://www.dlib.org/dlib/november05/hamma/11hamma.html (supporting the view that museums should "plac[e] . . . visual reproductions in the public domain and clearly remov[e] all questions about their availability for use and reuse [by the public)]").

provision of access to 'informational and cultural works. The second category refers to new emerging types of collaborative platforms for the production and distribution of cultural works (e.g. content-sharing platforms). One derivative ancillary function of these infrastructures is constructing and preserving cultural representations of social remembering. Regarding both categories, dynamics of privatization are appearing to take place, at least to some extent and regarding some circumstances. Memory institutions are partially relocated outside of public-oriented spheres and within market-oriented settings. As for traditional activities of memory institutions, these processes may include two transformations: (a) the entrance of commercial players to cultural fields that thus far, have been dominated by traditional public-oriented memory institutions; and (b) the partial implementation of proprietary practices by long established public-oriented memory institutions such as museums and libraries. Regarding the second category of emerging collaborative infrastructures for social remembering, privatization is marked by the commercialization of these infrastructures.

In such instances of privatization, the paradigm of digitized cultural preservation may be turned over once again, only this time *from distribution back to control*. In Part II, I argued that the technological conditions of digital networks offer a new paradigm of cultural preservation – a paradigm of distribution instead of the traditional paradigm of tangible control. The privatization of networked memory institutions implies a partial return of a control paradigm. Only now, instead of being dictated by physical conditions – the scarcity of authentic tangible cultural works and the fear of their destruction – the renewed control paradigm is driven by the profit opportunities that come with digitization. Part II also demonstrated how, by making both the *inputs* and *outputs* of networked memory institutions a tradable good – a commodity, copyright law functions as a mechanism that facilitates and supports dynamics of privatization.

The privatization of networked memory institutions is both partial and complex. Regarding traditional memory institutions, the long-standing legacy of these institutions, as custodians of the public, is still the dominant approach. Many traditional memory institutions are constantly seeking paths for public-oriented models of digitized cultural preservation.[136] Yet, with the heavy

136 One example is the previously cited OCA, which already includes more than eighty libraries and research institutions, including the Smithsonian Institution. *See supra* note 110; Katie Hafner, *Libraries Shun Deals to Place Books on Web*, N.Y. TIMES, Oct. 22, 2007, http://www.nytimes.com/2007/10/22/technology/22library.html. *See also* Making of

burden of copyright law, the goodwill of public-oriented memory institutions may not always be operational.[137] Regarding commercial cultural retrieval intermediaries that have a derivative de facto function as memory institutions, the situation is even more complex. Entities like YouTube or Google have no proclaimed intention to follow a public-oriented model of cultural preservation. Their emergence as novel types of memory institutions represents a *social contradiction* between their contemporary goals (maximizing profits) and their long-term implications (externalities) on *future's past*. Legal regulation, and particularly copyright law, has a prominent role in either increasing or resolving this tension between the dual capacities of privatized memory institutions. My purpose in the following part is to outline some of the consequences that derive from the privatization of networked memory institutions. Part V then continues by offering some regulatory responses for this emerging reality.

PART IV – THE CONSEQUENCES OF PRIVATIZING MEMORY INSTITUTIONS

Before outlining the consequences of privatizing memory institutions, I wish to emphasize two caveats. First, the following discussion by no means presumes an idealized image of memory institutions in prior decades. To the contrary, both governmental and public-oriented memory institutions tend to suffer from failures and disruptions, which burden their selection and access policies. Traditional public-oriented memory institutions (e.g., museums) usually focus on the preservation of "high culture" with a considerable elitist approach regarding cultural works that are worth preserving.[138] Governmental memory institutions (e.g., public archives) focus on very particular types of information and cultural materials. In addition, their access policies may be highly

America, http://www.hti.umich.edu/m/moagrp (last visited Feb. 26, 2008) (comprising a joint project between the University of Michigan and Cornell University, intended to preserve and make accessible through digital technology a significant body of primary sources related to development of the U.S.); Sweden Royal Library's *Kulturars* Project, http://www.kb.se/kw3/ENG (last visited Feb. 26, 2008) (exemplifying a national initiative for digital cultural preservation, designed to preserve and make accessible everything found on the Swedish Internet).

137 *See* Section 108 Study Group, Information for the 2006 Public Roundtable and Request for Written Comments (2006), http://www.loc.gov/section108/docs/FRbackground2-10-06.pdf (arguing that current positive copyright law lacks a scheme of exemptions and limitations that enables public-oriented memory institutions to function in a networked environment).

138 *See* Pierre Bourdieu, *The Market of Symbolic Goods*, 14 POETICS 13 (Rupert Swyre trans., 1985). *See also* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE (Richard Nice trans., Harvard Univ. Press 1984).

influenced by power practices of control over knowledge.[139] Even when legally accessible, there are many practical impediments for accessing and using materials in official and public archives. And finally, traditional memory institutions represent very specific ways of thinking about cultural preservation, which are narrower than the prospects of digitized cultural preservation.

The second caveat is that I am not undermining the many social benefits that come with the entrance of commercial enterprises to the fields of cultural preservation and social remembering. Commercial enterprises like Google or Corbis are responsible for an outstanding proliferation of large-scale knowledge and cultural retrieval projects. Moreover, in comparison to traditional memory institutions, commercial enterprises are more inclined to adopt content-natural and populist approaches regarding the knowledgeable goods and cultural representations that they document and to which they provide access. Indexing and selection mechanisms of commercial cultural retrieval intermediaries may have their own biases.[140] Nevertheless, they are still largely based on decartelized bottom-up mechanisms for assigning relevance in which users and individuals have a significant role. Hence, overall and when compared to traditional cultural institutions, retrieval practices of commercial networked intermediaries may be more attentive and responsive to people's preferences. Additionally, as indicated in Part III(A)(I) *supra*, some networked intermediaries apply a partial free access model which may represent an improvement when compared to prior periods.

With this background, my subsequent discussion does not wish to idealize traditional and prior types of memory institutions. Similarly, it does not wish to invalidate the important role of commercial intermediaries as part of an overall pluralistic equilibrium of memory institutions. As someone who believes in the value of popular culture, I think that commercial memory institutions have an important role in the landscaping of culture. Yet, I also believe that social conditions of gradual privatization, which leave too little breathing room for other types of memory institutions, may give rise to a new set of problems. To this issue I now turn.

A. *Memory Institutions and What they Stand For*

My aim in this section is to provide a preliminary inquiry of

139 *See* Sax *supra* note 46, at 117-133 and the cases and sources cited therein (surveying restrictions on access to libraries' and museums' collections)

140 *See infra* notes 176-180 and accompanying text.

memory institutions.[141] Until today, this topic has gained very little attention in legal scholarship.[142] My following discussion does not pretend to provide a full comprehensive analysis of memory institutions and their social-cultural functions. Rather, I wish to focus on portraying memory institutions through the prism of free speech and the attributes of a democratic culture.[143] This perspective will serve me later on when returning to the issue of privatization.

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141 At this point, one caveat should be emphasized: this article has no pretension of taking a position in the various debates between historians and philosophers of history regarding the nature of history, historiography and the work of historians. For a discussion of these issues, see Lawrence Stone's critique of the post-modern approach of history. Lawrence Stone, *History & Post-Modernism*, 131 PAST & PRESENT 189, 217-18 (1992). S*ee also Debates from the Journals*, *in* THE POSTMODERN HISTORY READER 239-73 (Keith Jenkins ed., 1997) (thoroughly accumulating sources regarding the different approaches on the nature and subject matter of history); R.G. COLLINGWOOD, THE IDEA OF HISTORY (1946) (presenting a more traditional view). Indeed, the juncture of post-modernity and the notion of "history" evoked many debates and discussions. *See, e.g.*, Bennet, *supra* note 39 (discussing the nature of history as discursive moves by mediated groups of gatherers in public historical spheres, and concluding that the past is simply what is seen). History is always a substitute for a past, as it is constructed by the work of historians until it dissolves that very idea of past itself. *Id.* Under this perspective, history, as well as the past it narrates, are limited by the texts of history. *Id.* For further development of "historical time" and its semantics, see generally REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME (Keith Tribe trans., Columbia Univ. Press 2004). Another broad area of discussion concerns "objective history" and the role of contextualization, narratives' construction and interruptive processes in the work of historians. *See, e.g.*, WHITE, *supra* note 39 (presenting the argument that what historians do is establish contexts and narratives that rationalize the past and then identify something as "history"); HAYDEN WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM (1978) (developing White's approach).

142 Although outside of legal scholarship, prominent academics, including Derrida and Foucault, have studied archives and the social-cultural forces that surround them. *See* JACQUES DERRIDA, ARCHIVE FEVER (Eric Prenowitz trans., 1995); MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., 1st Am. ed., Pantheon Books 1972). There are also researches that study institutions of social remembering. *See, e.g.*, BLOUIN & ROSENBERG, *supra* note 1. My discussion in the following paragraphs does not aim to fully cover the social, cultural, and discursive aspects of memory institutions. Instead, I focus on very few and partial aspects of memory institutions that are crucial for understanding the consequences of privatization in the context of memory institutions.

143 See, e.g., Balkin, supra note 30, at 4-5 (noting that "a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture . . . . A democratic culture is democratic in the sense that everyone - not just political, economic, or cultural elites - has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and sub-communities to which they belong. People have a say in the development of these ideas and meanings because they are able to participate in their creation, growth, and spread. Like democracy itself, democratic culture exists in different societies in varying degrees; it is also an ideal toward which a society might strive. Freedom of expression protects the ability of individuals to participate in the culture in which they live and promotes the development of a culture that is more democratic and participatory . . . . The idea of a democratic culture captures the inherent duality of freedom of speech: Although freedom of speech is deeply individual, it is at the same time deeply collective because it is deeply cultural.") For further elaboration of the notion of cultural democracy and its various variations in the literature see Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces* of Property, 85 Tex. L. Rev. 1799, 1843-55 (2007).

Memory institutions are more than mere repositories for those who deal with historical research. Memory institutions are frameworks for selecting, indexing, storing, preserving and then making accessible, materials and narratives with cultural and social significance. These functions place memory institutions in a fundamental position of influence on people's perception of the past, life-hoods, beliefs, ideologies, cultural tastes, preferences and the shared significance of cultural works to communities and individuals within them.[144] Part II demonstrated how *networked* memory institutions are gradually converging and merging with broader categories of *speech institutions*. By using the term "speech institutions" I am aiming at social constructs that facilitate the production and distribution of information and cultural artifacts: newspapers, broadcasters, publishers, universities, search engines and many other types of media and communications mediators.[145] Memory institutions are a unique category of *speech institutions* because of their strong, non-inclusive engagement with the *dimension of time* and an *intergenerational element*. Memory institutions deal with the formation, preservation and accessibility of representations that *across times* become memories, facts and narratives about the past. Regarding this capacity, the task of memory institutions is dual:

(a) Facilitating processes that determine *future's past*, or otherwise phrased, long-standing durable cultural representations to which future generations will have access. These include, for example, what libraries do in the context of printed works, what television and films archives do in the context of audio-visual works, and what Flickr does currently with regard to digital images.

(b) Facilitating the capacities of individuals to take part in the landscaping of cultural and informational works for future generations, including adding one's personal imprint through the organization, selection, contextualization, reference and

144 John Henry Merryman, regarded by many as the lead theorist of cultural property law, has emphasized the intrinsic expressive value of cultural property as embodying the values of truth, memory, and the shared significance of cultural works to communities and individuals within them. John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831 (1986); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

145 The notion of "speech institutions" represents a new paradigm that is gradually being employed by First Amendment scholars, and that examines whether, to what extent, and under which conditions certain types of "speech institutions" should be accorded special treatment. *See, e.g.*, Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. (forthcoming 2008), *available at* http://ssrn.com/abstract=1008851; Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998).

adaptation of such materials. Consider, for example, the restrictions that a content-sharing site like YouTube – a paradigmatic example for an emerging networked memory institution – intends to impose on the use of copyrighted materials within user-generated uploaded content.[146] Restrictions of this kind are a de facto regulation of people's participation in individual and collective social remembering. Similarly, even a search engine's basic algorithm could be perceived as a mechanism that facilitates individuals' capacities to take part in the landscaping of history. And with regard to traditional memory institutions, the decision of governmental and municipal archives as to what types of materials to preserve also constitutes a form of regulating people's participation in the landscaping of history.

