

REMIXING SHARING: SHARING PLATFORMS AS A TOOL FOR ADVANCEMENT OF UGC SHARING

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ABSTRACT

As a form of derivative work, an unauthorized remix of original user generated content (UGC) constitutes copyright infringement and faces intellectual property law barriers. The existing scholarly discussion about remix is lacking in two aspects: First it fails to consider the unique implications of remix of original UGC. Second, it fails to consider remix in the context of sharing platforms such as YouTube. This article fills the gap and demonstrates that remix of original UGC is important and should be promoted while, at the same time, certain elements, such as personality interest and financial interests, should influence the methods to encourage permission to remix original UGC.

In this context, a survey of the field reveals that sharing platforms play two significant roles respecting UGC usage: a regulatory and an educational role. Sharing platforms redistribute and divide users' copyrights through the platforms' terms of use (TOU) and in doing so play a regulatory role. Sharing platforms also serve to educate users by providing information about copyright and alternative ways to permit use. A critical review suggests that the way the sharing platforms fulfill these two roles today is far from optimal and raises contractual and utility concerns. Nevertheless, this does not lead to the conclusion that the optimal solution is to eliminate or decrease users' copyrights through legislation or sharing

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platforms' TOU. To the contrary, users deserve copyright protection and some control on their works. Thus, this article concludes that through reforms of the regulatory role and of the educational role, reforms that are interconnected, remix sharing among users can successfully be protected and promoted.

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I. INTRODUCTION

Users today create video which they share on sites like YouTube, take family photos and post for all to view on Flickr, write blogs about politics or their hobbies, and describe their lives in detail on Blogger; they create profiles and friends on Facebook, create music pages or personal pages on MySpace,

engage with each other online, comment on each others' work, collaborate over the internet, and participate in numerous other like activities online. All of these activities fall under the rubric of User Generated Content (UGC). UGC is shared through sites like YouTube, Flickr and Blogger (sharing platforms), which serve as platforms for user based activities such as sharing content created by users, commenting on said content, creating community, and viewing user created content.

One of the most popular forms of creating UGC is known as remix. Remix is the act of taking a pre-existing work and incorporating it in a new work or a mashup of several pre-existing works.¹ A famous example of remix is "Bush and Blair's Endless Love," which features video clips of President Bush and Prime Minister Blair who seem to lip-synch the song "Endless Love."² The remix carries with it a strong political message about the relationships between Bush and Blair.³ Of course, while not all UGC remix carries with it important political or other messages, remix does generally represent a form of speech through which users can utilize cultural references and convey ideas that will be understood by all participants.⁴ However, remix, being a form of derivative work requires permission from the owner of the copyrighted work—here the UGC faces legal difficulties.⁵

To date, scholars have generally argued about the benefits and damages of remix as part of UGC and as a cultural phenomenon, but much of the discussion about remix culture are concentrated on the relationships between UGC and the mass media industry,⁶

¹ JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 113, 115 (2008) ("[A]bout one in four young people say they remix content of any kind into their own artistic creations. . .").

² Locopolitico, *Bush and Blair's Endless Love*, YOUTUBE (Feb. 9, 2007), http://www.youtube.com/watch?v=w8rr6fz1hQQ&feature=player_embedded.

³ *Id.*

⁴ See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 76(2008); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 112, 134 (2008); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 15 (2006) (discussing how the Internet allows for a more informative environment which fosters a more attractive cultural production system).

⁵ Niva Elkin-Koren, *User-Generated Platforms*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY 111, 121–22 (Rochelle C. Dreyfus, Harry First & Diane L. Zimmerman eds., 2010) [hereinafter Elkin-Koren, *User-Generated Platforms*].

⁶ See LESSIG, *supra* note 4, at 28–29 (stating Sousa's fear that "Read/Write" (RW) culture would disappear and be displaced by a "Read/Only" (RO) culture);

few have also concentrated on the multilayered relationships between users and the sharing platform.⁷ These discussions, however, are lacking in two aspects: (1) the discussions fail to provide a detailed discussion concerning remix of original UGC, as it seems that the common notion is simply that such remix should be allowed,⁸ but this notion is not so clear, and (2) the discussions fail to consider and provide an extensive account on the relationship between sharing platforms and remix and the role of sharing platforms in promoting remix.

In this article, I will concentrate on filling those gaps in the existing research on both counts. Specifically I analyze the stand-alone desirability of remix of original UGC. Here, I suggest that a closer look at the original UGC remix reveals that such remix is indeed a desirable activity. I then take a close look at the relationships between remix of original UGC, and the role of sharing platforms in promoting remix of original UGC. This analysis leads to the identification of a few arguments that hold a special force with respect to original UGC, consequently separating original UGC from mass media content.

Sharing platforms, as the platforms upon which users upload and share their content, play an important role in this narrative, as they are in effect actively governing and regulating users' behaviors and rights.⁹ Looking at the various sharing platforms' practices regarding UGC, I am able to identify two roles that the sharing platforms play, (1) a regulatory role—as the sharing platforms redistribute and divide users' copyrights on their UGC through the platforms' terms of use or service (TOU or TOS), and (2) an educational role—as sharing platforms sometimes provide information about copyright and alternative ways to permit use

NEIL WEINSTOCK NETANEL, *supra* note 4; Robert P. Merges, *Locke Remix ;-)*, 40 U.C. DAVIS L. REV. 1259, 1266–67 (2007) [hereinafter Merges, *Locke Remix*].

⁷ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 112; Niva Elkin-Koren, *Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks*, in GOVERNANCE, REGULATIONS, AND POWERS ON THE INTERNET (E. Brousseau et al. eds., forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321164 [hereinafter Elkin-Koren, *Governing Access*].

⁸ By “original” I mean to differentiate between UGC that is a product of remix or contains in some form preexisting work, and UGC which is the independent product of users' innovation, wholly original, worthy of independent copyright protection, and most importantly, is not a remix of a preexisting work. Thus, original UGC remix is the making of a derivative work based on an original UGC work protected by IP.

⁹ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 127.

of copyrighted content. In this respect, I offer a critical review of the sharing platforms' practices concerning regulation of users' rights. Specifically, I critique the excessive licensing of the users' rights through the TOU, which users do not read and are often not able to understand, but nonetheless are bound by, as well as the inadequate educational scheme currently in place to promote remix. This examination leads to the understanding that although remix can be promoted at the UGC level, the current reforms in place do not fit the UGC environment. Thus, I complete this analysis by suggesting related reforms to the current regulatory and educational practices of the sharing platforms.

The discussion will proceed as follows: part II elaborates on the UGC phenomenon as well as sharing platforms and the complex relationship these two entities share. Part III surveys the current practices of five well-known sharing platforms and sets out their regulatory and educational role. Part IV presents arguments both opposing and supporting remix culture. This part will show that while the debate more often than not revolves around the remix of mass media content such debate, nonetheless, provides a basis for constructing an argument in favor of original UGC remix and simultaneously provides the limits for the methods of facilitating original UGC remix. Part V provides critical analysis of the current sharing platforms' practices. Parts VI in light of such analysis, offers some reforms to the current practices with a special emphasis on the strengthening of the educational role of sharing platforms. Part VII provides a conclusion of the discussion.

II. THE PHENOMENON OF USER GENERATED CONTENT

UGC has changed the world of culture and information creation as we know it. The dichotomy that once existed to distinguish producer from consumer is no longer; instead, today, at the age of "Read/Write,"¹⁰ UGC represents content created by those who were once viewed as passive cultural customers.¹¹ Users, the past passive consumers, are now active creators of

¹⁰ LESSIG, *supra* note 4, at 28 (discussing a "Read/Write" (RW) culture where young people "read" their culture by listening to it, adding to it, and re-creating the culture around them).

¹¹ Debora Halbert, *Mass Culture And the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 924–25 (2009).

culture—by expressing opinions, sharing political views, writing about their lives in blogs, creating and sharing visual art like photos and video, creating stories based on existing culture—like fan fiction, and creating new stories.¹² This UGC can be characterized as a new expression, original UGC, or a remix of existing works.¹³ The “classes” of the past are blurred; users are now consumers of products, producers of content, and viewers of others’ content. This, in turn, has changed the norms of action on the Internet, that is, the use that is perceived as permissible and that which is perceived as prohibited. With these changes also comes the question of how to find a balance between permitting and encouraging new uses by users, and the need to incentivize the creation of the content on which users often build.

A. *The Development of UGC*

Let’s start at the beginning. How did we get to this point? One of the most important innovations that contributed to the growth and development of UGC is the Internet.¹⁴ The Internet reduced the costs of and decentralized production, communication, and the dissemination of information, thereby, enabling each user to become a content provider, “a publisher, TV network, radio station, movie studio, record label, and newspaper, all wrapped into one.”¹⁵ The technological innovation of the Internet removed the obstacle to users’ participation in culture and information creation and, at the same time, facilitated its user’s ability to find content and information by significantly reducing the costs of an information search.¹⁶ In short, the Internet makes everything accessible to everyone. In the press of a button one can distribute a work and make it available to millions within seconds. In this environment, UGC is thriving.¹⁷ Without intermediates and without costs (aside from the costs of purchasing the software or other equipment required to create the UGC, and costs of the time and effort dedicated to creating the UGC), the user can become creator and reach the masses—a privilege reserved to few

¹² Elkin–Koren, *User-Generated Platforms*, *supra* note 5, at 114, 119–20.

¹³ *Id.* at 113.

¹⁴ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1501 (2008).

¹⁵ *Id.* at 1501–02.

¹⁶ *See id.* at 1499–1501 (“The Internet is a vast network for communication built on a platform that is open to all.”).

¹⁷ *Id.* at 1500.

in the past is now available to all.¹⁸

B. The Network Characteristic

UGC includes not only individual work, rather, the same elements that enable the individual creation and dissemination of UGC are also responsible for the reality that a major part of UGC includes collaborative projects like open-source software or Wikipedia.¹⁹ Yochai Benkler has addressed the phenomenon of decentralized collaborative projects and named it the “commons-based peer production” of information.²⁰ Benkler demonstrates that the network characteristic lowers the costs of coordination efforts and makes possible the decentralized collaboration of multiple unrelated individuals who cooperate and create new projects without relying on a managerial structure.²¹ The success of peer-production projects is due to their modular character: (1) the ability to divide the projects into pieces that can be produced independently; therefore, providing each individual user with the flexibility to decide on the time and form of her contribution and (2) the ability to assemble and integrate all the pieces into the final product.²² These collaborative projects depend on efforts of many individuals with different motivations who contribute without asserting any copyright in the final product and cannot appropriate the final project.²³ It should be noted here that the motive for participating in the projects is not a monetary reward. Rather, it is connected to social and psychological motives, which sometimes cannot be replaced by money.²⁴ Therefore, introducing a monetary reward could, in fact, create the opposite effect of crowding out participants and corrode the incentive to participate in such projects. At the end of the day

[f]or all of us, there comes a time on any given day, week, and

¹⁸ BENKLER, *supra* note 4, at 30-33; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28-30 (2004) [hereinafter FISHER, PROMISES TO KEEP]; NETANEL, *supra* note 4, at 76; Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 989 (2004); Lee, *supra* note 14, at 1500, 1502-03; John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 227-28 (2008).

¹⁹ Quiggin & Hunter, *supra* note 18, at 227-29.

²⁰ BENKLER, *supra* note 4, at 60.

²¹ *Id.* at 60, 85.

²² *Id.* at 100.

²³ *Id.* at 60, 63.

²⁴ *Id.* at 96-9.

month, every year and in different degrees over our lifetimes, when we choose to act in some way that is oriented toward fulfilling our social and psychological needs, not our market—exchangeable needs. It is that part of our lives and our motivational structure that social production taps, and on which it thrives.²⁵

In the network information economy, individual users control the production by possessing the physical capital (computers, data storage devices, etc.) that make effective the human creativity each individual possesses. Such users deploy the existing knowledge and information of each individual, resulting in zero social cost.²⁶ Niva Elkin-Koren argues that unlike the motivations of traditional producers of cultural content, which were based on monetary incentives, the emergence of the collaborative project and peer production of information is not based on monetary incentives. This demonstrates other models of production are possible, and thus, greater weight should be given to other considerations.²⁷

C. The Professional Characteristic

The general conception of UGC is amateur, noncommercial content, created by nonprofessionals, who do not earn money from it; as the term user generated content suggests, it was originally perceived as having less value than the professional content of mass media industry.²⁸ However, since then, the line between amateur and professional users has blurred and the simplistic understanding of UGC as mainly amateur content fails to recognize the different layers of UGC in existence today.²⁹ Indeed, at first glance, UGC may often seem and in fact *be* amateur content. At the same time, however, sometimes professionals outside the employment boundaries also produce UGC.³⁰ And both amateur works and professional works are uploaded to the same sites, reside under the same TOU, and both, sometimes, are offered for sale, thereby making the distinction between amateur content and professional content

²⁵ BENKLER, *supra* note 4, at 98.

²⁶ *Id.* at 99, 107.

²⁷ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 123.

²⁸ Halbert, *supra* note 11, at 929. *See also* Quiggin & Hunter, *supra* note 18, at 204–05.

²⁹ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 118–19.