These attributes of memory institutions emphasize their distinctiveness from other types and functions of speech institutions. Memory institutions' social function is *forward looking* and *intergenerational*. It includes a fundamental impact on future generations, which in turn has two features. First, future generations are in essence a *captive audience* of memory institutions, captive in the sense that someone else, sometime before, deliberately or not, constructed a set of cultural representations, historical narratives, individual and collective memories that are to be preserved and left accessible for future generations. As opposed to contemporary audiences, future generations seem to have no practical ex-post ability to influence the remains of the past as they were accumulated and narrated by previous generations (e.g., art works that museums decide to obtain and preserve for the benefit of future generations). By making this argument I am not ignoring the failures and disruptions in the manners that contemporary speech institutions correspond to the preferences, tastes and demands of audiences.[147] I do argue, however, that by definition, future generations are in a much more disadvantaged position. They lack any capability of influencing the mechanisms of selection, indexing and preservation of materials that construct their past.

The second feature is that from a speaker's perspective, memory institutions involve an additional component that comes

146 *YouTube Unveils Anti-Piracy Protection*, MSNBC, Oct. 16, 2007, http://www.msnbc.msn.com/id/21319251.

147 *See, e.g.*, Baker, *supra* note 74, at 63-95 (discussing: (1) the failure of a market-oriented media system to have any natural or logical priority as a method of identifying and satisfying people's preferences and desires; (2) the distortions that market-generated preferences produce due to the inherent bias of markets towards commodified media products; and (3) the fact that people's preferences are determined by, rather than being exogenous to, any current realm of media products to which they are effectively exposed).

on top of other, more noticed elements of speech institutions. Memory institutions involve and regulate individuals' capacities to take part in the landscaping of history and culture for future generations. This element may be distinct from the regulation of one's participation in current and contemporary speech activities. It may be distinct in terms of the rights and powers that an individual can legitimately demand. It may also be distinct in terms of the types and consequences of the regulation – both public and private – that memory institutions impose on third-party participants.

Consider for example the case of user-generated content-sharing platforms, which function also as derivative memory institutions.[148] Regarding contemporary speech functions of such platforms, individuals seem to have a relatively weak freedom of speech claim for uploading "mere" non-transformative copyrighted materials on the platform (e.g., "my favorite video clips").[149] Yet, a stronger claim for uploading these materials may rise if one considers this action as participating in the landscaping of culture for future generations. Now, the same action may be perceived as an act of self-manifestation and contextualization that links to one's democratic right to take part in the formation of historical and cultural narratives. Indeed, I wish to argue that in a democratic culture, part of people's freedom of speech is the freedom to mark ones personal imprint on *future's past*. This is not just a matter of future audiences' reception interest in having access to plural and multidimensional perspectives and representations of the past. It is also a matter of conceiving people's participatory speech rights as including an intergenerational element, taking an effective part in processes of social remembering.

The functions and goals of memory institutions, therefore, are distinct from the functions and goals of contemporary cultural production and they may require another set of policy

148 *See supra* Part III; *supra* notes 67-80 and accompanying text.

149 *See* Julie E. Cohen, *Copyright, Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (persuasively showing how *pure* personal use, copying, and retelling of *naked* copyrighted materials embody important social values, including such that underlie the copyright system itself). *But see* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (articulating how pure copying of entire copyrighted works can also serve valuable First Amendment purposes, both for audiences and, less obviously, for speakers, for whom copying often serves interests in self-expression, persuasion, and participation). Both papers, however, acknowledge that there may be many circumstances in which copyright would still trump First Amendment considerations in circumstances of legitimate non-transformative copying and using of entire copyrighted works. I agree with views of Tushnet and Cohen. As further elaborated in Part V(B)(II) *infra*, "mere" reproduction of entire copyright materials may also be imminent for the functioning of memory institutions. Yet, as a positive law matter, this is not the prevailing view.

considerations and regulatory tools. One good example is libraries. Libraries are speech institutions with a primary function as memory institutions. Libraries collect, index and preserve knowledgeable goods with an ex-ante forward looking perspective.[150] Libraries are important for any contemporary exchange of knowledge and creative works. Yet, a major part of libraries' social function is preservation for future generations. This function distinguishes libraries from other speech institutions (e.g., university debating clubs) that focus mostly on contemporary discourses and exchanges of ideas. As memory institutions, libraries tend to follow three guiding elements: (1) comprehensiveness of their collections; (2) preservation; and (3) maintenance of cultural works at risk and equal access (free of charge or subsidized) policy.[151] Consequently, and in order to promote these goals, the legal regulation of libraries also tends to acknowledge copyright exemptions that are unique to libraries.[152]

What are, therefore, the goals that society should enhance regarding memory institutions? In my opinion, these goals are basically a variation on the general goals of a democratic culture, only with emphasis on the consequences of the *intergenerational aspect* and the *dimension of time*. Memory institutions' subject matter is cultural and informational representations. A democratic vision of memory institutions requires several elements, including openness, pluralism, diversity and, most importantly, active and equal participation of individuals in the production and distribution of cultural representations for future audiences. These components serve both as a means to promote

150 *See* Pessach, *supra* note 105, at 257.

151 *See* American Library Association, THE POLICY MANUAL § 1.3, http://www.ala.org/ala/ourassociation/governingdocs/policymanual/mission.htm (last visited Feb. 26, 2007). Priority Area A states:

ALA will promote efforts to ensure that every individual has access to needed information at the time needed and in a format the individual can utilize, through provision of library and information services. Goals:

(1) All individuals have equal access to libraries and information services.

(2) Instruction in information use is available to all.

(3) Government information is widely and easily available.

(4) Library collections are developed, managed, and preserved to provide access for users to the full range of available knowledge and information.

(5) Access to information is facilitated by bibliographic organization.

(6) Library use is high.

(7) Fees are not a barrier to library access and service."

Id.

152 *See* 17 U.S.C. § 108 (2008) (delineating limitations on exclusive rights pertaining to reproductions by libraries and archives). Recently, the Library of Congress convened a Section 108 Study Group with representatives of different stakeholders to review the current provisions and recommend changes in the light of the digital revolution. *See* Section 108 Study Group, http://www.loc.gov/section108/index.html (last visited Feb. 26, 2008).

democratic and autonomy interests of future generations and as an end regarding contemporary participants in the process of shaping future's past – the landscape of culture and history for future generations. Practically, a democratic culture of memory institutions calls for several elements:

> Institutional diversity that enables a *checks and balances* regime between different types and categories of memory institutions – commercial, public-oriented, participatory, traditional and novel – that complement each other and thus mirror a variety of angles "of and about" any contemporary society;
>
> (2) Capacities of individuals to access and use cultural materials and communicative platforms both as *inputs* and *outputs* in the course of their engagement in the landscaping of culture, history and social remembering; and
>
> (3) Technological and communicative infrastructures capable of facilitating the preservation and making available of cultural materials to future generations according to the above-mentioned criterions. From an intergenerational perspective, memory institutions require an element of compatibility and interoperability that make possible the longevity and transferability (migration) of cultural materials from one generation of memory institutions to the next (e.g., from institutions of tangible preservation to digital images collections).

My purpose in the following sections is to examine how the privatization of networked memory institutions corresponds with these conditions.

B. *The Commodification of Public Spheres for Social Remembering*

The first consequence of privatizing networked memory institutions is seemingly obvious but it is still fundamental. Privatization may partially induce the commodification of public spheres for social remembering. This development represents a transformation from prior decades in which public spheres were a focus of cultural preservation and memory institutions. The preliminary concerns that come into mind in this context are of *commercialization* and *unequal participation.*

(a) Commercialization

The impacts and biases of commercialization were already mentioned in Part III,[153] and they are basically mirroring the general drawbacks that are associated with corporate media. The risk is that if corporate media becomes a dominant player among

153 *See supra* notes 53-80 and accompanying text.

memory institutions, society's landscape of history and culture will be considerably a mirror of corporate media's perceptions and representations "of" and "about" the pasts and presents of society. This would be a distorted mirror in that it reflects several particular dominant social groups at most. In many occasions, this may not even be a mirror and reflector of life but rather a mirror of the views, beliefs, tastes, preferences and social conceptions that corporate media's particular interests are aimed to enforce in any given era. I will return to this issue in section IV(D) but the important point for our current discussion is the following. Because corporate media is a major stakeholder in contemporary cultural production, it is likely that in its concurrent *secondary capacity* as a memory institution, corporate media will focus on preserving mostly its own contemporary row materials. These materials tend to concentrate on particular types of commercial cultural representations, which do not necessarily reflect a pluralistic wingspan of society at any given time. Moreover, here one must recall that corporate media is considerably more focused on shaping preferences and beliefs rather than reflecting them.[154] This raises the risk that in its social remembering functions, corporate media will merely reinforce preferences and beliefs that were attempted to be embedded in any particular period.

By making these observations, I am not expressing a view against popular and commercial culture. I only argue that regardless of ones preferences toward commercial culture, there are disadvantages if corporate media's dominant position in any contemporary culture will become a main source and filter that memory institutions work through. Consider for example the differences between an amateur digital music library or a peer-to-peer file-sharing platform, and at the other extreme, a commercial online music store like iTtunes or Rhapsody. Or for another example, the differences between the television archives of Hulu[155] – a new online television archive of News Corp and NBC Universal – and on the other hand, the online television archives of the Internet Archive.[156] The long-term landscape of history and culture that is portrayed by digital archives of corporate media enterprises is expected to be notably different than that of other

154 *See* Baker, *supra* note 74, at 87-92. *See also* Pessach, *supra* note 84, at 1082-1083.

155 *See* Hulu, http://www.hulu.com/about (last visited Feb. 26, 2008).

156 *See supra* note 24 and accompanying text. *See also* Internet Archive's Moving Images Archive, http://www.imagesarchive.org/details/movies (last visited Feb. 26, 2008). The Images Archive describes itself as a "library of free movies, films, and videos. This library contains thousands of digital movies which range from classic full-length films, to daily alternative news broadcasts, to videos of every genre uploaded by Archive users. Many of these movies are available for download." *Id.*

memory institutions.

Another related aspect is that the commercialization of public spheres for social remembering can also lessen the commitment of memory institutions to the value of long-term continuation and comprehensiveness, regardless of economic considerations. Commercial intermediaries might abort projects that are not profitable or channel their resources to the retrieval and preservation of materials that are likely to sustain long-term profitability. Similarly, commercial intermediaries' commitment to patron confidentiality and privacy concerns seems to be more doubtful than the long-standing commitment to privacy of public libraries.[157]

(b) Unequal Participation

A second concern is the unequal participation in the activities and outcomes of memory institutions. The subject matters of memory institutions are to a considerable degree "political goods," elements with direct implications on the beliefs, ideologies, and preferences of individuals, as well as on their ability to have their say in such matters. Memory institutions thus operate in a political-public sphere that justifies and requires equal participation of individuals in their capacities both as contributors and as recipients of social remembering. For this reason, memory institutions and their subject matters are regarded by many as *public goods* that should be provided through public-oriented institutions with an inclination toward equal access and equal participation. Libraries, museums, archives, and other cultural preservation institutions are usually conceived as entities that bear unique social responsibilities and fiduciary duties to the public.[158] Indeed, these institutions suffer from their own biases and disruptions. Yet their legacy still tends to involve a sense of respect toward the value of equal access and, to some degree, the value of equal participation. Consider, for example, the Library of Congress's deposit requirements. Copyright owners are required by law to deposit a copy of all published works originating in the

157 *See* Siva Vaidhyanathan, *A Risky Gamble with Google*, CHRON. OF HIGHER EDUC., Dec. 2, 2005, at B7, *available at* http://chronicle.com/weekly/v52/i15/15b00701.htm.