³⁰ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 118.

even more challenging.³¹ Moreover, the simultaneous move from a world where production and distribution were a monopoly held by publishers to an era when individuals can and do create quality content and distribute it on their own, further contributes to the blurriness of an amateur–professional distinction.³²

D. The Incentive to Create

Another important feature of UGC concerns the driving force of creation—the incentive to create UGC. The traditional content industry is built on the thesis of profit making.³³ UGC, which is not incentivized by commercial gain, changes this conception and threatens the traditional thesis, especially when it can replace and compete with the traditional content, as in the case of encyclopedias and newspaper.³⁴ Unlike mass media industry, the motivation for UGC is not necessarily monetary.³⁵ In fact, some scholars even go so far as to argue that introducing monetary rewards into the UGC environment can have a counter effect of leading to a disincentive to create.³⁶ Users create content for various reasons: for enjoyment, for a challenge, to get attention, to show off skills and craftsmanship, to show expertise, as self-expression, to interact, or to express ideology.³⁷ This feature is important to the analysis of UGC sharing, since the creation is not motivated by commercial incentives, a closer examination of the incentive to share is a necessity. It should also be noted, however, that just because the production of UGC is not driven by commercial incentive does not mean that the incentive to

³¹ *See id.* at 119–20 (explaining the difficulty associated with differentiating between professional and amateur work).

³² *Id.*

³³ *See* Halbert, *supra* note 11, at 927 (“Mass society is commercialized and driven from the top down by profit-oriented models of cultural consumption. In other words, U.S. mass culture is commercial culture where culture is a commodity, like shoes or luxury cars”).

³⁴ *See* Quiggin & Hunter, *supra* note 18, at 204–05 (explaining how free UGC competes with traditional businesses like Microsoft and Encyclopedia Britannica).

³⁵ *See id.* at 205 (identifying various non-monetary reasons why amateur creators produce content which include creation for the joy of expressing themselves and to demonstrate superior skills).

³⁶ BENKLER, *supra* note 4, at 92–93; LESSIG, *supra* note 4, at 144–47.

³⁷ Elkin-Koren, *Governing Access*, *supra* note 7, at 15; Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 875 (2008) [hereinafter Hetcher, *Part One*]; Lee, *supra* note 14, at 1499–1500, 1503; Quiggin & Hunter, *supra* note 18, at 205–06.

share that content and to enable remix (as discussed further below) is clean from such considerations.³⁸

Similarly, Elkin-Koren argues that the notion of UGC as ‘nonprofit’ work is questionable.³⁹ Although a considerable portion of UGC is not created with the expectation of monetary reward, and there are a variety of reasons that drive users to share their content online, the definition of UGC as strictly nonprofit is imprecise.⁴⁰ UGC does not have to be created for monetary gain and can be created for a variety of reasons; nonetheless, the commercialization of UGC often emerges from these humble beginnings in different forms and stages.⁴¹ New business models permit users to gain revenues from their works.⁴² Users can sell their works, or make profit by advertisements.⁴³ Evidence of such commercial interest is found in the case of Danica Radovanovic who wrote a blog *Belgrade and Beyond*.⁴⁴ Danica found out that her blog was being “mirrored by a Chinese user” who attached Google AdSense to it in order to profit from it.⁴⁵ Danica opposed it and sought to block the mirror site.⁴⁶ This incident demonstrates the type of commercial pressure that exists in the UGC environment as Danica resented losing profit through AdSense and the “free riding” of the mirror site.⁴⁷ Thus, although the incentive to create the UGC was not monetary in nature, subsequent events can raise commercial

³⁸ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 124 (discussing how some UGC is put onto the web in hopes of selling it for profit).

³⁹ See *id.* at 123–24.

⁴⁰ See *id.* (listing reasons why users would choose to share content; some are for profit motivations, while others are not).

⁴¹ See *id.* at 123–26 (identifying the various uses of UGC including commercialization).

⁴² *Id.* at 124.

⁴³ *Id.* at 124–26.

⁴⁴ See Danica Radovanovic, *Blog Plagiarism—Web Infringement*, DIGITAL SERENDIPITIES (May 28, 2007, 11:46 PM), <http://www.danica.org/2007/05/28/blog-plagiarism-web-infringement/> (discussing what happens when an entire blog is stolen and used for profit); ZIKI, *Danica Radovanovic*, ZIKI.COM, <http://www.ziki.com/en/danica+24603/post/belgrade-and-beyond-is-moving-on-final-post+7765800> (offering the final post of *Belgrade and Beyond* and informing readers that the author of the blog will be moving on and where users can continue to follow the author online); Elkin-Koren, *Governing Access*, *supra* note 7, at 15–16 (discussing Danica Radovanovic and blog plagiarism in the context of the “commercial pressures” associated with the UGC environment).

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 15–16.

⁴⁷ *Id.* at 16.

interests to the surface.⁴⁸ Furthermore, commercial aspects also arise on the other side of the UGC pool. Sharing platforms have the goal of making profit, as they are commercial enterprises, but sharing platforms simultaneously depend on the contribution and content provided by users for their commercial success.⁴⁹ Sharing platforms have started to offer more commercial opportunities for users to make profit from their UGC. For example, YouTube offers the YouTube Partners program,⁵⁰ and Flickr invites some users to offer their works for sale under Getty Images.⁵¹ Moreover, it is likely that commercial pressure will increase as users put more attention in the commercial aspects of each work.⁵²

Niva Elkin-Koren suggests that there is a mixture of commercial and noncommercial motives that influence users thereby creating financial pressure.⁵³ However, despite the fact that UGC stems from a combination of commercial and social motives and can lead to revenue earned by the user, it is still different from industrialized content because UGC is not solely driven by the desire to create profit.⁵⁴

E. The Different Forms of UGC

Another important feature of UGC is that it can present itself in many forms and shapes. It can be wholly original, created by the imagination of the users, or it can use existing materials, whether through remix or influenced by existing work.⁵⁵ Remixing is not limited to mashup of professional content such as movies and music created by the mass media industry, but original UGC can also be used as remix material.⁵⁶ An example of this is the “Double Rainbow” video⁵⁷ that led to remixes and

⁴⁸ See *id.* at 14–16 (explaining the effect of commercialization on the UGC).

⁴⁹ See *id.* at 14–15 (identifying the nature of users as assets and profit generators).

⁵⁰ *What Is The YouTube Partner Program?*, YOUTUBE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=72851> (last visited Mar. 25, 2012).

⁵¹ *About the Flickr Collection*, GETTY IMAGES, http://www.gettyimages.com/Creative/Frontdoor/FlickrPhotos?isource=direct-entry_flickr_frontdoor_usa (last visited Mar. 25, 2012).

⁵² Elkin-Koren, *Governing Access*, *supra* note 7, at 16–17.

⁵³ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 125.

⁵⁴ *Id.* at 125–26.

⁵⁵ *Id.* at 113.

⁵⁶ See Merges, *Locke Remix*, *supra* note 6, at 1259–60.

⁵⁷ *Yosemitebear Mountain Giant Double Rainbow 1-8-10*, YOUTUBE, (Jan. 8,

imitations.⁵⁸ Many times users do not get permission for remixing original UGC.⁵⁹ This informal practice is particularly prevalent among the YouTube community.⁶⁰ But the fact that such practice is in most cases *informal* does not change the fact that such remix is copyright infringement, unless it is protected under one of the law's defenses.⁶¹ A *formal* permission to remix will create more certainty and encourage and promote more remix and sharing.⁶²

While original UGC does not create any problems concerning copyright infringement, remixed UGC causes problems and raises the most opposition, leading to the notion that remixed UGC is nonoriginal content, mostly "free riding" on the efforts of original (often professional) authors and is, therefore, less valued and inferior to original content.⁶³ Remix is usually done without the original author's consent and doing so infringes upon the author's right to make derivative work and copy.⁶⁴ As further elaborated upon in section IV below on remix, different solutions, mainly legal reforms, have been suggested in an attempt to mitigate this problem while preserving remix in furtherance of innovation and creation.⁶⁵ Addressing the problem of remix is even more important when one considers the future of the Internet, mainly the development of Web 3.0. It is anticipated

2010), <http://www.youtube.com/watch?v=OQSNhk5ICTI> [hereinafter *Double Rainbow*].

⁵⁸ See, e.g., Masonvv, *Auto Tune The Rainbow*, YOUTUBE (July 4, 2010), <http://www.youtube.com/watch?v=6g0yZDMBXiE> (remixing the dialog of *Double Rainbow* to a song); SchmoYoho, *Songify This: Double Rainbow Song!!*, YOUTUBE (July 6, 2010), <http://www.youtube.com/watch?v=MX0D4oZwCsA> (remixing the dialog of *Double Rainbow* to a song); TheWiltonWay, *Crazy Double Rainbow Guy Eats Breakfast 7-8-10*, YOUTUBE (July 8, 2010), <http://www.youtube.com/watch?v=mXHdSOwFRgM>.

⁵⁹ Lee, *supra* note 14, at 1508.

⁶⁰ *Id.*

⁶¹ See *id.* at 1509.

⁶² *Id.* at 1540–42 (comparing the advantages and disadvantages of both a formal and informal approach to the "systematic uncertainty of copyright law" and finding that adopting an informal approach alone may result in a more "haphazard[]" practice than a more hybrid approach that includes copyright practice adopted by the Courts and the Legislature).

⁶³ *Id.* at 1509.

⁶⁴ See LESSIG, *supra* note 4, at 100 (explaining that fair use defense is not a viable solution due to the price of defense and thus, RW use violates copyright law "[b]y default" and is therefore "presumptively illegal"); Lee *supra* note 14, at 1509.

⁶⁵ See, e.g., LESSIG, *supra* note 4, at 114, 253. See also NETANEL, *supra* note 4, at 86–89, 107; Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 133–34.

that a considerable part of Internet technologies will be dedicated to remix technologies as a basic default characteristic of the Internet.⁶⁶ The Web 3.0 will enable each user to customize how she sees the information.⁶⁷ In the Web 3.0 era, users will not only surf the web but remix it, as a basic function of the Internet.⁶⁸

F. Sharing Platforms

An important part of the UGC world is sharing platforms. One cannot effectively address the issue of UGC without addressing the sites that often times facilitate UGC. Sharing platforms revolve around UGC as it is the main, and many times, the only feature of the platform.⁶⁹ As their name suggests, sharing platforms are the platforms upon which users can share their UGC with other users and the world at large, and where they can view other users' content.⁷⁰ Sharing platforms also serve to facilitate collaboration between users and create a community within the platform.⁷¹ Some view sharing platforms as the new intermediates, carrying with them some of the problems of the old intermediates.⁷² Sharing platforms present a high level of consolidation, and other than the costs of building the platform, the platform does not bear many costs and the costs of each additional user are marginal.⁷³ Moreover, there is a network effect, which means that the more users join certain platforms, the more valuable the platform becomes. The subsequent decrease in competition and increase of entry barriers grant power to large sites such as Google and Facebook who attract the most users.⁷⁴ Thus, the use of a platform leads to the control of information and weakens competition because a user invests time and effort on the platform, resulting in valuable assets such as history, content, personal contacts, etcetera. Notably, the stickiness of a user to a specific sharing platform is dependent

⁶⁶ Lee, *supra* note 14, at 1501–02.

⁶⁷ *Id.* at 1500–01.

⁶⁸ *Id.* at 1501–02.

⁶⁹ *See id.*

⁷⁰ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 116.

⁷¹ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 116.

⁷² *See* Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 116 (stating that online platforms may suffer from the same problems as older media such as concentration of advantages among large scale intermediaries).

⁷³ *Id.*

⁷⁴ *See id.* at 116–18 (noting how such convergence makes it more difficult for new applications to penetrate the market).

upon the user's switching costs, which is dependent on the user's ability and ease to transfer to another site.⁷⁵ If users are unable to transfer these assets to a new platform easily, users will be locked to the specific sharing platform; this also creates entry barriers for new competitors and in turn influences the environment where users operate and UGC is produced.⁷⁶

The relationship between sharing platforms and users is not one-dimensional but complex because users embody two roles in connection to sharing platforms. On the one hand, users are creators, creating content for the platform, but users also act as participants on the platform by commenting on other users' works.⁷⁷ It is their creation of content that gives the sharing platform its commercial value.⁷⁸ Users are both consumers and producers of content. As for the sharing platform themselves, UGC is usually distributed through the sharing platforms that also make available for consumption other UGC.⁷⁹ By providing different features, from basic tools for sharing, to community and rating possibilities, the sharing platforms promote collaboration and interaction between users.⁸⁰ This multilayered role contributes to the sharing platforms' interest in what kind of content is presented on their sites. When more content becomes available to users—when users can actively engage with it and remix it—more content is created and presented on the sharing platform, and the sharing platform becomes more valuable.⁸¹

As can be seen, defining what content is part of the group of UGC is problematic. In today's UGC environment the differentiation between content created by professionals and

⁷⁵ *Id.* at 117.

⁷⁶ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 116–18 (exploring the negative effect costly transferability has on competition among platforms); Randal C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 NW. U. L. REV. 1, 6 (2008). One solution to the stickiness problem is data portability which would allow users to leave a platform at any time and by that will also grant them power in contrast to the Sharing Platforms. See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 133. But data portability is not without its faults, although it can reduce platforms' power, it creates a new problem of privacy. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1194 (2009).

⁷⁷ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 117–18.

⁷⁸ See *id.* at 117–18.

⁷⁹ See *id.* at 116–18.

⁸⁰ Elkin-Koren, *Governing Access*, *supra* note 7, at 12.