158 For an elucidation of this point, see Cuno, *supra* note 105. In some circumstances, such as in the case of museums, this duty is enforced through judicial oversight of the tax-exempt foundations that museums operate. *See* SAX, *supra* note 34; John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 493-507 (2003). Regarding other categories of traditional memory institutions, including libraries and archives, their subordination to public norms may be a consequence of either direct governmental involvement in their financing or inter-self-enforcing norms, which derive from the institution's legacy. See e.g. the American Library Association, Priority Areas and Goals, The Policy Manual, http://www.ala.org/ala/ourassociation/governingdocs/policymanual/mission.htm

United States with the Library of Congress within three months of publication.[159] Once materials are submitted, they can then be requested and borrowed by other libraries and patrons around the country. The deposit requirement represents a sense of equal participation and equal access regarding cultural preservation.

With privatization, what were previously *public goods* are now turning into *economic proprietary goods*[160]. Both memory institutions and their subject matter may now be operating under a new set of property rules which disregard the notion of equal and public participation in four key aspects: (1) in terms of people's ability to access and use preserved cultural materials; (2) in terms of people's capacities to take an active role in the landscaping of history; (3) in terms of people's ability to participate in determining the governance rules and guiding policies of memory institutions; and (4) in a somewhat paradoxical manner, commercialization involves not only risks of enclosure, but also a risk of *information overload* regarding particular types of cultural representations.[161] Because commercial enterprises tend to merge their function of contemporary content distribution with their ancillary archiving function, there are spillovers and drifts from *the production function* to *the preservation function.* Thus, torrent distribution of contemporary content may also become dominant within the social remembering capacity of corporate media and, consequently, leave less space for other representations of the past. Consider, for example, a commercial social network's (e.g., MySpace.[162]) contemporary function of *content promotion* with its secondary derivative function as a memory institution. Extreme commercialization of social networks and ruinous competition over audience attention may gulp down and put out of sight other elements and cultural representations.

(c) Institutional Economics of Social Remembering

Another consequence of commodifying the public spheres of social remembering involves the risk of the shift to institutional

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159 17 U.S.C. § 407(a) (2008). Section 407(e) provides means for obtaining deposit of copies and phonorecords of "unpublished" television and radio programs that have been broadcast in the United States. In order to effectuate such deposit, the Librarian of Congress may simply make an audio or video recording, or other fixation of such a broadcast as it occurs, and reproduce one copy or phonorecord for archival purposes. *Id.* § 407(e). Alternatively, the Register of Copyrights may make written demand upon "the owner of the right of transmission in the United States, for the deposit of a copy or phonorecord of a specific transmission program." *Id.* § 407(e)(2).

160 *See* Part III *supra.*

161 See, *e.g.*, Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (discussing information overload in terms of environmental law and information ecology).

162 See www.MySpace.com

structures with more transaction costs, thus leading to a regime that disrupts efficient information flow between memory institutions and within them. I argued previously that a democratic culture of memory institutions emphasizes three elements: diversity, comprehensiveness, and the empowerment of people's capacities to work through memory institutions while using cultural works both as recipients and as contributors. These conditions were never fully met. Yet, privatization may take society several more steps away from these elements. Networked memory institutions manage an immense number of cultural works, whereas the imposition of proprietary regimes tends to involve problems of *anti-commons* and *fragmentized markets.*[163] Additionally, one must add the layer of differentiated contractual terms and licensing regimes.[164] The expected outcome is a web of transaction costs that individuals and institutions face in a privatized environment of networked memory institutions.

Consider, for example, the case of digital image collections of art works. Once commercial enterprises like Getty Images, Corbis, and The Bridgeman Art Library are becoming dominant players in this field,[165] the use of each and every digital image in their collections becomes subordinated to a complex regime of rights clearance, including contractual terms. This in turn stimulates a loop of privatized concentration. While public-oriented entities may be driven out of this area of activity, commercial enterprises attempt to overcome such transaction costs by merging and converging cultural portfolios into larger bulks by mergers or acquisitions.[166]

A public sphere model of memory institutions, on the other

163 *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 670-77 (1998). Heller defines an anticommons regime as "a property regime in which multiple owners hold [effective] rights of exclusion in a scarce resource." *Id.* at 639, 668. An anticommons regime emerges whenever several owners have rights of exclusion in a resource that each wants to use. *Id.* At 669. Such a regime creates "horizontal" relations among competing owners of overlapping rights. *Id.* at 670. An anticommons regime may lead to what is described by Heller as the "tragedy of the anticommons." *Id.* at 677. A tragedy of the anticommons can occur when too many individuals have rights of exclusion in a scarce resource. *Id.* At 669. The tragedy is that rational individuals, acting separately, may accumulatively waste the resource by under-consuming it, compared with socially optimumal consumption. *See also* Niva Elkin-Koren, *Copyrights in Cyberspace – Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155, 1189-97 (1998) (discussing the impact of propertization of the commons in creating an anticommons regime, as private ordering may facilitate the proliferation of fragmentized rights of exclusion).

164 *See* Elkin-Koren, *supra* note 163.

165 *See supra* Part II.

166 See e.g. the report: Joseph Weisenthal, Getty Images Selling To PE Firm Hellman & Friedman For $2.4 Billion; 39 Percent Premium, Mon 25 Feb 2008 06:03 AM PST, in http://www.paidcontent.org/entry/419-getty-images-selling-to-pe-firm-hellman-friedman-for-24-billion/

hand, attempts to overcome these costs by gathering as many cultural works as possible into one *public* pool. In prior decades this goal was achieved by schemes like inter-library loans. In a networked environment, public-oriented memory institutions are visioning parallel ventures of open-content alliances.[167] Here, one must bear in mind that memory institutions' subject matter has attributes similar to those of a natural monopoly.[168] Hence, if all cultural materials are accumulated in just a few central sources (networks) from which they can be accessed, this would significantly lower the transactions costs that result from fragmentized licensing markets. As Google's Library Project exemplifies, even in a world of privatized memory institutions, society may end up with either one or several oligopolistic memory institutions. Regarding such a reality, however, a proprietary regime appears to be inferior to a public-oriented open-access scheme. My prior discussion highlighted the fact that due to high transaction costs, a model of robust free markets seems inapplicable in the context of proprietary memory institutions. As a result, a model of public provision may work better for the public interest than concentrated private ownership.[169]

167 *See supra* notes 112 and 134 and accompanying text. *See also* Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23 (2007) (describing the Creative Commons licensing schemes).

168 Natural monopoly occurs when fixed costs are so high and marginal costs are so low that it is less expensive for one company to deliver a given number of channels to an area than it would be for two or more companies to provide equivalent combined capacity, because average per unit costs would constantly decrease as any firm produces more. See Demsetz, *Why Regulate Utilities?,* 11 J.L. & Econ. 55, 56 (1968). While the term "natural monopoly" is usually associated with utilities such as electricity, water supply, or some aspects of telecommunication (id) a natural monopoly exists whenever the costs of production are such that it is less expensive for market demand to be met by one firm rather than more than one. In this situation it is optimal to have only one firm. When a natural monopoly exists, a common policy response is to subject it to some form of regulation, in order to ensure socially desirable outcomes when competition cannot be relied upon to achieve them (id). In our context, transaction costs highlight the efficiency of cultural preservation's public provision through one or only several firms, rather than through decentered market mechanisms and transactions. Such circumstances are usually analyzed through the paradigm of institutional economics, which attempts to locate circumstances in which the production, management, and distribution of resources through one firm is more efficient then through decentered market transactions. *See, e.g.*, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (Free Press 1975).

169 Part IV *infra* challenges the presumption that the proliferation of networked memory institutions requires a framework of economic resources and incentives that are preconditioned upon the support of a proprietary copyright regime. The important point for my current discussion is that the high transaction costs that a proprietary regime imposes on digitized cultural retrieval and preservation activities seem to far overreach the proclaimed contribution of such a regime to efficient allocation of resources and incentives for cultural preservation activities. I will argue in Part IV *infra* that copyright may be required for facilitating the production and distribution of cultural artifacts. Yet the later stage of networked preservation seems to operate well without the support of copyright and a proprietary regime.

C. *Future's Past, Separation of Cultural Powers and Privatization*

Another consequence of privatization is the gradual convergence between institutions of cultural *production* and institutions of cultural *preservation*. This previously mentioned point requires further elaboration. Until the emergence of networked memory institutions and their privatization, there was a considerable degree of institutional separation between *cultural production* institutions (e.g. book publishers, record companies, and film producers) and institutions for *cultural retrieval and cultural preservation* (e.g. libraries and archives), that is memory institutions. In digital domains, this separation is being blurred, whereas privatization further stimulates the integration of these two distinct functions. Not only are the same institutional frameworks functioning both as cultural producers and as cultural reservoirs, but also there are content drifts and integrations between the two functions.

Dynamics of this kind follow the logic of corporate media's political economy, which includes vertical and horizontal integrations that are aimed to fully utilize economics of scale and scope regarding intangible goods with high fixed costs and almost zero marginal costs.[170] According to such economics, the market for social remembering seems nothing more than one more ancillary derivative market in which efficiency considerations dictate further utilization of media products that have already obtained their popularity and audience attention. In addition, copyright law further induces the integration between cultural production and cultural preservation functions by making networked memory institutions inexpensive for contemporary corporate media and more costly for external independent memory institutions. Contemporary corporate media owns much of its own content and therefore can preserve it free of licensing fees. External independent memory institutions, however, are in a different position because they do not posses content portfolios of their own. Hence, unless sheltering under one of copyright's exemptions, they are required both to obtain authorization and pay royalties to copyright owners as a prerequisite for their preservation activities. This makes networked cultural preservation more economic for contemporary media enterprises.

170 *See* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Pessach, *supra* note 84, at 1088-91. *See also* BETTIG, *supra* note 53, at 79-103; ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 22-48 (1999); Paul DiMaggio, *Market Structure, the Creative Process, and Popular Culture: Toward an Organizational Reinterpretation of Mass-Culture Theory*, 11 J. POPULAR CULTURE 436, 440 (1977) (noting that larger, established media organizations have poorer records in providing innovative products than do smaller, independent firms).

Concurrently, it also increases the likelihood that contemporary media enterprises will concentrate on preserving materials that were originally produced by them, or that they are authorized to use.[171]

In my view, this integration between the production, distribution, and social remembering functions may bear undesired democratic and cultural consequences. One can think of the separation between the production function and the preservation function as a *checks and balances* mechanism that mitigates some of the failures and disruptions in the outputs of the production function. This separation of cultural powers enables a competent framework of memory institutions for preserving and reflecting a diverse range of cultural representations and memories, including representations that are not those of any dominant contemporary media institutions. It also enables a critical outlook on the biases of contemporary information and cultural representations such as those of dominating contemporary media enterprises.

Compare, for example, the Vanderbilt Television News Archive and its comprehensive collection of *all* television news programs in the United States[172] with any particular networked archive of a commercial television network (e.g., MSNBC News). Locating the function of social remembering in the hands of cotemporary news manufactures is likely to replicate many of the biases of the cotemporary commercial news media. [173]Independent memory institutions for television news, on the other hand, enhance mechanisms of selection, indexing and contextualization that overcome such biases, allowing a critical outlook on any dominant contemporary discourse rather than its

171 Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 400-12 (1999) (examining copyright's dynamic effect, that is, the ongoing influence of expansive copyright protection toward enclosure of the creative commons and diminishment of cultural diversity). This effect is explained by the inclination of corporate media, which own vast copyright portfolios, to (1) use mainly their existing copyright portfolios (which involves recycling within additional creative activity); and (2) burden the activity of independent creators and producers by demanding a super-competitive price for licensing materials from the corporate media's extensive copyright portfolios, thereby making the expressive activity of independent creators relatively costly compared to that of corporate media. *See also* Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81, 81 (2002). The result of these two aspects is a decreased degree of diversity, both within corporate media's activity and outside of it (whenever additional, external creative activity requires the use of existing copyrighted materials).

172 Television News Archive, http://tvnews.vanderbilt.edu/ (last visited Apr. 2, 2008).

173 *See, e.g.*, MARTIN HARRISON, MTV NEWS: WHOSE BIAS? (1985); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988); S. ROBERT LICHTER, STANLEY ROTHMAN & LINDA S. LICHTER, THE MEDIA ELITE: AMERICA'S NEW POWERBROKERS (1990); BERNARD GOLDBERG, BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS (2001).

replication.

D. *Privatized Memory Institutions, Leveraged Cultural-Political Dominance and Manipulations*

The preceding subsection relates to another concern. The privatization of memory institutions may stimulate intergenerational cultural dominance, including potential manipulations in the construction of historical narratives. Memory institutions deal with representations of narratives about historical truthfulness and cultural memories .[174] Consequently, memory institutions are and always were tangled with and influenced by power relationships. Political, economic, and legal powers are parameters with direct implications on the capacities of groups and individuals to participate in shaping future's past through memory institutions.

The privatization of networked memory institutions shifts significant shares of this *cultural capital* to commercial enterprises and corporate media. This in turn may stimulate dialectics in which commercial intermediaries replicate their cultural dominance from one generation to another. Since control over memory institutions entails influence over people's perceptions of their pasts, such a control also entails a dominant position in shaping people's contemporary preferences, livelihoods, and beliefs. The outcomes of such dialectics are then reproduced and amplified by the fact that the same contemporary audiences are also active participants in shaping their generation's *future's past.* Placing this *cultural capital*[175] in the hands of corporate media and communications industries raises new concerns regarding both direct and unintentional manipulations in the construction and management of social remembering. Indeed, the power of mass media in shaping contemporary elements of people's lives is well recognized. Nevertheless, expanding such powers and cultural dominance beyond any contemporary discourse and towards an intergenerational dimension imposes a new set of concerns.

Consider Google's variety of functions as a networked memory institution. Google has several ventures through which it will gradually obtain a dominant position over future's past and the landscaping of history. To begin with, Google's search engine maps, classifies and organizes the Internet both for contemporary

174 See TESSA MORRIS-SUZUKI, THE PAST WITHIN US: MEDIA, MEMORY, HISTORY (2005).

175 See Bill Martin & Ivan Szelenyi, *Beyond Cultural Capital: toward a theory of symbolic domination*, in PIERRE BOURDIEU VOLUME I, 278-302 (Derek Robbins ed., 2000); Pierre Bourdieu, *Cultrual Reproduction and Social Reproduction*, in KNOWLEDGE, EDUCATION AND CULTURAL CHANGE, 56-69 (Richard Brown ed., 1973).

users and for future generations. Google's search engine is also a gateway that many individuals use when they begin their own personal journey of working through culture. Other projects of Google, including Google's Library Project and YouTube, are also becoming central networked institutions for cultural preservation and social remembering. Google thus obtains a dominant position not only in shaping contemporary preferences and perceptions of people, but also in shaping people's perceptions about the past, society's collective memories, and cultural heritage. The outputs of this dominant position are then replicated and amplified whenever individuals who use Google's applications participate in further activities that deal with cultural retrieval and cultural preservation.

Imagine a documentary filmmaker in the year 2010, who relies and uses materials from YouTube. Or consider a legal historian in the year 2010, who looks in the Google Library for materials on the network neutrality debate, or a researcher who uses Google's search engine and the Google News application for searching materials on human rights violations in China. In all such instances, the de facto positioning of Google as a memory institution may result in biases and manipulations, which are then reproduced in further secondary works of those who use Google as their gateway and *time-tunnel* to society's landscapes of the past.

Among the potential biases and manipulations are the following.[176] One category is direct biases of either "private censorship" or advertising and content promotion policies.[177] Another more oblique type refers to computer-generated biases.[178] Even indexing and selection mechanisms that lack any direct commercial manipulations and are seemingly based on "objective" parameters (such as aggregation of popular links) may be manipulated by network effects, power distribution laws, and dynamics of a "winner-take-all" market.[179] As a consequence, computer-generated mechanisms for indexing and selection may

176 For an illuminating discussion of search engine biases and their implications, see Oren Bracha & Frank Pasquale, *Federal Search Commission?: Access, Fairness and Accountability in the Law of Search* (Law & Legal Theory Working Paper Group, Paper No. 123, 2007), *available at* http://ssrn.com/abstract=1002453.

177 *See* id. at 20-23.

178 Id.

179 Network economy, or "network effect," describes economic circumstances of increasing return to the scale of demand. *See generally* Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985). Power law distributions tend to arise in social systems where many people express their preferences among many options. As the number of options rise, people tend to concentrate on a smaller number of options. *See generally* BERNARDO A. HUBERMAN, THE LAWS OF THE WEB: PATTERNS IN THE ECOLOGY OF INFORMATION (2001); DUNCAN J. WATTS, SIX DEGREES: THE SCIENCE OF A CONNECTED AGE (2003).

reflect a *canon* of cultural representations that ignores many other voices and alternatives for *organizing* knowledge and cultures.[180] The landscapes of culture and history are thus constructed, indexed, and organized through particular and narrow dimensions of people's informational and cultural engagements in prior times.

Google is only one illustration of a broader concern. Privatized networked memory institutions follow certain biases and manipulations in their processes of knowledge retrieval and cultural preservation. Some biases and manipulations may be deliberate. But even when there are no deliberate manipulations, cultural and knowledge retrieval are still guided by a *selection and indexing agenda* – a certain ideology of organizing culture and knowledge that is based on a set of political, cultural, and economic perceptions.[181] Indeed, memory institutions have always been implicated by dynamics of this kind. For example, the traditionalist conception of an "archive" and the documents it should preserve rests on a particular conception of the past and historical research.[182] Memory institutions were always social constructs that mask as much as they reveal. There are, however, two novel elements in the biases and manipulations that privatized memory institutions may be subordinated to.

The first element refers to the entrance of commercial biases and manipulations in the landscaping of history. This naturally imposes a set of new risks to liberal democracies. The tension between capitalism and democracy is of no novelty. In 1977, Charles Edward Lindblom's ground-breaking work, *Politics and Markets: The World's Political-Economic Systems*, showed how, contrary to classical democratic theory, politics is not an autonomous sphere of activity, but is indeed shaped and controlled by the dominant economic interests. As a consequence of this "circularity," the most important issues of economic and social structure – what Lindblom called the "grand issues" – tended to remain at the margins of politics. The reason, Lindblom hypothesized, was the control exercised by corporate interests over the political agenda.[183]

The circularity that Lindblom describes emphasizes the consequences of commercial-economic biases and manipulations

180 *See generally* Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC'Y, 169 (2000).

181 See Lucas Introna & Hellen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16(3) The Information Society, 1-17 (2000).

182 *See* CAROLYN STEEDMAN, DUST: THE ARCHIVE AND CULTURAL HISTORY (Basic Books Publishers 2002).

183 *See* Charles E. Lindblom, Politics and Markets (1977).

in the operation of networked memory institutions. Biases and manipulations of this kind are not just a matter of attaining and retaining cultural dominance. In addition, these are also mechanisms for reinforcing and replicating certain economic and political structures, while veiling other optional ways and perspectives. Because "the past" and *social remembering* are major forces in contemporary politics, control and manipulations in representations of the past become imminent for any contemporary social conditions. By organizing knowledge, information, and culture, networked memory institutions are influencing the boundaries of political discourses for future generations. Consequently, once economic and commercial interests become involved in memory institutions, their ideology and self-interests, as a social group, are bound to be reflected in their representations of the future's past. From this perspective, the call for *separation of powers* between the cultural production function and the cultural preservation function[184] becomes imminent. The second element refers to substantial lack of transparency regarding the biases and manipulations of privatized memory institutions. Networked intermediaries tend to limit the public's knowledge of their algorithms, selection, and indexing mechanisms.[185] In addition, users and third parties do not usually have direct access to the full *"naked"* databases of privatized memory institutions. As opposed to the Library of Congress and its catalogue, one may search Google Library through Google's searching facility, but cannot browse the full database of sources directly or otherwise according to one's own self-defined parameters and algorithms.[186] This lack of transparency makes the biases and manipulations of privatized networked memory institutions very hard to detect. Cultural and derivative political dominance are thus gained, maintained, and replicated through a "black box" that leaves little effective powers of *critical cultural studies* regarding the driving forces of cataloging knowledge and culture for future generations. I am not arguing that in prior periods, the selection mechanisms of traditional memory institutions, such as museums, or archives, were transparent. Nevertheless, what is changing now is that the lack of transparency, in the selection mechanisms of memory institutions, is being coupled together with the lack of institutional separation

184 *See supra* Part IV(C).

185 *See* Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 232-34 (2006); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 36-40 (2007).

186 *See supra* Part III(A).

between the function of cultural production and the functions of cultural preservation and social remembering. This, in turn, imposes a new set of problems such as the ones just described.

E. *Summation*

The partial privatization of memory institutions introduces a new order to the politics of the future's past. At the outset, it is a social-cultural order that imports structures and dynamics similar to those of contemporary cultural production by corporate media. Commercialization and unequal participation are two elements that unsurprisingly are associated with the partial privatization of memory institutions. Privatization also diminishes the institutional separation between the function of cultural production and the function of cultural remembering. As a result, social groups with dominant positions in contemporary media are able to reproduce their social dominance from one generation to another. The power to remember, as well as the power to forget, is thus gradually being concentrated, at least partially, in clusters of commercial enterprises with particular interests, beliefs, ideologies, and preferences. From a long-term and intergenerational perspective, these dynamics might be hazardous for a democratic culture because they disrupt and manipulate social remembering practices. I do not aim to portrait a dystopian collapse and diminishment of public-oriented memory institutions. I do argue, however, that in a long-term perspective, dynamics and developments, such as the ones that were described in this part, might have a gradual negative impact on social remembering practices and their capacities to serve a public-oriented viewpoint. My purpose in the final Part is to outline several reform proposals for de-privatizing networked memory institutions and relocating them back into public spheres of social remembering.

PART V – DE-PRIVATIZING NETWORKED MEMORY INSTITUTIONS

Where do we go from here? To a considerable degree, the privatization of networked memory institutions is an inventible byproduct of the new social conditions that digitization encompasses[187]. Reform proposals in this context require, therefore, a dose of pragmatism in adjusting regulatory solutions that provide enough breathing room for *independent* public-oriented and individual-based networked memory institutions. But before reaching my particular reform proposals, some general

187 *See* part III *supra*.

remarks are worth mentioning.