⁸¹ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 127 (arguing that the principle of exclusivity inherent in copyright law is in direct opposition to what makes the UGC business model a success).

amateurs does not help, especially when everyone has the opportunity to receive revenues from their content through financial opportunities offered by the sharing platforms.⁸² The subgroups created within the UGC world merit a long and separate discussion as well as research. For the purpose of this paper, it is sufficient to say that the term “original UGC” addresses any content created by users, which is not a remix of existing material and is carried by a sharing platform—even if the users receive monetary compensations for their content, but excluding content created by commercial mass media industry players. For example, if FOX or BBC published part of their content on YouTube, this content is not considered UGC, but if an amateur user generates commercial revenues from her content utilizing the commercial options offered by sharing platform like the YouTube Partners program, this *will* still be considered UGC. In a similar vein, when a professional user publishes content on a sharing platform (for example, a Disney animator that publishes new materials for her enjoyment on a sharing platform), it too will be considered a UGC, as long as the content and publication are not done as part of the professional user’s work requirements and obligations.⁸³

III. SHARING PLATFORMS’ PRACTICES

In this section I provide a survey of practices of five popular sharing platforms. In doing so, I show that each type of sharing platform available in practice fulfills two roles simultaneously: (1) a regulatory role, as sharing platforms contractually change users rights; and (2) An educational role, as some sharing platforms provide their users with information concerning copyright and methods of licensing rights. The examination of the various sharing platforms reveals the similarities and differences between the practices of sharing platforms, especially concerning the educational role, contributing to the discussion of whether these practices are adequate for sharing among users.

A. *YouTube*

Google Sites are the largest video sharing websites in existence

⁸² *See id.* at 119–20 (discussing the eroding distinction between professional and amateur UGC).

⁸³ *Id.* at 118.

and the most viewed website in the USA with 14.6 billion videos viewed in May 2010—representing about 43 percent of the market and “YouTube accounted for the vast majority of videos viewed at the property.”⁸⁴ The YouTube terms of service (TOS) model is the most extensive TOS model, under which YouTube is granted a broad license to use many of the users’ copyrights and other users are granted permission for some uses, as well.⁸⁵ The YouTube TOS also provides extensive information on copyright.⁸⁶ A user who joins YouTube is bound by YouTube’s TOS,⁸⁷ YouTube’s privacy notice,⁸⁸ and YouTube’s Community Guidelines.⁸⁹ Through its TOS, YouTube plays a regulatory role, as it contractually changes the scope of users’ rights.⁹⁰ Although YouTube emphasizes that users retain ownership of their content, a user who creates and submits her own content to YouTube grants YouTube a broad license:

For clarity, you retain all of your ownership rights in your Content. However, by submitting Content to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube’s (and its successors’ and affiliates’) business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.⁹¹

Under the same TOS, a user who uploads original work to YouTube also grants other users a narrow license pertaining to some of the user’s exclusive rights: “You also hereby grant each user of the Service a non-exclusive license to access your Content through the Service, and to use, reproduce, distribute, display and perform such Content as permitted through the functionality

⁸⁴ *ComScore Releases May 2010 U.S. Online Video Rankings*, COMSCORE.COM (Jun. 24, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Releases_May_2010_U.S._Online_Video_Rankings.

⁸⁵ *Terms of Service*, YOUTUBE, <http://www.youtube.com/t/terms> (last visited Mar. 25, 2012) [hereinafter YouTube TOS].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *YouTube Privacy Notice*, YOUTUBE, <http://www.youtube.com/t/privacy> (last updated Dec. 8, 2010).

⁸⁹ *YouTube Community Guidelines*, YOUTUBE, http://www.youtube.com/t/community_guidelines (last visited Mar. 25, 2012).

⁹⁰ YouTube TOS, *supra* note 85.

⁹¹ *Id.*

of the Service and under these Terms of Service.”⁹² The implication of this regulatory scheme is that under YouTube’s TOS, users are forbidden from making modifications to other users’ work without permission from the original creator.⁹³ Although YouTube has the right to prepare derivative work, this permission does not apply to other users.⁹⁴ In fact, users can employ all other rights (in connection with the functionality of the service) excluding derivative work, which is the only right among the bundle of rights that is forbidden.⁹⁵

YouTube also fulfills an educational role by providing users with information on copyright and permissible uses. In its Community Guidelines, YouTube provides a links to Copyright Tips⁹⁶ and a Copyright Help Center⁹⁷ that contains within it a YouTube Copyright Workshop,⁹⁸ all of which explain in simple terms: what a copyright is, the extent of a user’s copyright ownership in her original work, the need to respect others copyright, and also a little information about Creative Commons licensing as a method to relinquish some rights.⁹⁹ Indeed, YouTube provides its users with a lot of information concerning their rights and it appears to endeavor to teach users how to avoid copyright infringement.¹⁰⁰ However, information concerning sharing UGC is sparse and mostly summed up by referring users to Creative Commons.¹⁰¹ Nonetheless, the presence of such content is illustrative of the educational role YouTube took upon itself not only to limit copyright infringement, but also to provide some guidance regarding the different alternatives available for sharing thereby raising the

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *Copyright Tips*, YOUTUBE, http://www.youtube.com/t/howto_copyright (last visited Mar. 25, 2012).

⁹⁷ *Copyright Center*, YOUTUBE, <http://www.google.com/support/youtube/bin/topic.py?&topic=10554&hl=en-US> (last visited Mar. 25, 2012).

⁹⁸ *YouTube: Copyright Workshop*, YOUTUBE, <http://www.google.com/support/youtube/bin/static.py?page=guide.cs&guide=25903&topic=25065> (last visited Mar. 25, 2012).

⁹⁹ *YouTube Help, Level 3—Authorized Use*, YOUTUBE, <http://www.google.com/support/youtube/bin/static.py?page=guide.cs&guide=25903&topic=25069> (last visited Mar. 1, 2012).

¹⁰⁰ *See Copyright Education*, YOUTUBE, http://www.youtube.com/t/copyright_education (last visited Mar. 25, 2012) (acting as a gateway for tutorials and resources about copyrights).

¹⁰¹ *Id.* (providing a link to an explanatory page on “Creative Commons”).

possibility for YouTube to play a potentially larger and more meaningful role in this respect.¹⁰²

In addition to its popular use, YouTube offers a program named the “YouTube Partner Program” that enables users who opt in for the program to earn revenues from their original content by allowing relevant advertisements to run with the videos.¹⁰³ YouTube also experimented with an offline-viewing feature, which enabled only its partners to offer download of their videos for free or for a fee set by the partner and to decide which license to attach to each download.¹⁰⁴ The universities participated in this project, such as Stanford and UC Berkeley offered their materials for free, but YouTube also tried to experiment with download of the other partners’ content in return for payment.¹⁰⁵ YouTube, however, has halted this initiative and the download “Click-to-buy” feature is no longer available to YouTube Partners.¹⁰⁶ The rate of success of this initiative as well as the reasons to halt it, are still unclear.

Nonetheless, these services raise questions concerning the nonmonetary versus monetary incentives to create and share UGC. YouTube itself turns the UGC environment into a commercialized environment and introduces a new set of commercial considerations and interests to the users. Not only do these services raise questions about the shift to monetary interests, such services also raise questions as to how these services influence sharing on two fronts. The first front involves the question of the type of users who are using these services. If people who are interested in these services are not all “pure” amateurs, and we can identify two classes of users, pure amateurs and professional amateurs (i.e., users, not necessarily professional users, who make profit through these services and

¹⁰² See *supra* text accompanying notes 96–101.

¹⁰³ *What Is The YouTube Partner Program?*, YOUTUBE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=72851> (last updated Apr. 5, 2011).

¹⁰⁴ Thai Tran, *YouTube Goes Offline*, YOUTUBE BLOG (Feb. 12, 2009), <http://youtube-global.blogspot.com/2009/02/youtube-goes-offline.html>; Leena Rao, *YouTube Hopes To Boost Revenue With Video Downloads*, THE WASH. POST (Feb. 12, 2009, 1:28 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/12/AR2009021203239.html>.

¹⁰⁵ See Tran, *supra* note 104.

¹⁰⁶ *Downloading YouTube videos*, YOUTUBE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=56100> (last updated Dec. 1, 2011); Grant Crowell, *How to Create Click-to-buy Links In YouTube—for Free*, REELSEO, <http://www.reelseo.com/youtube-click-to-buy-link/> (last visited Mar. 25, 2012).

view these services as a source of income) this initiative might not have a great influence on the class of “pure” amateurs. The second front of sharing concerns the motivation to share in general, and the scope of privileged uses that will be permitted, in particular, by users who utilize these services.¹⁰⁷

Finally, YouTube recently announced a new collaboration with Creative Commons¹⁰⁸, through which YouTube offers its users the ability to license their works under Creative Commons’ attribution license (CC BY), and additionally, YouTube has created a Creative Commons library containing material licensed under CC BY.¹⁰⁹ This collaboration offers a method that enables sharing between users, as users can license their works under CC BY, which permits remix.¹¹⁰ However, this initiative offers *only* one licensing option and does not give the users the opportunity to choose from the variety of Creative Commons licenses that exists.¹¹¹

B. Flickr

Flickr is one of the largest image hosting web sites online with more than 40 million users¹¹² and hosts more than 6 billion photos.¹¹³ Similar to YouTube, through the TOU of Yahoo (which owns Flickr)¹¹⁴ Flickr users grant Yahoo a broad license to “use,

¹⁰⁷ See Quiggen & Hunter, *supra* note 18, at 230-31 (“At a superficial level, it is apparent that people act differently, and are expected to act differently in relationships mediated by money as opposed to relationships in other social contexts”).

¹⁰⁸ Creative Commons is a nonprofit organization aimed at providing a variety of free digital licenses that copyright holders can choose from and attach to their works. See Lee, *supra* note 14, at 1485–86. See *infra* Part V.C for further elaboration on the organization and its aims.

¹⁰⁹ See Jane Park, *YouTube Launches Support for CC BY and A CC Library Featuring 10,000 Videos*, CREATIVE COMMONS BLOG (June 2, 2011), <https://creativecommons.org/weblog/entry/27533>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Flickr & Snapfish: Ready... Set... Print!*, YAHOO! YODEL ANECDOTAL BLOG (Nov. 12, 2009, 2:11 PM), <http://ycorpblog.com/2009/11/12/flickrsnapfish/>; *Statistics Summary for Flickr.com*, ALEXA, <http://www.alexa.com/siteinfo/Flickr.com> (last visited Jan. 26, 2012) (showing that Flickr is not only one of the largest image-sharing sites, but also one of the most visited websites in the world in general, currently ranking forty-third in global web traffic).

¹¹³ Lucian Parfeni, *Flickr Boasts 6 Billion Photo Uploads*, SOFTPEDIA.COM (Aug. 5, 2011), <http://news.softpedia.com/news/Flickr-Boasts-6-Billion-Photo-Uploads-215380.shtml>.

¹¹⁴ Caterina Fake, *Yahoo Actually Does Acquire Flickr*, FLICKR BLOG (Mar. 20, 2005), <http://blog.flickr.net/en/2005/03/20/yahoo-actually-does-acquire->

distribute, reproduce, modify, adapt, publicly perform and publicly display” their work if it is posted on publicly accessible areas of Yahoo. The TOU grants Yahoo the right to modify items posted.¹¹⁵ Unlike YouTube, however, Yahoo does not grant any rights to other users, only to itself.¹¹⁶

Although Flickr lacks a center for information on copyright similar to YouTube’s Copyright Workshop or YouTube’s Copyright Help Center, Flickr emphasizes the ownership that each user possess in her content, and the need to respect others’ rights.¹¹⁷ But this information is quite limited and does not match the extensive information provided by YouTube regarding copyright and infringement of copyright.¹¹⁸

The default copyright regime in Flickr is “[a]ll rights reserved,” but Flickr users can elect to subscribe to a Creative Commons license.¹¹⁹ By applying Creative Commons’ license, a user makes her original image available for download by anyone.¹²⁰ As Niva Elkin-Koren illustrated in 2008, the majority of users elected the most restrictive Creative Commons license;¹²¹ this is still true, to some extent, today. A random check done by Flickr shows that more users select the most restrictive license (Attribution-

flickr/.

¹¹⁵ *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Mar. 25, 2012) [hereinafter Yahoo TOS].

¹¹⁶ *Compare* Yahoo TOS, *supra* note 115 (declaring that the rights of content submitted to the network of Internet properties owned by Yahoo are granted to Yahoo, without mention of the rights of other parties), *with* YouTube TOS, *supra* note 85 (stating expressly that the YouTube Service and its users are both granted the rights to use, reproduce, distribute, display, and perform content submitted to the site).

¹¹⁷ *Flickr Community Guidelines*, FLICKR, <http://www.flickr.com/guidelines.gne> (last visited Mar. 25, 2012) (showing how the site merely asks users to respect the copyright of others, without much additional information provided on what constitutes copyrighted material). *See supra* Part III.A (discussing the information that YouTube does provide in its guidelines, regarding copyrighted material and permissible uses).

¹¹⁸ *Compare Flickr Community Guidelines*, *supra* note 117, *with* *What is Copyright?*, YOUTUBE, http://www.youtube.com/t/copyright_what_is (last visited Mar. 25, 2012) (demonstrating how information about copyright is presented in a clear manner, with additional information also available on other links in YouTube’s Copyright Education Center).

¹¹⁹ *Creative Commons*, FLICKR, <http://www.flickr.com/creativecommons/> (last visited Mar. 25, 2012) (showing that there are six types of Creative Commons licenses, each of which are alternatives to full copyright and grant a specific set of rights to other people).

¹²⁰ *Help/FAQ/Photos: How Can I Stop People from Downloading My Photo?*, FLICKR, <http://www.flickr.com/help/photos/#85> (last visited Mar. 27, 2012).

¹²¹ Elkin-Koren, *Governing Access*, *supra* note 7, at 13.