A preliminary step toward de-privatizing is raising public awareness both to the democratic prospects of networked memory institutions and to the obstacles that extreme privatization tends to impose in this context. Here, two key points should be emphasized. First, along with other perspectives, the legal discourse over the future of networked memory institutions should be framed through the prism of *free speech jurisprudence*. My preceding discussion highlighted the connection between memory institutions and a democratic culture of free speech. Memory institutions regulate the powers of individuals to take part in the landscaping of cultural and informational works for future generations, as well as the ability of future generations to be exposed and have access to a diversified range of representations and narratives from and about the past. The introduction of free speech jurisprudence to the regulation of memory institutions is helpful for two reasons. First, it further emphasizes the importance of supporting a diversified and democratized social structure of memory institutions. Second, freedom of speech is a normative source that can and should serve as a compass in adjusting and fine-tuning positive copyright law doctrines in a manner that would lessen the dependence of public-oriented memory institutions on copyright owners. By making this argument I do not wish to overstate optimism about judicial activism in reconstructing copyright law according to the First Amendment.[188] I still believe that, regardless of the bounded limits of constitutional challenges to copyright law, framing the debate over the privatization of memory institutions as a free speech matter bears important normative consequences. It introduces a democratic compass that is based on the values of equal participation, political freedom, and personal autonomy.[189] As my earlier discussion indicated, these are exactly the values with which memory institutions correspond.

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188 *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003) (rejecting a First Amendment challenge to the constitutionality of the Sonny Bono Copyright Term Extension Act). In *Eldred*, the majority's opinion had two prongs. First, the court observed that, on the whole, there is no conflict between copyright and free speech because the copyright scheme incorporates its own speech-protective purposes and safeguards (such as fair use defense or the idea-expression dichotomy). *Id.* at 219-221. Second, the court implicitly stated that there still may be circumstances in which First Amendment scrutiny might be necessary if and when Congress would alter "the traditional contours of copyright protection." *Id.* at 221. *See also* Michael D. Birnhack, *Copyright Law and Free Speech After* Eldred v. Ashcroft, 76 S. CAL. L. REV. 1275 (2003) (discussing the intersection of copyright and free speech after the Supreme Court's decision in *Eldred v. Ashcroft*).

189 *See* Balkin, *supra* note 30, at 33-50 (framing freedom of speech as a matter of political freedom, personal autonomy, and equal participation in the spheres of culture and politics).

The second element emphasizes the importance of a social remembering ecosystem that facilitates *independent* memory institutions that are capable of a critical overlook on any contemporary media institutions. Given the dominant position that corporate media occupies both in traditional and emerging media markets, networked memory institutions require a public sphere of cultural preservation that is independent and critical of commercial cultural production. The interplay between contemporary spheres of cultural production and independent spheres of social remembering is vital. Part IV demonstrated how the privatization of networked memory institutions tends to involve vertical integration between the function of cultural production and the function of social remembering. The political economy of communications markets encourages contemporary media intermediaries to converge cultural retrieval and cultural preservation into their other ongoing communications and content activities.[190] Policy makers should therefore come up with solutions and alternatives to this inclination.

De-privatization of networked memory institutions thus becomes almost a prerequisite for institutional separation between contemporary cultural production and social remembering. One target is strengthening public-oriented and individual-based memory institutions. Policy makers need to support both traditional memory institutions (e.g., networked activities of museums, libraries and archives) and emerging novel frameworks of content sharing that have a derivative function of social remembering (e.g., open-content infrastructures and peer to peer file-sharing platforms). A second goal is advancing *institutional diversity* of cultural retrieval and cultural preservation activities performed by different types of platforms, intermediaries and institutions.[191] Society requires governmental, commercial, traditional, elitist, popular, civic-engaged, minority, and as many other types and categories of memory institutions as possible.

190 *See* Part IV(B)-(D) *supra*.

191 *See* Baker, *supra* note 74, at 94, 102, 188-92 (articulating two distinct levels in which the media should be constructed, according to democratic parameters). The first level refers to the internal framework of a media organization, or its editorial and managerial scheme. *Id.* at 188-92 The second level refers to the communicative sphere on its whole, or the different media institutions it consists of and their interactions. *Id.* at 188-92. Regarding the external level of the communicative sphere on its whole, Baker concentrates on offering a "cocktail policy," which blends together as many different kinds of media institutions, both market-oriented and public, in a manner that enables each and every type of media institution to cover and supplement, "check and balance," the drawbacks of the others. *Id.* at 188-92. Such a structure of a plurality of media intermediaries, which differ in their content preferences and managerial rules, is expected to derive a more diversified media environment and mitigate some of the deficiencies of a market-oriented media system.

Diversity in organizational structures of memory institutions serves several goals. It advances the pluralistic vision of a democratic culture by enabling a variety of speakers and a variety of audiences to participate in cultural retrieval and social remembering. Institutional diversity also mitigates, balances and supplements the products, outputs and content management policies of commercial memory institutions. If along with Google's Library Project, there is a digital library of the Open Content Alliance,[192] and, along with Youtube, Wikipedia develops its own user-generated moving images collection, de-privatization will become a visible option.

Practically speaking, this presents a relatively complex scheme of regulation that will encompass all layers of communicative actions, not only *the content layer* and its regulation through copyright law, but also *the physical layer* and *the logical layer*.[193] Broadband discrimination against P2P file-sharing,[194] search engines' manipulations and biases, [195] and software interoperability[196] are just a few examples of elements in the physical layer and the logical layer that may require regulatory intervention. In the remaining sections of this article, I wish to focus only on the content layer and its regulation through copyright law. I offer several adjustments to copyright law that advance the above-mentioned goals. The accomplishment of these reforms alone is expected to have a direct and prominent contribution to the de-privatization of memory institutions.

A. *Copyright and the Organizational Structure of Memory Institutions*

Part III(B) demonstrated how copyright law encourages the activity of commercial memory institutions, while imposing costs and burdens and discouraging not-for-profit, civic-oriented memory institutions.[197] De-privatization of networked memory

192 *See* OCA, *supra* note 110.

193 See Yochai Benkler, *Viacom-CBS Merger: From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. LJ. 561, 562 (2000) (distinguishing between the physical infrastructure layer (wires, cable, radio frequency spectrum), the logical infrastructure layer (software), and the content layer).

194 *See* Bill D. Herman, *Against Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 107 (2006) (listing a number of recent examples of content and application blocking).

195 *See* Bracha & Pasquale, *supra* note 179, at 20-23.

196 *See* Besser, *supra* note 34, (discussing the problems of longevity and digital content migration). Efficient and decentralized facilitation of digital content requires overcoming problems of technological obsolescence and the relatively short life expectancy of digital media. *Id.* This requires software and computer code interoperability between different types of digital Medias. Interoperability, in turn, may be disturbed by technological protection measures, different standards and copyright protection.

197 *See* Baker, *supra* note 74, at 16, 70 (emphasizing the fact that "background" legal regimes, and particularly copyright law, determine the outcomes of media markets).

institutions requires a legal policy that facilitates free use of digitized cultural artifacts and narrows their subordination to copyright. Such a legal regime would increase the capacities and incentives of public-oriented memory institutions. Concurrently, with limited copyright protection and competition from public-oriented memory institutions, the profitability of networked memory institutions would decrease, and with it the economic motivation of commercial enterprises to invest in this area.

Reduced copyright protection is important, therefore, for four reasons: (1) it is fundamental for enabling the activity of public-oriented, non-commercial memory institutions on a low-cost basis; (2) it unchains memory institutions from subordination to copyright owners and the proprietary regime that they tend to impose; (3) it reduces the economic rents from memory institutions and, as a result, also reduces the incentives of commercial entities to enter this field; and (4) it lessens the evolutionary processes described in Part III(B)(2)(b) that push traditional, public-oriented memory institutions toward commercial, privatized practices.

This analysis is further supported by the basic attributes of networked communications platforms as described in Part II. In his influential work, *The Wealth of Networks*, Yochai Benkler articulates how the attributes of networked communication platforms facilitate efficient, commons-based, peer production of content and information by a variety of *non-market players*[198]. According to Benkler, with the emergence of networked communication platforms, a new mode of social production emerged: commons-based peer production. This novel mode does not rely on either the price system (markets) or centralized commands within the hierarchy of firms to allocate resources. Benkler defines "commons-based production" as a system of production in which inputs and outputs from production processes "are shared, freely or conditionally, in an institutional form that leaves them equally available for all to use as they choose at their individual discretion." [199] Benkler then argues that, given the zero cost of existing information and the declining cost of communication and processing, human capacity becomes the

Media markets operate and allocate resources for the production of different media products according to benefits and costs, which are derived from the scope of property rights in such products. *Id.* As Baker demonstrates, copyright law may favor the production of some types and some ways of producing content over others. *Id.* at 16, 70. Likewise, copyright law may disadvantage the production of other types of content either by refusing to protect them, or by imposing costs and burdening their ability to rely on existing copyrighted materials. *Id.* at 15-19, 66, 92, 209-10, 294.

198 BENKLER, *supra* note 65, at 90-127.

199 *Id.* at 62.

primary resource in the networked information economy.[200] Therefore, with examples including Wikipedia and other open-source software, commons-based peer production is gradually becoming both a visible and an efficient mode for cultural production and cultural exchange.

Benkler's work includes two insights that support reduced copyright protection for both the inputs and the outputs of networked memory institutions. First, in a networked environment, there are viable efficient models for cultural preservation that do not require the backing of strong intellectual property rights. As long as the framework of incentives is based on motivations other than monetary profits, the social conditions of networked communication platforms are capable of facilitating and supporting non-market alternatives of cultural production and cultural exchange. Individual-based and public-oriented memory institutions are a prime example of this. Moreover, in such settings, strong intellectual property rights burden and stifle full realization of the prospects that digitization offers. Consider, for example, a digital images collection of art works like the one ARTstor manages.[201] In a networked environment, projects of this kind are economically operational through decentralized participation of public-oriented cultural institutions, which contribute the scanned images and then share the cumulative databases among themselves and with the public. Copyright protection of either the *inputs* or the *outputs* of such activity may be both unnecessary and burdensome to public-oriented memory institutions.

There is still one consideration that may complicate this call for decreased copyright protection: the multi-sided and Janus-faced nature of networked memory institutions, that is, their tendency to converge and integrate with contemporary production and distribution of content and cultural works.[202] For example, a significant share of the content that is being uploaded and distributed through content-sharing platforms like YouTube or Flickr consists of contemporary *copyrighted* materials.[203] In my

200 Id.

201 *See supra* notes 126-127 and accompanying text.

202 *See supra* Part II(C) and Part IV(C) supra..

203 One recent example is a law suit filed by the entertainment conglomerate Viacom against YouTube.com for nearly 600,000 unauthorized clips of Viacom's entertainment programming that have been available on YouTube. See Greg Sandoval, "Viacom sues Google over YouTube clips," Story last modified Tue Mar 13 15:21:21 PDT 2007 <http://www.news.com/Viacom+sues+Google+over+YouTube+clips/2100-1030_3-6166668.html.
For a copy of Viacom's complaint see:
http://www.news.com/pdf/ne/2007/ViacomYouTubeComplaint3-12-07.pdf/

opinion, the inclusion and contextualization of this content by decentralized individuals is highly contributive for social reemerging. Yet, concurrently, this type of activity might harm the *contemporary* value of, or the potential markets for, the copyrighted works. Take, for another example, the case of PLYmedia, an application that enables end-users to sync independent content, such as comments, to audio-visual works (e.g. adding bubble captions to the original content) [204]. Now imagine an individual who uses PLYmedia on several news- worthy video -clips, which she then uploads to her MySpace personal page. This is an act of individual participation in creation of the historical landscape. Yet, concurrently, it is an activity that may provide a contemporary market substitute for consuming or purchasing these video clips via their standard distribution channels.

There are no neat and crystallized solutions for such tensions raised by the *multisided aspects* of networked memory institutions. The farther we reach in the life-cycle of a copyrighted work, the more minor these tensions become.[205] Yet regarding new contemporary copyrighted works, to some extent, the risks of undermining incentives for contemporary commercial cultural production may be valid. In the remaining sections, I outline my proposals for copyright law reforms in relation to the activity of networked memory institutions in more detail. These proposals are constructed in a manner that takes into account the risks of disincentivizing contemporary, commercially-based cultural production. I do not expect my proposals to eliminate the privatization of networked memory institutions. Nevertheless, they would strengthen public-oriented memory institutions in a manner that is likely to achieve a better equilibrium between the various types of memory institutions. I focus on: (1) *ex-ante* privileges that enable free use of copyrighted materials by memory institutions; and (2) *ex-post* obligations that are intended to moderate and limit extreme proprietary regimes of networked memory institutions.

B. *Reforms in Ex-Ante Copyright Privileges of Memory Institutions*

Ex-Ante copyright privileges of memory institutions encompass exemptions and limitations that enable free use of copyrighted materials by memory institutions. My proposed reforms in this context refer to: (1) adjusting a particular

[204] *See* PLYmedia, http://www.plymedia.com (last visited Feb. 26, 2008).

[205] In most circumstances, the life-cycle of a copyrighted work is such that much of its value and potential markets are utilized in periods that are closer to the first publication of the copyrighted work, although, there may be exceptions to this generalization.

exemption for digital archiving; (2) reforming the fair use defense regarding the scope of legitimate "transformative uses" and private uses (copying) of copyrighted materials; and (3) adjusting the DMCA's Anti-Circumvention Prohibitions.

(I) A Particular Exemption for Digital Archiving

Current copyright law schemes lack an adequate exemption for digital archiving. As mentioned above, Section 108 of the Copyright Act, which is the central exemption in this context, seems almost obsolete for digitized cultural preservation activities.[206] In a recent important work, Diane Zimmerman outlined a comprehensive proposal for a compulsory licensing scheme that would authorize reproduction of copyrighted works for the purposes of digital archiving and cultural preservation.[207] Similar proposals were outlined by Peter Menell[208] and by the Section 108 Study Group.[209] In order to realize de-privatized cultural democracy of memory institutions, a particular exemption for digital archiving should adhere to the following principles:[210]

In addition to *traditional* non-profit institutions (e.g., public libraries, museums and archives), an exemption for digital archiving should be applicable also to a variety of other frameworks, including commercial, civic and individual-based memory institutions. Alternately, a digital archiving exemption

206 See *supra* notes 86-88 and accompanying text. See also Zimmerman, *supra* note 85, at 1013-1026; Roberta R. Kwall, *Contract Options for Individual Artists: Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author's Perspective on § 108*, 29 COLUM. J.L. & ARTS 343, 351-55 (2006).

207 *See* Zimmerman, *supra* note 85, at 1027-40. Similar, though narrower proposals have been discussed by the Section 108 Study Group, which currently reexamines the exemptions and limitations applicable to libraries and archives under the Federal Copyright Act, specifically in light of the changes wrought by digital media. *See supra* note 149.

208 See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age,* 44 HOUS. L. REV. 1013 (2007).

209 *See supra* note 88 and accompanying text.

210 A related issue is reform in the deposit requirement of copyrighted works. Copyright owners are required to deposit a copy of all published works originating in the United States with the Library of Congress within three months of publication. 17 U.S.C. § 407(a) (2008). Once materials are submitted, these materials can then be requested and borrowed by other libraries and patrons around the country. 17 U.S.C. § 407(a) (2008). Section 407(e) of the Federal Copyright Act also provides means for obtaining deposit of copies and phonorecords of television and radio programs that have been broadcast in the United States. *Id.* Current structure of the deposit requirement suffers, however, from drawbacks similar to the ones that were mentioned in the context of section 108 of the Federal Copyright Act. 17 U.S.C. § 108. Thus, for example, the current version of the deposit requirement does not apply to new forms of non-fixed informational materials such as web-sites. Another major obstacle is that with regard to digital copies of a copyrighted work, the deposit requirement itself provides no legal mechanisms that are responsible for making such materials available and accessible to the public. A full discussion of the required reforms in the deposit requirement exceeds the scope of this article, and I leave it to another opportunity.

should have *a functional basis* rather than an *institutional* basis that exempts particular categories of cultural institutions. In addition, and unlike current version of Section 108, an exemption for digital archiving requires that archivists will have the ability to capture and document artifacts of cultural objects that they *do not own or posses*. Finally, any revised exemption for digital archiving should apply also to making the full content of digital archives accessible to the public, including "off-premises" and through networked communication platforms (e.g., the Internet). These basic principles imply a broad exemption. They also involve a shift to a *non-market* model of digital archiving. Everyone would be able to establish and make accessible digital collections of cultural works. Such an exemption, however, is likely to involve mass reproductions of entire copyrighted works. Consequently, a *compulsory licensing scheme* seems inevitable in order for the U.S. to comply with international obligations and to provide copyright owners with a fair compensation for the use of their works.[211]

It is also true that, regarding relatively new copyrighted works, digital archives could also function as a *de facto* substitute for market provision of such works. Nevertheless, in my opinion, this possibility could be approached and handled within the proposed exemption. Thus, for example, the compulsory licensing scheme could include a *differential* scale of royalties for the making accessible of newly released copyrighted works, whereas the mere reproduction of such works for the purpose of preservation should not be subjected to the same increased

[211] The Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") permit an exemption to the reproduction right only in "certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." *See* Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, as last revised Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Rights, art. XIII, Apr. 15, 1994, 33 I.L.M. 81, *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm. Similarly, the WIPO Copyright Treaty recognizes copyright owners' right of "communication to the public." WIPO Copyright Treaty, art. 8, Dec. 20, 1996, 112 Stat. 2860, *available at* http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf. According to the WIPO Copyright Treaty, an exemption to the exclusive right vested in article 8 would be applicable only in "certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." *Id.* at art. 10(1). *See also* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST, 218-19 (Kluwer Law Int'l 2004). At least with regard to mass reproduction of entire copyrighted works, even a compulsory licensing scheme does not guarantee full compliance with current obligations under international copyright law. *See* Zimmerman, *supra* note 85, at 1041-42. *See also supra* Part IV(A). It is worth adding that the reproduction exception in article 9(2) of the Berne Convention does not cover reproduction of *audio-visual works*. Berne Convention, *supra*. Therefore, according to the Berne Convention, domestic legislatures may be prohibited from adjusting, within their own copyright law, an exemption that would authorize reproduction of copyrighted *audio-visual works* for preservation purposes, including through a compulsory licensing scheme.

amount of royalty fees. This scheme would enable immediate inclusion of copyrighted works in digital archives, whereas their making accessible to the public through the archive would be dependent on either the passage of time or the payment of increased royalties. The general principle may be to create a differentiated decreased scale of royalties for different periods in the life-cycle of copyrighted works. In addition, commercial attributes of the archiving entity may also result in higher royalties. The purpose of this differentiated scale of royalties is that, in periods closer to the release of a copyrighted work, such high royalties would make its accessibility to the public unprofitable for commercial archiving entities.

By making these proposals, I am not ignoring the fact that a compulsory licensing regime for digital archiving could decrease the incentives of commercial enterprises to enter this field. Nevertheless, I do not see that this possibility is a consideration that outweighs the advantages of the proposed exemption. To the contrary, dynamics of this kind follow my general recommendation toward de-privatizing of digital archiving and locating it closer to society's public spheres. The proposed exemption for digital archiving does not provide a comprehensive solution for all of the activities that a democratic culture of memory institutions encompasses. General cultural production and cultural distribution activities, which have only a derivative function of social remembering, are less likely to be covered by a particular exemption for digital archiving. Regarding such activities, the focus should be on reforms and adjustments in the fair use defense. I now turn to this issue.

(II) Adjusting Fair Use for Networked Memory Institutions

Current application and interpretation of the fair-use defense[212] tends to identify the public interest almost solely with secondary uses that have a strong element of "*transformativeness*," which is presently interpreted as the incorporation of copyrighted material into a new independent, "socially-valued," original, creative work.[213] De-privatized networked memory institutions

212 *See* 17 U.S.C. § 107.

213 *See, e.g.*, Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (2000). In 1990, Judge Leval proposed the transformative test in his influential article. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). It was adopted by the Supreme Court in its next fair use decision. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994). Judge Leval viewed transformativeness as critical to whether a use "fulfill[ed] the objective of copyright law to stimulate creativity." Leval, *supra*, at 1111. According to Leval, uses that added value to the original brought something new and creative into the world, so they might be justified even if the copyright owner objected, while mere repackaging or republication was not

require a different fair use doctrine. Fair use analysis needs to be less rigid when quantifying an identified "social value" of a new creative work that uses copyrighted materials. Networked memory institutions require fair-use determinations to be more holistic and responsive to the seemingly "passive" manners in which people engage in the landscaping of history and the formation of cultural memories. According to this approach, individuals' "mere" discourses, correspondence and personal "cut and paste" contextualization of cultural (copyrighted) materials merit considerable value for social remembering processes. This approach implicates two practical issues: (1) redefining the scope of legitimate "transformative" uses of copyrighted materials; and (2) enabling private uses (copying) of copyrighted materials as part of the fair use defense.

(1) Redefining "Transformative-Uses"

The category of "transformative uses" needs to be redefined in a manner that encompasses also "*mere 'naked' use*" of copyrighted works for personal reference and re-contextualization of cultural, copyrighted works. Thus, even without "adding value" by using the copyrighted work as part of a new independent creative work, I propose that fair use should also be applicable to personal encounters with copyrighted, cultural works, even if such encounters are not necessarily a new, derivative, creative work. Accordingly, uses such as the incorporation of copyrighted works into a page in MySpace or Facebook should be considered as *transformative uses* that may find shelter under the fair use defense.

At the practical level, the category of *transformative uses* seems malleable enough to be adjusted in the above-mentioned manner. Indeed, currently, it is presumed that in order to satisfy the criterion of "transformativeness," the secondary work must contain a discernible element of critical commentary.[214] Yet, parts of the Supreme Court's understanding of "transformativeness" in the *Campbell* decision seem broad enough to make our proposed revision of the "transformative uses" category Possible.[215] In *Campbell*, the court identified transformative uses as uses that "add something new, with a further purpose or different character, altering the first with new expression, meaning, or message,"[216] and uses that "provide social benefit, by shedding light on an

creative and therefore did not deserve protection from liability. *Id.*

214 *See, e.g.*, Cohen, *supra* note 146, at 1199.

215 *See Campbell*, 510 U.S. at 579-83.

216 *See id.* at 579.

earlier work, and, in the process, creating a new one."[217] These expressions of the Supreme Court are not conclusive or exclusive.[218] Yet, overall, the *Campbell* decision seems to leave enough interpretive flexibility to enable courts to take a more relativist approach in determining the boundaries of "transformativeness" as a legal term.

(2) Enabling Private Use (Copying) of Copyrighted Materials

There are several reasons why free private copying of copyrighted, cultural materials is a fundamental part of de-privatizing networked memory institutions. Private copying and reproduction of copyrighted cultural works are prerequisites for active participation by individuals in social remembering practices.[219] Individual-based participation in social remembering is preconditioned upon prior robust exposure, access and correspondence with cultural materials. Free private copying is very much a prerequisite for achieving the pluralistic vision of networked memory institutions that this article wishes to advance. Reliance on commercial markets as the only legitimate channel for accessing and using copyrighted, cultural works does not seem to suffice in this context because of the strong distributional bias of commercial markets. Market institutions leave many individuals without effective access to copyrighted, cultural works, a fact which has direct negative spillovers on a democratic vision of individuals' cultural participation.

Fair use, therefore, should be more responsive to private uses (copying) of copyrighted materials.[220] At least this should be the situation in legal settings that do not have a particular exemption for private copying (e.g., as part of a mandatory levy scheme on media and copying devices).[221] For example, in my view, reasonable private copying of copyrighted materials through peer-to-peer file-sharing platforms may find shelter under the fair use exemption.[222]. There are no easy solutions for delineating the

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217 See id.