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NonCommercial-NoDerivs License, CC BY-NC-ND, 62,085,052 photos) over the broadest license (Attribution License, CC BY, 32,189,400 photos).¹²² But, Creative Commons offers a wide spectrum of licenses, and users choose from among licenses varying from Attribution (the broadest license), Attribution-NonCommercial-ShareAlike (and other intermediate licenses), and Attribution-NonCommercial-No Derivs (the strictest license); some of these licenses enable derivative work.¹²³ Even though the majority of users, who license their work under Creative Commons' licenses, do not choose the broadest license, the majority of users do not necessarily select the most restrictive license either and instead tend to select a license in the middle which allows for the making of derivative work.¹²⁴ This data is also backed up by data on Flickr's Creative Commons' licensing practices from a four-year period spanning from 2006 to 2010.¹²⁵ Over those four years, the distribution of licenses used has changed and there has been a slow shift to more liberal licenses.¹²⁶ As for permission for derivative work, similar to the random check stated above, among the six licensing schemes offered by Creative Commons, four permit derivative work, and more than 60 percent of users have chosen one of those four licensing schemes rather than one of the two licenses that prohibited derivative work.¹²⁷ It should be noted, however, that although there is an increase in the number of images currently licensed under Creative Commons licenses (from 10 million to

¹²² *Creative Commons, supra* note 119.

¹²³ *See id.* (noting that the Attribution license lets others copy, distribute, display, and perform copyrighted work and its derivative works, while the No Derivatives Works license is more restrictive, and only allows others to do the aforementioned acts with verbatim copies of the copyrighted work).

¹²⁴ *Id.* Flickr's random count shows that although there are approximately 73,817,767 photos placed by users under licenses that prohibited derivative works, the overwhelming majority of photos (about 141,237,043) are currently under one of the less restrictive types of licenses that permit derivative work usage. *Id.*

¹²⁵ *See* Mike Linksvayer, *Creative Commons Licenses On Flickr: Many More Images, Slightly More Freedom*, CREATIVE COMMONS BLOG (Mar. 10, 2010), <https://creativecommons.org/weblog/entry/20870>.

¹²⁶ *See id.* It is important to state that Creative Commons defines works that are "free cultural works" as works under license that permit both commercial use and derivative work use (which are only slightly above 20 percent of works but such works have experienced an increase over the years). *Id.* For the purposes of this article the important numbers concern the permission of derivative work, rather than that of the most liberal licensing.

¹²⁷ *Id.*

135 million images),¹²⁸ there are more than 5 billion images on Flickr,¹²⁹ which means that most of the images on Flickr are not licensed under Creative Commons licenses.

Flickr also collaborates with Getty Images.¹³⁰ Getty Images editors offer some Flickr users the opportunity to join the Getty collection and to offer their works through Getty under a right management license, which includes restrictions on usage but also allows the purchase of exclusive rights for some products, or under a royalty free license, which permits the licensee to use the product multiple times for multiple unspecified uses.¹³¹ Both licenses are offered for a price provided by Getty that is calculated based on the respective user's intended use, or based on the image size and the number of people entitled to use the images.¹³² If a user that licensed her images under a Creative Commons license accepts the Getty invitation, her license will automatically switch to a royalty-free license.¹³³ This blurs the distinction between monetary and nonmonetary incentives in the UGC environment, and similar to the YouTube case, raises further questions as to the shift to monetary incentives and the influence on users' motivation to permit remix.

It is interesting to compare the YouTube model to the Flickr model regarding the freedom of users to permit privileged uses of their works. Under Flickr, the default situation is 'all rights reserved' and users can decide what uses they permit through Creative Commons licensing. YouTube also enables users to license their work under Creative Commons' licenses.¹³⁴ Unlike Flickr, however, YouTube, in its TOS, already automatically

¹²⁸ *Id.*

¹²⁹ Zack Sheppard, *5,000,000,00*, FLICKR BLOG (Sept. 19, 2010), <http://blog.flickr.net/en/2010/09/19/5000000000/>.

¹³⁰ See *About the Flickr Collection*, GETTY IMAGES, http://www.gettyimages.com/Creative/Frontdoor/FlickrPhotos?isource=direct-entry_flickr_frontdoor_usa (last visited Mar. 25, 2012).

¹³¹ *Id.*

¹³² *Help: What Sort of Licensing does Getty Images Support?*, FLICKR, <http://www.flickr.com/help/gettyimages/?search=getty#402252> (last visited Mar. 25, 2012); *License Information*, GETTY IMAGES, <http://www.gettyimages.com/Corporate/LicenseInfo.aspx> (last visited Mar. 25, 2012) (further explaining licensing information for Getty images).

¹³³ See *Help: Can I License My Creative Commons Content?*, FLICKR, <http://www.flickr.com/help/gettyimages/?search=creative+commons#425795> (last visited Feb. 1, 2012).

¹³⁴ See YouTube TOS *supra* note 85.

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grants some privileged use to other users.¹³⁵ Accordingly, the freedom of choice users hold under the Flickr model is actually larger than the one they have under the YouTube model.

C. Facebook

Facebook is one of the biggest social networks, operating at the moment with more than 500 million members,¹³⁶ and is said to be the most used social network today.¹³⁷ Facebook declares in its Principle sheet, which provides guidance to the “Statement of Rights and Responsibilities” (Facebook’s TOU), that “We are building Facebook to make the world more open and transparent, which we believe will create greater understanding and connection. Facebook promotes openness and transparency by giving individuals greater power to share and connect.”¹³⁸ In doing so, Facebook provides its vision for the sharing and freedoms that guide its ideology. Among other things, Facebook supports the freedom of people to share whatever they want in any format that they want. Facebook’s TOU represents a belief that people should own their information and should be able to take their information with them anywhere they want, which includes removing it from Facebook.¹³⁹

Facebook’s TOU is similar to other sharing platforms’ TOU agreements. Under paragraph 2 of the TOU, “Sharing Your Content and Information” Facebook declares the user as the owner of content that is covered by intellectual property rights, but similar to any other platform the user grants Facebook “a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [users] post on or in connection with Facebook (IP License).”¹⁴⁰ According to the definitions “use” entails: “use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.”¹⁴¹

¹³⁵ *Id.*

¹³⁶ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Mar. 25, 2012).

¹³⁷ See Andy Kazeniak, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, COMPETE PULSE (Feb. 9, 2009, 2:57 PM), <http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network/>.

¹³⁸ *Facebook Principles*, FACEBOOK, <http://www.facebook.com/principles.php> (last visited Mar. 25, 2012).

¹³⁹ *Id.*

¹⁴⁰ *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last visited Mar. 25, 2012).

¹⁴¹ *Id.*

And similar to other platforms, Facebook asks users to respect other users' rights.¹⁴² It does not, however, grant any rights in the content to other users.¹⁴³

Although Facebook's model is not different than the models of other platforms with respect to the division of users' right and using its TOU to grant itself permission for derivative work use, it seems that Facebook's TOU is worded in a way that is more accessible to the ordinary user. Unlike other platforms, Facebook provides a comprehensive description of its ideology and principles.¹⁴⁴ But most importantly, Facebook presents a unique model regarding modification of the TOU terms. While the other surveyed platforms can change the TOU unilaterally without notice,¹⁴⁵ Facebook supports a transparent process under which there is an organized procedure of notice and voting on amendments to its principles or TOU, which binds Facebook to certain rules.¹⁴⁶ Facebook's model in this regard is unique by showing respect for the users and their contribution to the platform, and by providing users the ability to influence the terms that govern them.

D. MySpace

MySpace is a social network with more than 62 million users.¹⁴⁷ One of MySpace's features is MySpace Music, which

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See Facebook Principles*, FACEBOOK, *supra* note 138.

¹⁴⁵ *See* YouTube TOS, *supra* note 85, at paragraph 14 ("YouTube reserves the right to amend these Terms of Service at any time and without notice, and it is your responsibility to review these Terms of Service for any changes."); Yahoo TOS, *supra* note 115, at para. 1 ("Yahoo! Inc. ("Yahoo!") welcomes you. Yahoo! provides the Yahoo! Services (defined below) to you subject to the following Terms of Service ("TOS"), which may be updated by us from time to time *without notice to you.*") (emphasis added); *Terms of Use Agreement*, MYSFACE, <http://www.myspace.com/help/terms> (last visited Mar. 25, 2012); *Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last modified Mar. 1, 2012) [hereinafter Google TOS] ("You should look at the terms regularly. We'll post notice of modifications to these terms on this page. We'll post notice of modified additional terms in [Blogger].").

¹⁴⁶ *Statement of Rights and Responsibilities*, FACEBOOK, *supra* note 140, at paragraph 13 (Facebook will provide notice to users who register for it within a certain limited number of days, if more than 7,000 comments were posted on a suggested amendment, Facebook will conduct a vote that will bind Facebook so long as more than 30 percent of the active registered users have voted). *See also Facebook Principles*, FACEBOOK, *supra* note 138, at paragraph 9.

¹⁴⁷ Jon Swartz, *Myspace CEO Believes in Social Network*, USA TODAY (Mar.

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enables artists to upload their songs and gain wide exposure.¹⁴⁸ Users of MySpace grant MySpace limited license “to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute” in connection with the MySpace service.¹⁴⁹ MySpace explicitly forbids the modification of other users’ content: “The MySpace Services contain Content of Users and other MySpace licensors. Except as provided within this Agreement, you may not copy, modify, translate, publish, broadcast, transmit, distribute, perform, display, sell or otherwise use any Content appearing on or through the MySpace Services.”¹⁵⁰ Thus, under the MySpace TOU, other users do not have any authorization to use UGC unless they first receive permission.

MySpace also provides information concerning copyright: what is copyright, what is protected under copyright, what right copyright entails, who is an owner, and more.¹⁵¹ However, unlike other sites mentioned above, MySpace fails to provide any information about ways to share UGC or offer any licensing possibilities such as Creative Commons.¹⁵²

E. Blogger

Blogger is a blog publishing service owned by Google.¹⁵³ Blogger users retain their copyright over the content they submit, although they have to grant Google a broad license to use their content.¹⁵⁴ Users give Google “worldwide license to use,

31, 2011, 1:57:30 PM), <http://www.usatoday.com/tech/news/2011-03-30-myspace-ceo-mike-jones.htm>.

¹⁴⁸ *Myspace Music Launches New Tools for Artists; Partners with ReverbNation*, MYSPACE, <http://www.myspace.com/pressroom/2010/12/myspace-music-launches-new-tools-for-artists-partners-with-reverbnation/> (last visited Mar. 25, 2012) (“Myspace Music offers an ever-growing catalog of freely streamable audio and video content to users and provides major, independent, and unsigned artists alike with the tools to reach new audiences.”).

¹⁴⁹ *Myspace.com Terms of Use Agreement*, MYSPACE (June 25, 2009), <http://www.myspace.com/help/terms> [hereinafter Myspace TOS].

¹⁵⁰ *Id.*

¹⁵¹ *Copyright 101*, Myspace Help, MYSPACE, (Dec. 21, 2011, 5:20 PM), http://myspace2.custhelp.com/app/answers/detail/a_id/744/kw/copyright.

¹⁵² *Cf. supra* Part III.A–B (explaining that Youtube and Flickr provide information about Creative Commons).

¹⁵³ *See The Story of Blogger*, BLOGGER, <http://www.blogger.com/about> (last visited May 24, 2012) (explaining that Google purchased Blogger, yet remains an entity within Google).

¹⁵⁴ Google TOS, *supra* note 145. Note that Google’s TOS was amended on Mar. 1, 2012, to unify the use and privacy policies across all of the Google

host, store, reproduce, modify, create derivative works . . . , communicate, publish, publicly perform, publicly display and distribute such content.”¹⁵⁵ Google may use this license “for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.”¹⁵⁶ Google does not grant rights in the content to other users.¹⁵⁷ Specific to Blogger, there are two separate help pages dedicated to educating users about copyright, the Blogger Copyright Policy page and the Blogger Copyright Tips page; the main concern of both of these pages seems to be preventing users from posting protected material.¹⁵⁸ Finally, it should be noted, like YouTube, one of Blogger’s features is an AdSense service, under which users of Blogger can earn money by allowing relevant advertisements to appear on their blogs, thus raising a question of motivation.¹⁵⁹

Overall, as can be seen by the above survey of sharing platforms, each issue themselves licenses to use the UGC, but do not try to appropriate the content for themselves, and they do not use the TOU to acquire property on the UGC—a practice that preserves the ownership of the users who created the relevant content. One possible reason for this is that sharing platforms compete with each other for users; thus, each platform seeks to give the users preferable terms in order to attract as many users as possible to its platforms.¹⁶⁰

owned services. *Id.* The new policy states that additional “Service”-specific terms may add to the general terms, however, the Terms of Services hyperlink on the Blogger Polices page simply redirects to the general Google terms page. *Id.* *Blogger Polices*, GOOGLE, <http://support.google.com/blogger/bin/answer.py?hl=en&answer=41935&topic=12467&ctx=topic> (last visited May 24, 2012) [hereinafter *Blogger Polices*].

¹⁵⁵ Google TOS, *supra* note 145.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* (allowing Google users to retain rights to the content they submit); *cf.* YouTube TOS, *supra* note 85 (granting users a license to other users’ content).

¹⁵⁸ *See* *Blogger Polices*, *supra* note 154 (containing hyperlinks to the “Blogger Copyright Tips” page and the “Blogger Copyright Policy” page). The former Blogger-specific terms of use page explicitly informed users about the option to license their material under a Creative Commons’ license, although the Blogger Policy pages themselves display a Creative Commons license. *See id.* Google TOS, *supra* note 145.

¹⁵⁹ *About AdSense for Your Blog, Blogger Help*, GOOGLE, <http://support.google.com/blogger/bin/answer.py?hl=en&answer=42534> (last visited Mar. 25, 2012); *Google AdSense Product Tour*, GOOGLE, https://www.google.com/adsense/www/en_US/tour/index.html (last visited Mar. 25, 2012).