218 *Id.* at 580 (holding that the "commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)").

219 See Julie E. Cohen, *Copyright, Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1198-1205 (2007); Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 YALE L.J. 535 (2004.)

220 *See* Jessica Litman, Symposium, *Frontiers of Intellectual Property: Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

221 For an illuminating survey and analysis of private copying exemptions and levy systems in Germany, see Kateruna Gaita & Andrew F. Christie, *Principle of Compromise? Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying*, 8 INTELL. PROP. Q. 422 (2004).

222 It is worth noting that this is not the view that was taken by courts. *See e.g.*, A&M

boundaries between legitimate, permissible, personal copying, and unauthorized, commercial-type, mass reproduction of copyrighted works. Yet, I dare propose that copyright law need not impose an absolute bar on digital private copying just because it is broader and more extensive than analog private copying. Legislators may create novel compulsory licenses and levy schemes in this context.[223] But with or without such schemes, a democratic culture of social remembering requires that, up to a certain degree, personal uses remain sheltered from markets' governance.

(III) Adjustments in the DMCA's Anti-Circumvention Prohibitions

Adjustments are also required with regard to technological protection measures (TPM's) that restrict access and use of digital copyrighted content and their legal protection by the anti-circumvention prohibitions of the Digital Millennium Copyright Act (DMCA).[224] The DMCA's anti-circumvention provisions are of two basic types. First, the DMCA prohibits users from circumventing control technology to gain access to protected works.[225] Second, the Act prohibits the manufacture and trafficking of devices, technology, and services that are primarily designed to assist users in circumventing technology that: (1) controls access to content that is protected under the Copyright Act;[226] or (2) effectively protects a copyright holder right by controlling uses of such content.[227] Along with these provisions, the DMCA also purports to protect counter interests by delegating to the Librarian of Congress the power to suspend application of the access prohibition to the extent required to prevent undue burdens on users of creative works. The Act requires the Librarian to subsequently undertake a review every three years to monitor the ongoing impact of the access prohibition on non-infringing uses and provides for a three year suspension of the prohibition with regard to those works for which the Librarian finds an adverse impact.[228] In making this determination, the Librarian must devote particular attention to the availability of works for non-profit archival, preservation, and educational

Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (imposing primary liability for copyright infringement on end-users who employ peer-to-peer file-sharing software to download copyrighted materials and rejecting the adoption of the fair-use defense in such circumstances).

223 *See supra* note 207-211 and accompanying text.

224 DMCA §§ 103, 1201.

225 *Id.* § 1201(a)(1)(A).

226 *Id.* § 1201(a)(1)(E).

227 *Id.* § 1201(b).

228 *Id.* § 1201(a)(1)(C)-(D).

purposes and for criticism, comment, news reporting, teaching, scholarship, and research.

Technological protection measures geared toward cultural artifacts and particularly legal protection against their anti-circumvention are regulatory tools with an embodied bias toward a privatized model of networked memory institutions. Part II described the paradigm shift of digitized cultural preservation from control to distribution. Technological protection measures overturn the paradigm of digitized cultural preservation from a paradigm of distribution back to a paradigm of control. The only difference is that now this paradigm is no longer based on — or justified by — the scarcity and "physical conditions" of authentic cultural objects from the past. Rather, this second generation of a control paradigm is based onprivate ordering regimes that derive their enforceability from technological fencing mechanisms and the legal backing of the anti-circumvention prohibitions. These private ordering regimes then stimulate and support the commodification of digitized cultural artifacts and consequently the privatization of memory institutions. The regulation of the DMCA's anti-circumvention prohibitions should focus, therefore, on two accumulative goals: (1) enabling access and secondary use of digitized cultural works for the purposes of cultural retrieval and cultural preservation; and (2) enabling the activity of public-oriented and civic-engaged memory institutions that are less likely to proliferate in an environment of technologically legally protected digital artifacts.

(1) Adjusting a Particular *Preservation Exemption* as part of the Librarian of Congress Rulemaking Procedure

Sections 1201(a)(1)(C) and (D) of the DMCA include a procedure that authorizes the Librarian of Congress to suspend the anti-circumvention prohibitions, for a period of three years, if the prohibitions tend to have an adverse impact on non-infringing uses with regard to particular types of works and particular types of uses. In making this determination, the Librarian must also devote particular attention to the availability of works for non-profit archival, preservation, and educational purposes. Thus far, this safeguard option of the DMCA has not been fully appreciated and utilized in the context of digitized cultural preservation. The only area in which the Librarian of Congress takes archiving and preservation into account is the realm of computer programs and video games. Here, a rulemaking by the Librarian of Congress that legalized circumvention was issued with regard to obsolete computer programs and video games require the original media

or hardware as a condition of access.[229]

My proposal is that future rulings of the Librarian of Congress will put more emphasis on circumstances in which the anti-circumvention prohibitions have an adverse impact on non-infringing archiving and preservation activities. Future rulemakings may cover two levels: (a) particular types of users that take part in archiving and preservation activities; and (b) particular categories of works whose technological protection measures tend to impose serious impediments to archiving and preservation activities. Thus, for example, a rulemaking by the Librarian of Congress may refer to digital archiving and preservation activities by museums, libraries, and archives, with particular focus on works that were "born digital" and that according to their industries' practices, are usually locked under technological protection measures. A moving images archive, for example, may then legitimately circumvent the technological protection measures of DVDs in order to include them in its collection.

Another example refers to video-sharing web-sites, like YouTube,[230] that by the use of technological protection measures, limit the ability of users to download and make copies of content that other users upload on the content-sharing platform. Previous parts of this article emphasized the unique importance of user-uploaded content to social remembering. As a result, memory institutions of various types (e.g., the Internet Archive)[231] are likely to identify the significance of archiving the content of video-sharing platforms for future generations. Therefore, a rulemaking by the Librarian of Congress that suspends the anti-circumvention prohibitions regarding archiving and preservation of user-uploaded materials is indispensable for enabling legitimate non-infringing activities of this kind.

(2) Enhancing Fair Use and other Copyright Privileges with Regard to Technologically Protected Cultural Materials

A second element refers to the applicability of fair use and other copyright privileges with regard to technologically protected cultural works. Several scholars have called for compliance between digital rights management systems and copyright law's

229 *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201), *available at* http://www.copyright.gov/fedreg/2006/71fr68472.pdf.

230 *See* Posting of Lawrence Lessig to Lessig Blog, *The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, blip.tv, and Even Google*, http://www.lessig.org/blog/archives/003570.shtml (Oct. 20, 2006, 5:12 EST).

231 *See supra* note 100 and accompanying text.

exemptions and limitations.[232] Their arguments emphasize concerns that TPMs and the anti-circumvention prohibitions override the traditional breath-space of copyright law's exemptions and limitations. In order to overcome this imbalanced scheme, to which the TPM's and the anti-circumvention prohibitions give rise, several proposals have been made. Overall, these proposals focus on enforcing fair use privileges against TPM's either directly (e.g., through the creation of a "Key Escrow" System) or through legalizing "the right to hack" TPM's.[233] Recently, Reichman, Dinwoodie and Samuelson proposed a "*reverse notice and takedown regime*" to enable legitimate public interest uses of technologically protected materials.[234] According to their proposal, users would be able to give copyright owners notice of their desire to make public interest uses of technically protected copyrighted works, and rights holders would have the responsibility to take down the TPM's or otherwise enable these lawful uses.

These proposals, and especially the proposal of Reichman, Dinwoodie and Samuelson, are highly important for de-privatizing networked memory institutions. On their own, reforms in copyright's exemptions schemes would be ineffective unless public-oriented memory institutions and users are able to effectively access and use the increasing amount of technologically protected cultural materials. A "*reverse notice and takedown regime*" is specifically important because at least some types of networked social remembering practices are unlikely to be covered by a Librarian of Congress rulemaking.[235] A pluralistic vision of networked memory institutions thus requires a legal framework that provides individuals and institutions both the legal tools and the legal validity to access and use technologically protected materials.

232 For an excellent comparative analysis of this issue, see Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323 (2004).

233 *See* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

234 See Jerome H. Reichman, Graeme B. Dinwoodie & and Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 98 (2007).

235 Given past experience, it is unlikely that the LOC procedure will provide a full and comprehensive solution that the law of digital cultural preservation requires in the context of the anti-circumvention prohibitions. *See* Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the U.S. Copyright Act* 17-18 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 07-137, 2007), *available at* http://ssrn.com/abstract=960724.

C. *Reforms in Ex-Post Obligations of Networked Memory Institutions – Imposing a Share-alike Requirement on Privileged Uses*

Along with ex-ante privileges, a cultural democracy also requires the imposition of ex-post obligations on networked memory institutions. My proceeding analysis demonstrated the dual layer of proprietary rights that characterize the activity of networked memory institutions. One layer consists of rights that are possessed and managed by originating owners of copyrights in cultural works. On top of it comes another layer which includes the rights that memory institutions – and especially commercial memory institutions – manage and enforce. YouTube, the Google Library Project, Corbis, and ARTstor are just a few examples for memory institutions that compose this second layer while imposing their own accumulative proprietary regime on other users and memory institutions.

Part III emphasized the central role that this second layer of proprietary regimes has in inducing the privatization of networked memory institutions. Hence, de-privatization of memory institutions also demands regulation that will moderate imbalanced proprietary regimes by networked memory institutions. More specifically, policy makers need to develop a set of public-interest "*access*" and "*free secondary-use*" obligations for networked memory institutions. The goals of these obligations are: (1) sustaining a robust and pluralistic equilibrium of memory institutions while mitigating the concentration of cultural powers in the hands of only a few commercial intermediaries; and (2) enabling free flow of information and cultural artifacts that are managed by commercial intermediaries.

Here, I propose to develop a set of obligations that will complement the general ex-ante privileges previously outlined. The basic idea is to condition ex-ante privileges of memory institutions upon the acceptance of ex-post obligations.[236] For example, the proposed exemption for digital archiving would require its beneficiaries to enable future third parties free access and use of cultural materials that were obtained with the legal support of the digital archiving exemption. Similarly, beneficiaries of a fair use privilege will be bound to correspondingly *share-alike* the products of their privileged use

[236] For a related discussion, see Van Houweling, *supra* note 164, at 23 (making an analogy between land conservation assessments and "share-alike" requirements that are included within GPL and creative commons licenses). My proposed scheme in the main text is also based on an assessment model, yet it is a model that imposes *mandatory* assessments, which are the quid-pro-quo of privileges (exemptions) for using copyrighted materials.

with future users. Before getting into the doctrinal aspects of the proposal, several general remarks are required.

One advantage of my proposal is its coverage of contractual limitations and technological protection measures that are imposed by commercial memory institutions. A second advantage refers to the proposal's ability to bypass the practical difficulties in any legislative attempt to impose a new set of limitations on commercial memory institutions in their capacities as copyright owners and licensors. Since my proposal rests on a *quid-pro-quo* between benefiting from copyright's exemptions and complying with reciprocal share-alike obligations, it is relatively easy to integrate it into current copyright law positive doctrines. Thirdly, a *share-alike* requirement functions also as a mechanism for implementing distributive values and enabling more people to take part in social remembering practices. Indeed, my proposal is inconclusive in terms of the fact that it covers only materials that were originally obtained through a copyright exemption. Nevertheless, as long as the layer of ex-ante exemptions is well constructed, the scope of the share-alike requirement is expected to have a significant impact.