¹⁶⁰ Steven Hetcher, *User-Generated Content and The Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA

It is plausible, however, as Steven Hetcher suggests, that this is not the case; since the terms setting the control and identifying the users as the owners of their content are set in the TOU, it is unlikely that this is done for competition reasons as users rarely read the TOU which are construed in a complicated way such that average users cannot understand them.¹⁶¹ If indeed sharing platforms would have wanted to use it as a competitive advantage, only providing such terms in the TOU would not serve the promotional purpose—because most do not know about them.¹⁶² In Hetcher's opinion, the main reason for keeping the ownership with the users is to avoid liability for third party infringement.¹⁶³ Having ownership may risk the sharing platforms' ability to claim a safe harbor defense against secondary liability, as the closer the sharing platform is to ownership of the content, the harder it is for it to claim safe harbor, and as Hetcher explains, unlike a competitive advantage, this goal can be achieved without users' awareness of the TOU.¹⁶⁴

COMPUTER & HIGH TECH. L.J. 829, 861 (2008) [hereinafter Hetcher, *Part Two*]. Users are very concerned with the TOUs of their sharing platforms. Users may delete their accounts or boycott sharing platforms when modifications they do not like are made to the TOU. *See, e.g.*, Edward Champion, *I'm Done with Facebook*, RELUCTANT HABITS (Feb. 15, 2009), <http://www.edrants.com/im-done-with-facebook/> (explaining a change in Facebook's terms of service which arguably 'seize[d] the rights' of anything created and distributed through its network); *Boycott Facebook! Here's Why*, PEREZHILTON.COM (Feb. 16, 2009 1:45 PM), <http://perezhilton.com/2009-02-16-boycott-facebook-heres-why> (encouraging readers to boycott Facebook because of the modifications they made to their terms of service); Stan Schroeder, *Facebook: All Your Stuff is Ours, Even if You Quit*, MASHABLE (Feb. 16, 2009), <http://mashable.com/2009/02/16/facebook-tos-privacy/> (warning readers of the changes to Facebook's terms of service and advising them "not to take it lightly"). Platforms seek to attract and keep as many users as possible, and thus, they will address Users' concerns and modify their TOUs in a way that Users find agreeable. *See, e.g.*, Brad Stone & Brian Stelter, *Facebook Backtracks on Use Terms*, N.Y. TIMES, Feb. 19, 2009, *available at* <http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html?> (explaining how changes that Facebook made to their terms of service caused an uproar among its users to which Facebook responded within days, by eliminating the changes.); Ben Popken, *Facebook Reverts Back to Old Terms of Service*, THE CONSUMERIST (Feb. 18, 2009 6:12 PM), <http://consumerist.com/2009/02/facebook-reverts-back-to-old-terms-of-service.html> (explaining Facebook's decision to revert back to its original terms of service in response to the "global attention and outcry" that ensued as a result of a change in terms).

¹⁶¹ Hetcher, *Part Two*, *supra* note 160, at 861.

¹⁶² *Id.*

¹⁶³ *Id.* at 861–62.

¹⁶⁴ *Id.* at 862.

Regardless of the reasons behind it, in practice, the users retain the ownership rights in their work that is posted on the sharing platforms.

To summarize, the regulatory aspect of the various representative sharing platforms considered is quite similar. Most of the sharing platforms examined receive, through their TOU, a broad license to use users' content, including the right to modify that content. The same broad license is not granted to other users, and at best other users may receive a narrower license in the TOU (which does not grant the right to modify the UGC work). As for the educational aspect, while some sharing platforms provide extensive information concerning copyright and infringement of copyright, the information provided about remix of UGC is very limited, and concerns only the use of Creative Commons license; and none of the sharing platforms provide information about the importance of sharing in general, or the importance of remix in particular.¹⁶⁵

IV. REMIX CULTURE

One in four young people engage in remix and create content that incorporates other original content.¹⁶⁶ This indicates that the remix phenomenon has a firm grip in the UGC arena. Remix, as a form of UGC, has raised a lot of debate because remix is usually done without the consent of the original author, and is considered infringement of copyright law.¹⁶⁷ In this part, I survey the different arguments that support and reject a broad "right" for remix in order to understand the support for remix between users themselves (i.e., permission to create remix from original UGC). To date, it seems that most of the discussion concerning remix takes place in the realm of mass media industry as opposed to the area of individual users; and little attention has been given to the question of remixing original UGC. The discussion concerning remixing and the sharing of original UGC among users derives from the assumption that if mass media content should be open for remix, then all the more original UGC

¹⁶⁵ See *supra* Part III (discussing the various practices of sharing platforms).

¹⁶⁶ PALFREY & GASSER, *supra* note 1, at 113.

¹⁶⁷ Emily Harper, Note, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society By Storm*, 39 HOFSTRA L. REV. 405, 417, ("[M]ashup artists rarely seek permission to put songs in their mashups. . . [and] artists who fail to obtain proper authorization before using copyrighted material to create new works are liable for copyright infringement").

should be open to the same. Thus, it seems that there are no different considerations concerning remix that differentiate remix of original UGC from remix of mass media content. I argue, however, that this conclusion is not correct. At first glance, remix of original UGC content might seem to be an obvious product of these discussions; in reality, some of the arguments against remix, such as the personhood theory, are stronger when applied to original UGC. Therefore, arguments both for and against the remix of UGC need to be considered on their own merits.

A. *Opposition Against Remix Culture*

I begin by concentrating on three general arguments presented in opposition of modifications of existing works. By describing these arguments as represented in general, I intend to differentiate them from the more specific arguments which address the question of remix specifically as part of the relationship between the mass media industry and users. The arguments described hereinafter can, theoretically, be applied equally to the question of remix of original UGC. These three arguments are in essence an application of the three major theories represented as justifying intellectual property rights in general.¹⁶⁸

The first argument is a utilitarian one: since cultural goods are nonrival and nonexcludable, they are public goods, and as such can be used by anyone.¹⁶⁹ In this context, intellectual property rights are meant to serve as a means to assure the innovator that she has the opportunity to profit from her innovation, and in doing so incentivize her to create and disseminate innovations so that ultimately, society can benefit from the innovation.¹⁷⁰ This theory not only justifies granting the creator control over verbatim copying of the innovation, but also justifies giving the creator control on modifications of the work—because, on balance, the social benefits derived from creating an optimal incentive to create outweigh the social costs of granting such broad rights.¹⁷¹

¹⁶⁸ William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1446, 1450–55 (2010) [hereinafter Fisher, *User Innovation*].

¹⁶⁹ *Id.* at 1446.

¹⁷⁰ See Fisher, *User Innovation*, *supra* note 168, at 1446–47.

¹⁷¹ See *id.* at 1447–49.

incomplete, as the strength of this argument is context related and does not lead to the same result in all possible situations. For instance, while on the extreme end of the spectrum there are times where the broadest protection is needed, on the other end of the spectrum there are situations where nonmonetary incentives will suffice to achieve the optimal level of creation.¹⁷²

It may also be argued that the case of original UGC lies at the narrower end of the spectrum, where nonmonetary incentives are sufficient to encourage creation, and granting the right to derivative work is not justified in this environment.¹⁷³ This argument is furthered by the consideration, already elaborated, that many original UGCs are amateur and noncommercial.¹⁷⁴ I oppose this contention.

First, as discussed above, the notion that UGC is just amateur content without any commercial interests is no longer correct; there are economic forces operating on users who create UGC. Although economic forces are not necessarily the initial incentive to create, they can become a larger part of the users' interest along the way.¹⁷⁵ As the UGC world continues to expand and develop, more commercial opportunities for using UGC will continue to develop, and commercial interests might become part of initial motives to create.¹⁷⁶ Such development is problematic for the purpose of remix, however, as it will inevitably lead to enclosure movement.¹⁷⁷ Second, as will be elaborated further on, this claim only relies on the utilitarian approach of intellectual property.¹⁷⁸ Nonetheless, in the context of original UGC, the personhood theory is very much relevant and provides strong

¹⁷² See *id.* at 1447, 1452–1454 (providing contextual differences in the degree to which monetary incentives may affect creativity and the correlating need for intellectual property protection).

¹⁷³ *Id.* at 1447. See also Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 123, 125 (describing UGC as typically nonprofit activity motivated by various social motivations, but acknowledging the raising of commercial interests).

¹⁷⁴ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 118 (describing most UGC as amateur, not professional, and not commercial).

¹⁷⁵ See *id.* at 119, 123–25 (explaining that while UGC is most often produced with no expectation of economic payment, it may later become economically viable for use by a third party or the creator in a commercial setting).

¹⁷⁶ See Elkin-Koren, *Governing Access*, *supra* note 7, at 16–17.

¹⁷⁷ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 129–30 (proposing that increased commercial interest in UGC may compel creators of UGC to produce for profit).

¹⁷⁸ See *infra* pp. 317–18.

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support for granting creators broad intellectual property rights, among which is the right to control modifications of their creation.¹⁷⁹

The second argument is a moral argument. The creator invested efforts, labor, time, and sometimes money to create the product we all enjoy; using her work without compensating her is immoral.¹⁸⁰ However, this argument, as Fisher indicates, has merits when we consider exact copying, but it does not necessarily lead to the same conclusion when we consider derivative work.¹⁸¹

The third argument is the personhood argument. The personhood theory is positioned on the notion that there exists a connection between one's work and one's identity and that through their works people identify and express themselves and their personalities and thus, people treat their works as extensions of self.¹⁸² The personhood theory justifies recognizing the author's right to prevent destruction of their work even after it has left their control.¹⁸³ Still, reducing control can to the contrary reduce the author's pain. Since under the current rule the author controls the right to modify, any modification will be perceived as endorsed or created by her, creating distress to her when she is dissatisfied by the result.¹⁸⁴ The theory posits, however, that if there was a rule permitting modification while contemporaneously requiring a clear indication that a modification was made, the author's pain will be reduced.¹⁸⁵

While these oppositions of users' right to modify existing content are applicable to modification of mass media content as well as to original UGC, Robert Merges focuses his analysis of the subject on the relationships between mass media industry and remix.¹⁸⁶ Merges acknowledges that remix has potential cultural benefits but disagrees that the implication of remix is a drastic change to the copyright law.¹⁸⁷ His first argument rests

¹⁷⁹ See Fisher, *User Innovation*, *supra* note 168, at 1451–52 (explaining the “personhood theory” and how it relates to UGC creators’ possible need to control product modifications).

¹⁸⁰ See *id.* at 1450–51.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1451.

¹⁸³ *Id.* at 1451.

¹⁸⁴ Fisher, *User Innovation*, *supra* note 168, at 1451–52.

¹⁸⁵ *Id.* at 1452.

¹⁸⁶ Merges, *Locke Remix*, *supra* note 6, at 1262–66.

¹⁸⁷ *Id.* at 1262.

on practical grounds; high enforcement costs and consumer's demand for more freedom relating to rights are the informal reality, which leads owners to abstain from enforcing their rights and consequently creating a right to remix.¹⁸⁸ Market practices bear more significance for remix than legal reforms.¹⁸⁹ In fact, Merges claims, remix culture has grown despite the existence of the law, the existence of ability to enforce rights do not create a "chilling effect," as most remixers will not be deterred by the possibility of legal liability.¹⁹⁰ More importantly, even if some might be deterred, there is no justification to grant full legal right to remix as the law's purpose is to create a balance between creators and users, not maximize remix.¹⁹¹ Content creators deserve to reserve their rights, and thereby control their work even if in preserving their right, remixers bear some legal risk.¹⁹² Such risk cannot be the ground of stripping content owners of their respective rights.¹⁹³ Moreover, Merges refutes the necessity of remix as a self-expression tool in light of mass media control of symbols and cultural content.¹⁹⁴ He holds that exposure to mass media is not inevitable, individuals have a choice whether to opt out from or be exposed to mass media culture; thus, there should be limits to remix of mass media.¹⁹⁵

Merges' second argument concentrates on the people behind the corporate mask. He claims that performing radical changes in the copyright law would be unfair to the people who create the mass media content.¹⁹⁶ In doing so, Merges offers us a different narrative by looking at the people behind the label of mass media such as those working for big media companies like Disney as well as independent creators. Merges explains how such players see content creation as their work, and how they hope to earn a living from it.¹⁹⁷ Focusing the narrative exclusively on self-expression and users rights to remix makes one forget the "people who are just trying to make a living."¹⁹⁸ When

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1263–64.

¹⁹¹ *Id.* at 1264.

¹⁹² Merges, *Locke Remix*, *supra* note 6.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1267.

¹⁹⁵ *See id.* at 1267–68.

¹⁹⁶ *Id.* at 1271–72.

¹⁹⁷ *Id.* at 1269–72.

¹⁹⁸ Merges, *Locke Remix*, *supra* note 6, at 1271.

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considering that there are two interests involved, those the creators and the remixers, what is needed is a balance, and a drastic change to the law is not the right balance, especially when considering that much of the material is free for use anyway.¹⁹⁹

Merges not only suggests a different normative argument focusing on the ‘little people’ but also claims that weakening intellectual property protection in the digital era and focusing on the amateur content will destroy the “creative professional class” who make a living from their creativity through the mass media industry and depend on the strength of intellectual property rights to protect their livelihood.²⁰⁰

Merges stronger argument rests on the distinctions he makes between the levels of originality of each group and the corresponding weight to be given to each groups’ claims.²⁰¹ Original content is more “valuable” than remix content, the claim of the remixers is not on the same level as claims of original creators because original content is the input for remix, and without the former the latter does not exist.²⁰² According to Merges: “Originality which draws on ideas, rather than fixed and final creations, is to be privileged over originality that mixes together preexisting final works.”²⁰³ Consequently, original creators should have control as to whether, when, and how their work becomes an input for others.²⁰⁴ Furthermore, preserving the current regime rather than weakening it guarantees flexibility. Under a property right regime, individuals have a choice to relinquish those rights and thus, changing the law will lead to a loss of flexibility.²⁰⁵ Merges suggests two updates to the copyright law. First, he recommends—legislate a “right to include” which will enable the use of the work.²⁰⁶ According to Merges, Congress should legislate for a provision that enables items to be sold with a “Copyright Waiver” notice that will indicate to other users that the copyright holder has relinquished

¹⁹⁹ *Id.* at 1273.

²⁰⁰ Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1250, 1252 (2008) [hereinafter Merges, *Property in the Digital Era*].

²⁰¹ *Id.* at 1258–59.

²⁰² *Id.* at 1259.

²⁰³ *Id.* at 1260.

²⁰⁴ *Id.* at 1259.

²⁰⁵ Merges, *Property in the Digital Era*, *supra* note 200, at 1274.

²⁰⁶ *Id.* at 1272.

her rights.²⁰⁷ This scheme, while similar to voluntary licensing schemes like Creative Commons, enables exempting rights, but would facilitate more uniformity in its status as a statutory notice.²⁰⁸ Second, since collaborative projects are becoming common but traditional intellectual property concentrates on individual authors and has trouble recognizing rights in group creative activity, there should be a model to recognize group rights in collaborative projects in order to award group efforts.²⁰⁹

The concern for the place of traditional mass media institutions is also central in the strong objection voiced by Andrew Keen to the amateur culture that evolved in the Internet. Keen's objection to the UGC is much wider than the concern Merges conveyed, and touches upon moral questions of education, quality, and true meaningful discussion.²¹⁰ Keen sees amateur culture and sites like YouTube or Facebook as threatening cultural standards, morals, and most importantly, the traditional mass media institutions.²¹¹ As the argument goes, "democratization" of the media, the blurring between authors and audience and fact and fiction, leads to confusion, creates a lot of useless information, and makes it difficult to identify reliable information which results in the decline of true civic conversation.²¹² Remix culture, according to Keen, undermines the concept of copyright and authorship, as well as the notion of individual creativity, and replaces it with a "hyperlinking community" engaging in self-references, drawn to the "wisdom" of the crowd.²¹³ Keen also recognizes that traditional media institutions are in decline. Replaced by blogs and free ad sites like Craigslist—the newspaper industry has lost much of its audience and subscribers and is forced into wide scale dismissals, as it is unable to sustain itself through advertisement revenues.²¹⁴

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1272–73.

²⁰⁹ *Id.* at 1273–74.

²¹⁰ See ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE 1–9 (2007) (describing Web 2.0 new media and its adverse effect on academic discourse, culture, and media consumption).

²¹¹ See *id.* at 4–5, 7.

²¹² *Id.* at 27.

²¹³ *Id.* at 44.

²¹⁴ See *id.* at 8 ("In the first quarter of 2006, profits plummeted dramatically at all the major newspaper companies—down 69 percent at the New York Times Company, 28 percent at the Tribune Company, and 11 percent at Gannett, the nation's largest newspaper company. Circulation is down, too. At

If traditional institutions of media were all to die who would replace them? According to Keen those would be bloggers, social networking sites, and YouTube.²¹⁵ And the result—“What happens, you might ask, when ignorance meets egoism meets bad taste meets mob rule? The monkeys take over. Say good-bye to today’s experts and cultural gatekeepers. . . . In today’s cult of the amateur, the monkeys are running the show.”²¹⁶ Moreover, this is not a worthy substitution because amateurs do not have the talent, experience, expertise, resources, and code of ethics traditional media possess.²¹⁷ For example, while traditional media denounces and disciplines the staging of facts, such behavior runs rampant on the Internet.²¹⁸ At the same time, free amateur content undermines the authority of the experts by placing amateurs on the same level (as Wikipedia does) all the while traditional institutions (like Encyclopedia Britannica) that employ experts and adhere to the accuracy of facts are unable to battle the free content offered on the Internet.²¹⁹ This results in the diminished value of the expert class and job losses, which in turn result in the loss of cultural gatekeepers who have traditionally helped consumers of information differentiate between what is important and what is not, and what is reliable and what is not.²²⁰ The consumers become victims who are unable to differentiate misinformation from reliable fact.²²¹ Furthermore, sites like YouTube, MySpace, and Google are not an equal substitute to the traditional media, as they themselves build on it.²²²

Keen suggests embracing projects that strengthen the authority of the expert and keep a clear line between amateur and professional content, such as the Citizendium project that builds on the idea of Wikipedia, but gives more room and respect to the experts.²²³ Finally, Keen supports the filing of more legal

the *San Francisco Chronicle*. . . readership was down a dizzying 16 percent in the middle two quarters of 2005 alone. And in 2007, Time Inc., laid off almost 3000 people, primarily from editorial, from such magazines as *Times*, *People*, and *Sports Illustrated*.”)

²¹⁵ *Id.* at 9.

²¹⁶ KEEN, *supra* note 210.

²¹⁷ *Id.* at 52.

²¹⁸ *Id.* at 53–54.

²¹⁹ *Id.* at 44–45.

²²⁰ *Id.* at 45.

²²¹ KEEN, *supra* note 210, at 45.

²²² *Id.* at 9.

²²³ *See id.* at 184–99 (noting how the Citizendium project “incorporate[s] the

suits against sharing platforms such as MySpace and YouTube, as a tool to signal the high price of intellectual property theft and to deter file sharing and the “cut-and-paste culture.”²²⁴

However, Keen’s theory is contested. For instance, Benkler argues that while the Internet turns its readers into active participants in the public sphere, which can result in diversity of opinions and information, it does not lead to information overload and the fragmentation of public discourse.²²⁵ To the contrary, the Internet structure creates an independent filter that leads only to important and valued information being viewed by most people.²²⁶ When looking at the Internet architecture, we can see that sites tend to cluster according to topics like social and political views. Filtration starts at the small clusters according to specific subjects and only the most valuable information surfaces to reach the most viewed site at that level. From there, filtration continues to bigger clusters until it reaches the most visible sites on the web where a common theme may emerge and serve as a basis for public discourse.²²⁷ Additionally, important views reach the highly visible sites and thus, they become susceptible to opposition as well.²²⁸ Furthermore, unlike mass media, the Internet structure just described prevents centralization because by creating multiple paths of connections between different clusters and sites, the Internet structure prevents the singular control of information flow and editorial decisions.²²⁹

To conclude, much of the discussion surrounding the faults of remix culture on the Internet centers on the connection between the mass media industry and amateur users and mass media content as the building blocks of UGC. While Keen’s criticism raises questions as to the role of the Internet and UGC content generally as opposed to the role of professional content in mass media, and about the ability of UGC to replace professional

voice and authority of experts with the user-generated content [of Wikipedia]).

²²⁴ See *id.* at 199 (arguing that law suits “send[] a powerful message about the high price of intellectual property theft”).

²²⁵ See BENKLER, *supra* note 4, at 220 (“[T]he social practices of information and discourse allow a very large number of actors to see themselves as potential contributors to public discourse. . .”). “Internet use patterns solve the problem of discourse fragmentation. . .,” *id.* at 238.

²²⁶ *Id.* at 255.

²²⁷ *Id.* at 247–48, 256.

²²⁸ *Id.* at 256–57.

²²⁹ See *id.* at 179 (describing the centralization of mass media). See *id.* at 246–257, 260 (regarding structure of discourse on the Internet).

content and ultimately take over our lives, Merges offers us a new narrative concerning the implication of remix culture on the creative professional class that constitutes ‘the people’ behind faceless media firms. Nonetheless, while neither theory rejects remix culture completely, both question the boundaries of its existence. The disagreement is to *how* remix culture should be allowed and in *what form*, rather than *whether* remix culture should be allowed at all.

Keen would accept models that enable amateur creativity alongside professional creativity, when the latter receives more recognition and is clearly distinguishable from the former. But even if Keen’s criticism rejects remix culture altogether as a culture that ruins the foundation of our moral society and advances misinformation and lack of talent, I question Keen’s initial presumptions as to the character and value of remix. Keen ignores the political and democratic value of enabling many to voice their opinion. He also attributes to the many users who use UGC innocence and lack of understanding and ability to differentiate between amateur content (and thus its reliability, if that is in question) and professional content,²³⁰ but this assumption is not necessarily true or grounded. Moreover, Keen presents a clear dichotomy: mass media is professional content, while UGC is nonprofessional amateur content, although it can be perceived or presented incorrectly as professional.²³¹ This dichotomy, as discussed in section II, does not hold true to the same extent today as it may have in earlier years.

I think that due to the increase of UGC, users have become more aware of the quality of the material presented to them and to the reliability of each source. Moreover, as users become more prominent figures in the Internet world, they become, like with a ‘real’ newspaper, more aware of their reputations (as do the other users) since users do invest time and effort into developing their online personalities, especially in projects where accuracy and reputation of accuracy is important.²³² This alone can be

²³⁰ KEEN, *supra* note 210, at 45–46.

²³¹ *See id.* at 49–52 (questioning whether “citizen journalists” writing things like blogs on the internet can ever be analogized with real, professional, and traditional journalism).

²³² For example, Wikipedia requires users to be accurate and provide citations, as well as provide natural point of view. *Five pillars*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Wikipedia:Five_pillars (last modified Jan. 29, 2012). “All articles must strive for verifiable accuracy.” “Verifiability is one of Wikipedia’s core content policies, along with No original research and Neutral

incentive to provide accurate information. In a more aware and less naïve society than the one portrayed by Keen, Keen's fears that the "monkeys" will rule seems exaggerated. Keen's basic assumption that the Internet leads to the loss of the cultural gatekeepers who ensure reliability and represent the importance of information is problematic. As I discussed above, the dichotomy between responsible professionals and amateurs that do not bear any reliability or responsibility is not entirely true, as there are information outlets on the Internet that care about their reputation. Thus, the dichotomy offered by Keen does not fully represent the complexity that exists in the Internet.

While Merger's argument concerning the superiority of original content as the building blocks of remix have some relevance to the question of remixing original UGC (particularly, it raises the question as to the amount of control original UGC creators should have concerning remixing of their content) it, by itself, does not create a strong argument to prohibit remix. The fact that original UGC serves as input for others does not merit justification for control as it is not indicative of any actual pain or harm caused to the original creator.

However, in my opinion, in the original UGC arena the personhood argument holds a special force and has stronger hold concerning original UGC rather than mass media content. Unlike mass production of cultural content, original UGC is a singular creation that requires efforts, investment of time and labor, and many times, it contains bits of the user's personality. The connection between the creator and the creation and the reflection of oneself through the creation is strong in the case of original UGC and is certainly stronger than in the context of mass media. Users express themselves through their creations, and that holds a special force even if such creation is incentivized by nonmonetary rewards, such as self-expression, engagement, and even fame. The personhood theory forces us to deal with the dilemma of promoting remix of original UGC, given the

point of view. These policies jointly determine the type and quality of material that is acceptable in articles. They should not be interpreted in isolation from one another, and editors should familiarize themselves with the key points of all three." *Verifiability*, WIKIPEDIA.COM, <http://en.wikipedia.org/wiki/Wikipedia:Verifiability> (last modified Jan. 29, 2012). *See also*, Picker, *supra* note 76, at 6–7 (discussing how users build reputation on eBay and that being a cause for stickiness); Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 117, 133 (describing how users stick to a certain social network due to inability to transfer assets such as content, contacts, and personal history).

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possibility that in an environment often not driven by monetary rewards, compensation for such conduct will not necessarily reduce the pain an original creator will feel due to modification of her work. Similarly, since original UGC can carry a more personal character and attachment, the moral argument and fairness of the remix can also have a greater hold for original UGC.

Additionally, utilitarian argument also has some place in this discussion. If users know that their works are exposed to any remix by others and that they have no control over the fate of their work, due to the personal connection between the creator and the creation, this may lead users to refrain from publishing their content on sharing platforms. This outcome will also depend on other variables that play an important role for users, such as whether the personality interest is more important than other nonmonetary gains created by publication of the content, for instance the ability to share and engage with others. While there is no decisive answer that will apply in all cases, we can assume that the awareness of the lack of control over one's published work will deter, at least to some extent, the publication of content that carries personal importance to the creator. Furthermore, even if we take into account that some users have commercial interests and thus, some monetary compensation can reduce the pain of modification a user will feel, we also have to take into account that remix can hurt those financial interests (when, for example, the remix is a substitute to the original work), and consequently might reduce users' incentives to publish or even create their materials.

Before coming to a final conclusion, we have to address the counter arguments supporting the remix culture, and analyze whether any of the arguments supporting remix tilt the balance in favor of remix culture.