The implementation of a viral, share-alike requirement is likely to make commercial memory institutions a less profitable business and may also decrease the economic incentives for such activities. Yet, as I already argued, it is exactly this form of *reverse-regulation* that the de-privatization of networked memory institutions requires. Moreover, given the unique social functions of memory institutions, there may be positive long-term expressive implications for introducing notions such as *reciprocity* and *social responsibilities* into this field.[237] Cultural retrieval and cultural preservation are a joint enterprise of individuals and institutions working together within the social machinery. The success of such a human project, as well as the success of many other cultural and creative encounters, is largely based upon introducing a strong element of reciprocity into copyright law, at least in this area of social activity. More specifically, my proposal covers three aspects of positive copyright law: (1) Imposing a share-alike requirement on beneficiaries of the fair-use defense; (2) obligations that are coupled together with exempted digital archiving; and (3) Safe-Harbors for and the obligations of content-sharing platforms and other hosting services providers.

[237] For a general discussion regarding reciprocity, see LAWRENCE C. BECKER, RECIPROCITY (1986). For an implementation of reciprocity as a guiding principle in the context of copyright law, see Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 322-24 (2007).

(I) Imposing a Share-Alike Requirement on Fair Use Beneficiaries

I propose to adopt a "share-alike" requirement[238] as part of the equitable conditions that fair use imposes on users who wish to benefit from the defense. The idea is that memory institutions, information intermediaries, and other third parties, who rely on fair use in the course of their cultural retrieval and preservation activities, will be legally bound to treat-alike subsequent third parties who wish to access and use the same copyrighted materials – now located in their new "hosting institution" – for subsequent retrieval and preservation activities.

For example, if Google argues that its Book Project's reproductions of entire copyrighted works are fair use, a similar exemption should apply to the benefit of future third parties who wish to reproduce and distribute these digital copies, from Google's databases and applications, for authorized purposes.[239] Google, therefore, will be prohibited from imposing technological and contractual obligations that revoke its share-alike obligations. On the positive level, my proposal rests on the equitable nature of the fair use defense and its common law origins.[240] In my view, the role of fair use does not suffice in generating islands of privileges and liberties to users. Concurrently, fair use could and should serve as a basis for imposing a degree of reciprocal obligations on its beneficiaries.

(II) Obligations that "Run With" Exempted Digital Archiving

Part V(B)(I) outlined my proposal regarding a particular exemption for digital archiving. Here, I also suggest that the application of such an exemption should be conditioned upon a reciprocal requirement. The contents of a digital archive that relies on the proposed exemption should be made accessible to the general public without imposing any technological or contractual limitations on its openness. This additional condition should be an integral part of any compulsory licensing scheme for digital archiving.[241] From a long-term perspective, the effective

238 The "share-alike" requirement is based on a concept offered by the "creative commons" licensing schemes. *See* Creative Commons, http://creativecommons.org (last visited Feb. 26, 2008). The share-alike licensing option creates a viral licensing scheme, requiring creators of derivative works to require subsequent users of their derivatives to use the same license that governs the original. *See* Creative Commons, Choosing a License, http://creativecommons.org/about/licenses (last visited Feb. 26, 2008).

239 *See* Frank Pasquale, *Conditions for the Digital Library of Alexandria*, MADISONIAN, Nov. 24, 2007, http://madisonian.net/archives/2007/11/24/conditions-for-the-digital-library-of-alexandria.

240 *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984) (characterizing fair use as an "equitable rule of reason"). *See also* Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

241 *See* Zimmerman, *supra* note 85, at 1033 (mentioning two similar requirements as

ability to access and use digital archives, including archives that rely on the proposed compulsory licensing scheme, is no less compelling than the effective ability to use originating copyrighted materials for preservation purposes. Commercial digital archives may use a variety of methods, such as subscription fees or indirect revenues from advertising, to recover their costs and make a reasonable profit. However, materials that were obtained and archived based on a compulsory licensing scheme should be freely accessible to third parties and their secondary users. The originating compulsory licensing scheme may include, in the right circumstances, a compensation for third parties' use of copyrighted materials. Nevertheless, as opposed to originating copyright owners, digital archives, which obtained their archived materials based on a digital archiving exemption, seem to have no justification for either controlling, or being compensated for, the use of their materials.[242] Also, one can assume that a viral share-alike requirement of this kind may decrease the incentive to commercial entities to enter this field. Consequently, a viral share-alike requirement will probably make more breath space for public-oriented and civic-engaged memory institutions, which are more likely to coexist with such a requirement. This, in turn, informs a structure of regulation that only supports de-privatization of memory institutions.

(III) Safe Harbors for and the Obligations of Hosting Services Providers

My prior discussion demonstrated that content-sharing platforms and other types of hosting services are emerging as a new dominant category of networked memory institutions. Accordingly, the law needs to provide safeguards that enable and facilitate the activity of individuals through such platforms. A full discussion of this matter exceeds the scope of this article. I will focus only on the viral share-alike requirement that I wish to introduce in this context. But before doing so, a few basic observations still need to be made. The main question in this context is whether content-sharing platforms may shelter under the safe-harbor of section 512(c) of the Federal Copyright Act as

part of a proposed compulsory licensing scheme for digital archiving: (1) that the database should be in a standardized format and one that allows users to search its content; and (2) that public domain materials within the archive are free for use by anyone who wishes to use them). As set forth in the main text, my proposal is broader than Zimmerman's proposal whereas it also rests on a different justification.

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

added by the DMCA.[243] The most recent example for the centrality of section 512(c) in this context is a law suit filed by the entertainment conglomerate Viacom against YouTube.com for nearly 600,000 unauthorized clips of Viacom's entertainment programming that have been available on YouTube.[244] Several scholars, including Timothy Wu[245] and Lawrence Lessig,[246] expressed the view that section 512(c) safe-harbor also applies with regard to the activity of content-sharing platforms and other types of web 2.0 applications. As Wu writes: "In 1998, that (section 512(c)) meant Geocities and AOL user pages. But in 2006, that means Blogger, Wikipedia, Flickr, Facebook, MySpace, and, yes, YouTube—all the companies whose shtick is 'user-generated content.'"[247]

Regarding networked memory institutions, the approach of Wu and Lessig seems both justified and fundamental. It is fundamental for continuous operation of content-sharing platforms in an organizational structure that enriches the landscapes of history and cultures with as many voices and narratives as possible. It is justified because, as Lessig points out, with the enactment of the DMCA, the safe-harbors for internet service-providers were part of a *qui-pro-quo* against the enactment of the anti-circumvention prohibitions. Copyright owners were given much more (maybe too much) control with regard to their portfolio of copyrighted works. Yet simultaneously, Congress had made a complementing move by reducing the liability of [content] intermediaries and service-providers by shifting from an opting-in strict liability regime to an opting out "notice and take down" regime.[248]

These are complex issues to be fully considered here. The proposal that I wish to make in this context is very specific. The applicability of section 512(c) safe-harbor should be conditioned upon a reciprocal obligation. Hosting services providers that rely

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243 17 U.S.C. § 512 (2000).

244 *See* Anne Broache & Greg Sandoval, *Viacom Sues Google Over YouTube Clips*, CNET NEWS, Mar. 13, 2007, http://www.news.com/Viacom+sues+Google+over+YouTube+clips/2100-1030_3-6166668.html.

245 *See* Tim Wu, *Does YouTube Really Have Legal Problems?,* SLATE, Oct. 26, 2006, http://slate.com/id/2152264.

246 Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, *available at* http://www.nytimes.com/2007/03/18/opinion/18lessig.html?ex=1331870400&en=a376e7886d4bcf62&ei=5088&partner=rssnyt.

247 See Tim Wu, *Does YouTube Really Have Legal Problems?,* SLATE, Oct. 26, 2006, *available at* http://slate.com/id/2152264.

248 *See* Wu, *supra* note 259; Bracha, *supra* note 140, at 1861 (discussing the choice between an "opting in" strict liability regime and an "opting out," "notice and take down" regime, in the context of Google's library project, while making analogies with § 512(c)'s "notice and take down" regime with regard to hosting services providers).

on section 512(c) safe-harbor should not limit — contractually, technologically, or otherwise legally – secondary uses of materials and information (e.g., metadata) that resides on their platforms after being uploaded by third-parties. According to this view, the flip-side of content-sharing platforms' reliance on section 512(c) safe-harbor is a reciprocal obligation not to organize the platform around a proprietary regime. Once classifying their activity as "a network that hosts information at the direction of users" and sheltering under section 512(c) exemption, content-sharing platforms cannot "lock" – either technologically or legally – third parties' materials that their hosting is privileged. A full elaboration of this proposal and its justifications exceed the scope of this article.[249] For my current purposes, this proposal is another mechanism for overcoming extreme privatization of networked memory institutions.

CONCLUSIONS

Digitization and networked communication platforms involve two conflicting layers of transformations in the political economy of social remembering and memory institutions. The first layer is a layer of prospects and hopes that are signified by the transformation from a control paradigm of cultural preservation to paradigm of distribution and redundancy. At least potentially, digitization can decentralize and democratize memory institutions and social remembering practices. This somehow utopian vision takes a turn once identifying the second layer of transformations which deals with the partial and gradual privatization of networked memory institutions. Privatization processes may take place with regard to both traditional public-oriented memory institutions and emerging novel types of memory institutions such as content-sharing platforms and social networks. At least to some extent, commercial players are now taking over components in both categories of memory institutions while attempting to implement proprietary practices and other elements that are part of corporate media's political economy. Copyright law supports such dynamics by making both the *inputs* and the *outputs* of networked memory institutions a tradable good – a commodity. Copyright law is also responsible for dynamics of evolution that gradually may change the cultural DNA of traditional memory institutions and make them more inclined to adopt proprietary practices.

[249] See Guy Pessach, *Reciprocal Share-Alike Exemptions in Copyright Law*, (February 20, 2008), *available at* SSRN: http://ssrn.com/abstract=1095711.

In order to fully grasp the consequences of these processes, one must go back to the functions of memory institutions in a democratic culture. Throughout this article, I demonstrated the value and importance of institutional diversity in social remembering practices. A democratic culture of memory institutions focuses on two key dimensions. The first dimension is intergenerational and it refers to the importance of providing *future* generations with as many landscapes of culture and history as possible. The second dimension refers to the right of individuals to participate in *contemporary* landscaping of culture and history for future generations.

Privatized memory institutions would impose several obstacles on the accomplishment of these goals. Commercialization and unequal participation are two elements that would characterize privatized memory institutions and that unsurprisingly conflict with a democratic vision of social remembering. My discussion also indicated that at least to some degree, privatized memory institutions may be less efficient than public-oriented and open-access social remembering practices. Privatized memory institutions may also avoid institutional separation between the social function of *cultural production* and the social function of *cultural preservation*. The resulted outcome is that groups and sectors with dominant positions in contemporary media would be able to reproduce, leverage and manipulate their social dominance from one generation to another. The power to remember, as well as the power to forget, would thus gradually be concentrated in clusters of commercial enterprises with very particular interests, beliefs, ideologies and preferences.

In the final part of the article, I outlined several reform proposals for de-privatizing networked memory institutions. As a general matter of policy, reduced copyright protection is likely to result in an equilibrium that strengthens the capacities of public-oriented memory institutions while reducing the incentives — and therefore the dominance — of commercial intermediaries entering this field. More specifically, I focused on two distinct types of reforms. The first type is reforms in *ex-ante* copyright privileges for networked memory institutions. Copyright law should include a revisited framework of exemptions, limitations and compulsory licenses that together are able to support independent ubiquitous activity by public-oriented memory institutions. The second type of reforms introduces my novel proposal to impose *ex-post* obligations on networked memory institutions. De-privatization of memory institutions requires also regulation that takes into account and moderates imbalanced

proprietary regimes that may be implemented by networked memory institutions. Copyright law should include, therefore, a complementary set of *reciprocal share-alike* obligations that come on top of the general ex-ante privileges that memory institutions should benefit from.

Thus far, social remembering processes and memory institutions received little attention by legal scholarship. The partial and gradual privatization of networked memory institutions emphasizes the importance of further in-depth research into this field of human activity. My purpose in this article was to begin such a discourse and set the grounds for future research.