B. Support for Remix Culture

Similar to the case against remix culture, there are three general arguments relevant to and in favor of the general question of modification; but these arguments can be applied with the same strength to the question of remix of original UGC.²³³ The first argument concerns economic efficiency. Under

²³³ Lee, *supra* note 14, at 1459–60. See also Fisher, *User Innovation*, *supra* note 168, at 1455, 58, 63.

this argument, original authors should not have the ability to exercise their rights when the costs of exercising such rights are greater than the benefits.²³⁴ An example of such instance is the case of parody; parody is socially valuable, but creators do not like to be laughed at, so the price to compensate the authors for this injury is too high. Therefore, if creators had the right to control and prevent the creation of parodies, there would be no parodies even though their social value is greater than their social costs, resulting in market failure.²³⁵ One solution to this problem is recognizing modification, like parodies, as fair use.²³⁶

The second argument concerns human flourishing. As Fisher demonstrates it is a two stage process, first, a description of what components will lead to human flourishing and good life, and second, an examination of how the legal rules should be changed to accommodate access to such a flourishing and good life.²³⁷ Fisher identifies five components that are needed for what constitutes the good life: autonomy, competence, engagement, self-expression, and community.²³⁸ He concludes that in all these dimensions, users' innovation leads to self-fulfillment; hence users' innovation should be protected by the law in order to advance human flourishing.²³⁹

The third argument concerns distributive justice. There is a high concentration of wealth in the hands of a few, which, among other things, leads to the centralization of the creation of symbols through which we define ourselves, resulting in semiotic power in the hands of the few.²⁴⁰ This concentration of power and control, the argument goes, is too high and the law should reduce it.²⁴¹ In the intellectual property field, such a goal should lead to greater freedom for users to innovate and remix.²⁴² Fisher reviewed possible solutions: This can be done by adjustments to the fair use doctrine through reducing the costs to creators who do not hold sufficient funds, or by creating privileged treatment to modified works that attack political or economic concentrations of

²³⁴ Fisher, *User Innovation*, *supra* note 168, at 1455.

²³⁵ *Id.* at 1455–56.

²³⁶ *Id.*

²³⁷ *Id.* at 1463, 74.

²³⁸ *Id.* at 1471.

²³⁹ *Id.* at 14712.

²⁴⁰ Fisher, *User Innovation*, *supra* note 168, at 1458–59.

²⁴¹ *Id.* at 1459.

²⁴² *Id.* at 1459–60.

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power.²⁴³ The third suggestion recommends that modification of mass media content should be permitted as a way to promote “semiotic democracy.”²⁴⁴ Semiotic democracy is described as the “decentralization of the power of making cultural meaning”²⁴⁵ and it is advanced by the ability to modify mass media content, especially when such modification is made public.²⁴⁶ In another place Fisher elaborates on the benefits and costs of semiotic democracy.²⁴⁷ The technological ability of each individual to engage creatively with cultural content, a privilege reserved for the few in the past, creates potential for all people to reshape and construct their cultural environment. Accordingly, encouraging people to become more engaged and less estranged, makes the cultural environment more interesting.²⁴⁸ Nevertheless, semiotic democracy bears with it costs to authors and society.²⁴⁹ Other than the damage to the individual, as modification can hurt the personality interest of the author, modification of cultural products also bears damage to society as a whole, by creating instability.²⁵⁰ Modification may change the meaning of the work and if the altered version is widely disseminated, it may corrode the ability to use the work as a cultural reference since the work no longer carries one definite meaning.²⁵¹ For the same reason, modification can also damage the prospect of making additional transformative use of the work in the future.²⁵² Finally, since there is no longer consistency, it can hurt the ability of future society to understand the society of today.²⁵³

One of the most well-known and prominent supporters of remix culture is Lawrence Lessig.²⁵⁴ According to Lessig, remix is the new form of writing and communicating among the people.²⁵⁵ Text has become the way in which the elite communicate, while remix media has become the way the masses communicate; and

²⁴³ *Id.* at 1460.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Fisher, *User Innovation*, *supra* note 168, at 1460.

²⁴⁷ FISHER, PROMISES TO KEEP, *supra* note 18, at 30–31.

²⁴⁸ *Id.* at 31.

²⁴⁹ *Id.* at 37.

²⁵⁰ *Id.* at 36–37.

²⁵¹ *Id.* at 36.

²⁵² *Id.* at 36–37.

²⁵³ FISHER, PROMISES TO KEEP, *supra* note 18, at 37.

²⁵⁴ Edward Lee, *Remixing Lessig*, 6 *U.S. J. L. & POL'Y FOR INFO. SOC'Y* 41, 41–43 (2010).

²⁵⁵ LESSIG, *supra* note 4, at 69.

as technology advances, more people are able to participate in the discussion.²⁵⁶ The significance of remix is defined by its cultural references, thus, the original is a necessary component to the message.²⁵⁷ Through media remix, for example, people can present an argument that is more effective than just using words, simply by the mere fact that images and sounds make a stronger impression than words.²⁵⁸ Furthermore, claims Lessig, our attitude towards remix is affixed by traditional norms that cannot be justified today.²⁵⁹ For instance, we find it natural to quote in writing without asking permission but not otherwise (e.g., quoting Bob Dylan singing, as opposed to quoting Bob Dylan lyrics, is prohibited) in essence, the act of remixing and the act of quoting are the same, the only difference is the source of the media from which we are quoting. This distinction is built on a traditional conception of writing as a tool available to all, while filmmaking and recording was historically the estate of the few.²⁶⁰ New technology now allows anybody to create films and/or records.²⁶¹

But, why is remix important? Lessig provides two social benefits that remix offers.²⁶² The first is community: remix happens within a community that supports itself and in which its members share and display their creations.²⁶³ This mere activity is valuable regardless of the quality of the content shared.²⁶⁴ The second value is education: remix is used as part of “interest-based learning,” when children engage with things that they are interested in, they learn more effectively.²⁶⁵ When children are engaged with remix, they possess the increased opportunity to focus more, overcome language barriers, etc. In summary, remix has become another form of learning.²⁶⁶ While remix does not necessarily guarantee quality material, it is still an important

²⁵⁶ *Id.* at 68.

²⁵⁷ *Id.* at 74–75.

²⁵⁸ *Id.* at 74. *See also* Halbert, *supra* note 11, at 938 (stating that having access to videos is an “important mechanism for communication in a world where our primary cultural references are visual instead of text-based”).

²⁵⁹ LESSIG, *supra* note 4, at 81–83.

²⁶⁰ *Id.* at 53–4.

²⁶¹ *See id.*

²⁶² *Id.* at 76–77.

²⁶³ *Id.* at 77.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 80.

²⁶⁶ LESSIG, *supra* note 4, at 80–82.

tool enabling millions to express their views.²⁶⁷ In this realm the price of the copyright wars is to make an entire generation criminal. “In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?”²⁶⁸

Neil Netanel offers a constitutional justification for copyright law in the UGC era.²⁶⁹ By supporting commercial mass media, copyright law supports free expression, as mass media advances free expression in ways that UGC cannot.²⁷⁰ Due to lack of resources and network characteristics, UGC cannot be substituted for mass media and provide public discourse or be a public watchdog as effectively as mass media can.²⁷¹ In this context, copyright law secures the financial independence of the media.²⁷² Nonetheless, Netanel’s attitude towards remix activity is not negative.²⁷³ He recognizes the importance of engaging with associative cultural goods that are viewed or read by many, as “[e]ffective speech commonly entails building upon specific works that have particular salience for the intended audience.”²⁷⁴ Existing works bear meaning to the designated audience, without the ability to engage with existing cultural works, especially iconic works, authors could not effectively convey their message.²⁷⁵ Moreover, sometimes speakers need to use a

²⁶⁷ *Id.* at 92–93.

²⁶⁸ *Id.* at xviii. *Contra* Steven Hetcher, *The Kids Are Alright: Applying a Fault Liability Standard To Amateur Digital Remix*, 62 FLA. L. REV. 1275, 1277 (2010) [hereinafter Hetcher, *The Kids Are Alright*]. Hetcher argues that contrary to Lessig’s assumption, most of remix activity is exempted through fair use defense and therefore is not considered illegal. Hetcher concentrates mainly on amateur non commercial remix however, as the UGC world develops, and commercial interests become a larger part of it, it is unclear how this facture will be calculated in Hetcher’s fair use analysis. *Id.*

²⁶⁹ NETANEL, *supra* note 4, at 92–93.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 96–97.

²⁷² *Id.* at 99–100; *but see* BENKLER, *supra* note 4, at 227–30, 232–33 (claiming that peer production can fulfill the watchdog role as well, and present examples such as the Dieblod case); *but cf.* Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 126–27 (arguing that this justification is weak when considering that UGC offers a more democratized and participatory public discourse).

²⁷³ *See* NETANEL, *supra* note 4, at 47–48 (discussing far reaching digital distribution of user generated remixes and mashups of known works as a potent art form and a vehicle for social critique or political commentary).

²⁷⁴ *Id.* at 133–34.

²⁷⁵ *Id.* at 134.

particular work that bears a special and specific meaning regardless of other works.²⁷⁶ Netanel opposes using the role of copyright law as a tool to exact payment for every use and recognizes that the current copyright regime creates transaction costs that prevent this kind of speech, he supports reforming copyright law in order to promote the noncommercial appropriation of iconic works, even at the expense of a decrease in revenues and a consequential decrease of investment in new works.²⁷⁷

Similarly to Netanel, Niva Elkin-Koren offers a discussion about the place of copyright law in the Internet arena; however, she particularly concentrates on the connection between UGC, sharing platforms, and the relevancy of copyright law to the business model and practices in the sharing platform environment.²⁷⁸ Elkin-Koren finds that the copyright law was designed according to the content industry's needs, thus the concept of exclusivity was a central way to recuperate investments and generate revenues.²⁷⁹ But the exclusivity business model is less relevant to the environment of sharing platforms and users. What attracts users to the sharing platform are other users and what keeps them there, is the community and information flow, thus, sharing platforms are interested in encouraging more distribution of content, sharing among the users, and enabling access to UGC.²⁸⁰ From the user's point of view, users create original content but also engage in the transformative use of preexisting works and for all of this, users need the ability to access, modify, and remix the content.²⁸¹ Thus, concludes Elkin-Koren, copyright law should play a smaller role in the UGC environment, as it can create unnecessary barriers.²⁸² Elkin-Koren argues that in an environment where each user have legal control and the right to determine the terms of use, lack of standardization will lead to a difference in licensing, pricings, and terms of use, which will ultimately increase transaction costs.²⁸³ The need for standardization

²⁷⁶ *Id.* at 134–35.

²⁷⁷ NETANEL, *supra* note 4, at 134–41.

²⁷⁸ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 124.

²⁷⁹ *Id.* at 114, 126.

²⁸⁰ *Id.* at 127.

²⁸¹ *Id.* at 121–22.

²⁸² *Id.* at 128.

²⁸³ *Id.* at 129.

increases as commercial interests become more prevalent in the UGC environment, since this can lead users to prevent access to their content in case of competition.²⁸⁴ Thus, the solution, according to Elkin-Koren, is not to enable private ordering, like Creative Commons contracts that leaves the decision regarding which uses to permit in the hands of the users, but by creating standardized terms of access which will give less choice to users.²⁸⁵ Standardization through sharing platforms' TOU is not optimal, as it does not solve the gap created between a legal regime designed to promote creativity and a new model of creativity.²⁸⁶ The optimal solution, according to Elkin-Koren, should be in the legal reform of copyright law.²⁸⁷

Unlike Elkin-Koren and Netanel, Tim Wu does not criticize or uphold the current copyright regime, but instead provides an observation regarding the current regime, which is relevant in part to original UGC remix.²⁸⁸ Wu observes that the current copyright regime is designed to enable a category of use he terms 'tolerated use.'²⁸⁹ Tolerated use is defined by Wu as a use that is permitted by implied behavior, for example, infringing use of copyright which the copyright holder is aware of, but does not enforce her rights for various reasons; some of the UGC, like fan fiction, is included in this category.²⁹⁰ How does the copyright law react to tolerated use? The law develops an "opt in" enforcement system under which use of the work will continue until the right holder stops it by issuing a notice.²⁹¹ Wu provides several examples of the "opt in" arrangement in copyright law.²⁹² The relevant example to the subject of UGC, is the informal practice of selective enforcement by copyright holders.²⁹³ Many right holders do not enforce their rights to the fullest, especially when it concerns modification rights.²⁹⁴ This in effect creates an ex post regime where noncommercial use is continued, and only stops

²⁸⁴ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 129–30.

²⁸⁵ Elkin-Koren, *Governing Access*, *supra* note 7, at 19.

²⁸⁶ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 133–35.

²⁸⁷ *Id.* at 133.

²⁸⁸ Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 617 (2008).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 619.

²⁹¹ *Id.* at 620–621.

²⁹² *Id.* at 621–623.

²⁹³ *Id.* at 622.

²⁹⁴ Wu, *supra* note 288 at 622.

when a cease and desist letter is issued.²⁹⁵ This system is useful mostly when a large amount of property rights need to be licensed, but the value of the transaction is low.²⁹⁶

Under this theory, if indeed remix is just a tolerated use that is protected from enforcement by informal practices²⁹⁷ or high costs prevent copyright owners from realizing their rights,²⁹⁸ why then is this discussion important? Why do we need to reform the law and practices to promote remix? One possible answer is traditionalism, as elaborated upon above, the only difference between quoting from a song and quoting from a text is the medium.²⁹⁹ This distinction is built upon an outmoded traditional conception of writing as accessible to all and media as the asset of the few, but it has no hold in today's reality and accordingly should not govern remix.

Lessig also provides a second answer to this question.³⁰⁰ Remix is a form of literacy.³⁰¹ Currently, the law inhibits the remix culture by making it infringement, thus, institutions like schools are unwilling to use remix which delays the development of remix as a form of literacy.³⁰² Furthermore, outlawing behavior that seems normal to today's generation leads kids to disrespect the law,³⁰³ and create "harm to a generation from rendering criminal what comes naturally to them."³⁰⁴

C. Reforms Suggested By Remix Supporters

Many of the supporters of remix culture oppose complete abolishment of copyright law and instead advance some type of reform of the current copyright regime that will foster remix.³⁰⁵ One of the most recommended reforms concerns the fair use

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 623–624.

²⁹⁷ *Id.*

²⁹⁸ Merges, *Locke Remix*, *supra* note 6, at 1262.

²⁹⁹ LESSIG, *supra* note 4, at 53.

³⁰⁰ *Id.* at 108.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 284 n.8.

³⁰⁴ *Id.* at 18. *Contra* Hetcher, *The Kids Are Alright*, *supra* note 268, at 1281, 1321 (claiming that the argument that educational institutions will not teach remix is unsupported and, since remix is fair use, the underlying presumption of criminality is also faulty).

³⁰⁵ *See* LESSIG, *supra* note 4, at 253 ("Copyright law must be changed. . . [n]ot abolished."); Halbert, *supra* note 11, at 958 (transformative noncommercial use should be more clearly protected").

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defense.³⁰⁶ Some call for expansion of the fair use defense by increasing the weight of transformative use considerations, examining more broadly the extent of transformative use, and regarding as transformative use—any creative engagement with the copyrighted work.³⁰⁷ Or, the fair use analysis could change by also considering whether a work is a complement to (i.e., an increase in the value of the original work) or a substitute for the original work.³⁰⁸ This could also be examined as part of the modification analysis whereas such use would not be considered modification.³⁰⁹

Some supporters call for deregulation of amateur creativity to advance the free use of amateur remix.³¹⁰ This reform rests on differentiating between commercial and noncommercial use; while noncommercial amateur content will be deregulated, when commercial entities want to make use of the content, they will have to pay the author.³¹¹ Similarly, Lessig argues that there should be a return to past practices where the law regulated uses that were connected to commercial activities only.³¹² Accordingly, the law should regulate use, not copies, by specifying the types of uses that should be prohibited, and concentrating on uses with commercial features.³¹³ Likewise, a “no-action policy” will enable the copyright owners to specify by, for example, posting on the Internet, the permissible and prohibited uses.³¹⁴ The owner could then concentrate enforcement on uses that hurt the economic value of the work, and also provide certainty to other users regarding permissible uses.³¹⁵

³⁰⁶ *E.g.*, Halbert, *supra* note 11, at 958; Fisher, *User Innovation*, *supra* note 168, at 1474.

³⁰⁷ Fisher, *User Innovation*, *supra* note 168, at 1474.

³⁰⁸ Wu, *supra* note 288, at 630–31.

³⁰⁹ *Id.* at 631–32.

³¹⁰ LESSIG, *supra* note 4, at 254–56; Halbert, *supra* note 11, at 958.

³¹¹ LESSIG, *supra* note 4, at 254–56. *See also* Halbert, *supra* note 11, at 955–56 (arguing that copyright law needs to create a better balance to allow maximum creation of derivative work and permit transformative noncommercial use. This should be achieved by a commercial/noncommercial dichotomy under which all noncommercial derivative works would be legal).

³¹² LESSIG, *supra* note 4, at 262–64.

³¹³ *Id.* at 254–55.

³¹⁴ Wu, *supra* note 288, at 633.

³¹⁵ *Id.* at 633–35 (adding that a no action regime will be preferable to a broad Creative Commons license for media companies, which in the most restrictive form still includes the right to reproduce and distribute, as it does not have to apply to the public at large, and unlike Creative Commons’ license, the “no action policy” can be revoked).

A similar approach, from the starting point of the First Amendment is offered by Niel Netanel.³¹⁶ The main purpose of Netanel's reform is not to advance remix as a value standing on its own, but to advance free speech by advancing remix as a tool to achieve this primary purpose.³¹⁷ Netanel suggests limiting the exclusive right to derivative work as an expansion of this right can hinder modifications of existing works.³¹⁸ Netanel modifies Jed Rubenfeld's proposal,³¹⁹ and suggests that a right to create and commercially distribute derivative work for a limited period of time will still preserve the incentive to create the derivative work without blocking subsequent free expression.³²⁰ At the same time, Netanel supports limited moral rights, under which original authors will get attribution in derivative works, and he also establishes penalties applicable to both the original owner and secondary authors in order to facilitate efficient transactions.³²¹ For example, he states that secondary authors should be penalized for failing to notify the original author of the intent to create a derivative work, and should pay for a license if the attributed profit is similar or exceeds the offered license fee.³²²

Netanel also offers reform concerning the sharing platforms that facilitate the speech.³²³ YouTube and other platforms that host UGC are alternative platforms for speech, thus, copyright law should not in effect be used as a mass media tool to acquire domination in digital media by threatening and suing sharing platforms.³²⁴ Instead, he suggests a regime under which noncommercial file sharing and remixing will be considered

³¹⁶ NETANEL, *supra* note 4, at 195–96.

³¹⁷ *See id.* (discussing how free speech will be advanced by copyright law reform).

³¹⁸ *Id.* at 197.

³¹⁹ *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1, 4–5 (2002). In an effort to advance freedom of imagination Rubenfeld suggests that derivative work always contains some imagination and as such, should be free from injunction or damages. Instead, the original owner could only apply for profit allocation and get profits that are attributed to the underlining work, *id.*

³²⁰ *See* NETANEL, *supra* note 4, at 197–98 (stating as an example, that author Miguel de Cervantes completed Part II of the story of Don Quixote after reading a “specious sequel” to Part I).

³²¹ *Id.* at 215.

³²² *See id.* at 198.

³²³ *Id.* at 207–09.

³²⁴ *Id.* at 208.

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privileged uses.³²⁵ Consequently, platforms that enable the sharing of privileged uses would not face third party liability.³²⁶ But if a platform's value increases due to such privileged uses, it should be required to pay a statutory fee to the copyright holder.³²⁷

Additional reforms call for the return to the opt in system of copyright under which, after an initial period of protection, owners would have to register their work in order to be awarded continued protection rather than giving an automatic extension to all works, as this corrodes remix.³²⁸ The opt in system would have the benefit of extending copyright protection only to the works that still carry commercial value sufficient for their owners to opt in for protection, and would simultaneously release to the public domain, all other works for creative use.³²⁹ Other proposed reforms suggest simplifying the copyright law so it will be accessible to all people, in particular, the information about the exemptions provided by the law, since in today's world copyright law influences everyone, amateur and professional alike.³³⁰

Another way to facilitate more users' modifications of existing works is by broadly interpreting existing laws, such as giving a broad interpretation to the first sale doctrine, and interpreting the First Amendment to prevent liability for expressive modifications as a way to give users more freedom to modify the works they acquired.³³¹ On the same note, contracts that limit the fair use or the first sale doctrine should be invalidated and the law should permit circumvention of technological measures when the circumvention is done in order to modify the original work.

To summarize, the value supporters of remix culture find in remix activities include the free expression and common form of communication (under which remix is necessary for the ability to convey and express a message using symbols and meaning known to the targeted audience); serving as a tool to create

³²⁵ *Id.* at 208–09.

³²⁶ NETANEL, *supra* note 4, at 208 (explaining when third party liability would not be enforced).

³²⁷ *Id.*

³²⁸ LESSIG, *supra* note 4, at 260–65.

³²⁹ LESSIG, *supra* note 4, at 260–65.

³³⁰ *See* LESSIG, *supra* note 4, at 266–68.

³³¹ *See* Fisher, *User Innovation*, *supra* note 168, at 1475–76.

community and encourage education; incorporating semiotic democracy; and serving as an integral part of creating the good life and human flourishing. Some argue that the current copyright regime does not fit with the digital environment of UGC and remix, as it is centered on elements that are less relevant to a decentralized environment that builds and thrives by reusing existing works.³³² Most of the reforms suggested by the adherents of remix culture concentrate on reforming the copyright law to create a new business and legal model that will fit the Internet in general, and the UGC environment in particular. This concern turns on the type of uses and emphasizes the deregulation of amateur, noncommercial, and transformative uses.

How does this all connect to original UGC? Should we encourage the remix of original UGC? The justification for promoting original UGC remix is similar, and draws force from the general justifications for remix culture.³³³ As original UGC takes a more central place in the general culture, becomes a topic of conversations (and sometimes news),³³⁴ and as users become

³³² See LESSIG, *supra* note 4, at 253 (“But the form and reach of copyright law today are radically out of date”); Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 121-27 (arguing that copyright exclusivity model does not match the needs of the UGC environment, and corrode sharing which is the interest of both users and platforms).

³³³ See *supra* Part B.

³³⁴ An example of UGC that became news and a topic of conversation is the Double Rainbow YouTube clip, see *Double Rainbow*, *supra* note 57. Damon Brown, *How the ‘double rainbow’ video blew up*, CNN.com (July 14, 2010), http://articles.cnn.com/2010-07-14/tech/double.rainbows_1_double-rainbow-youtube-fighter?_s=PM:TECH. Another example is Jill and Kevin’s wedding entrance dance video, see, *JK Wedding Entrance Dance*, YouTube, http://www.youtube.com/watch?v=4-94JhLEiN0&feature=player_embedded (last visited March 25, 2012) (featuring the groomsmen and bridesmaids and later on the groom and the bride dancing down the aisle to Chris Brown’s song “Forever”). The video has more than 64,000,000 views. *Id.* It has captured media attention and the couple was interviewed on the “Today Show”, Michael Inbar, *Secrets Behind Wacky Web Wedding Aisle Dance*, Today.com (Dec. 22, 2009, 10:01AM), http://today.msnbc.msn.com/id/32122519/ns/today-today_weddings/; *Amazing Wedding Ceremony Dance Becomes YouTube Sensation* (video), The Huffington Post (updated May 25, 2011, 2:40PM), http://www.huffingtonpost.com/2009/07/24/amazing-wedding-ceremony_n_244241.html. The video was later recreated on the hit TV show “The Office”, Joal Ryan, *The Office Wedding Stand-Off*, E! ONLINE (Oct. 9, 2009, 11:37AM), http://www.eonline.com/uberblog/b148226_office_wedding_dance-off.html. Indeed, this video is not completely original as Chris Brown’s song is in the background, but nonetheless, it indicates and contributes to the general understanding of the place that UGC in general, is starting to take in our

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famous and gain audience and exposure of their works,³³⁵ the need to use original UGC will grow. Remix is a common form of creating new UGC and just as users remix any cultural content, so too will they want to remix original UGC. Just like any other cultural content, this type of remix is done as part of the cultural expression of individuals and as a way of providing a meaning, a subtext, and correspondence with others. Like any other remix, original UGC is important to the communication between people as it can carry with it a strong message that will only be transparent by using the original work. Remix of original UGC, like remix of mass media content, can promote semiotic democracy, and in my opinion, this is an important value that is inherent in remix and is a suitable goal to promote.

However, the importance of remix does not necessarily divest power from some of the arguments offered against remix. Indeed, remix is valuable but so is original UGC, not only as an “input” to remix, but mainly, as mentioned before, because original UGC has strong connections to personhood theory. Furthermore, UGC is perceived as amateur content or as ‘lesser than’ professional content, and consequently it is perceived as deserving of less protection.³³⁶

In my view, UGC is at the same level as any other Intellectual Property content that is produced, be it mass media content or other content and thus, it is entitled to full copyright protection. This contention draws force from several elements and developments in the UGC environment: Like any other content, and even stronger than some other cases, the personhood theory does provide a strong basis for the acknowledgement and preservation of users’ rights.³³⁷ But this alone is not enough because one can argue that there is no need to incentivize the creation of UGC through granting of copyrights, as the incentives

cultural discussion, and this does not diminish the fact that one of the strongest parts of this videos is the mere unique wedding entrance.

³³⁵ See Claudine Beaumont, *YouTube: Top 10 Celebrities*, The Telegraph (Nov. 26, 2008, 06:56PM) <http://www.telegraph.co.uk/technology/3527671/YouTube-top-10-celebrities.html> (“The site, now owned by Google, is one of the internet’s biggest success stories, and many of its users have gone on to successful careers on the back of early YouTube exposure. The massive global reach of the site and diverse audience means even weird and wonderful performers stand a good chance of being spotted by other web users and building up a cult following”).

³³⁶ Halbert, *supra* note 11, at 929.

³³⁷ Fisher, *User Innovation*, *supra* note 168, at 1451–52.

to create such materials are not dependent on the existence of copyright—thereby acknowledging that copyright protection will not advance the creation of such material. To the contrary, copyright protection will have negative effects like curtailing the advancement of information and culture.³³⁸ While it is true that the incentives to create are not necessarily monetary, as I already demonstrated, financial incentives and considerations do arise, and take on more weight in users' decisions as more financial opportunities are offered to them, and they can earn revenues from their content.³³⁹ In an environment that is developing commercial interests and introducing to users the financial value of their content, not acknowledging or granting users copyrights will lead to a disincentive to create content since there is no protection for that work. Additionally, as mentioned above, we can no longer describe UGC as merely amateur content that is squarely distinctive from professional content.³⁴⁰ The lines between professional and amateur has blurred in the UGC context,³⁴¹ as professionals and amateurs alike post on the same platforms, and both types of content can be UGC (e.g., a professional can publish material not for the sake of producing revenues, but for engagement and discussion).³⁴² This leads to several understandings: first, the quality of UGC does not fall below, and sometimes rises above, the quality of mass media content.³⁴³ Second, if we still adhere to the notion that mass

³³⁸ Niva Elkin-Koren, *The Changing Nature Of Books And The Uneasy Case For Copyright*, 79 GEO. WASH. L. REV 1712 (2011) (arguing that copyright law does not incentivize authors in the eBook environment); Z. Zarsky, *Law and Social Networks: Mapping The Challenges and Promises of User-Generated-Content Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 759 (2008) (discusses how users participate and contribute to sites like Wikipedia and YouTube without expectations for monetary rewards or ability to prevent unwanted use, and claims that “property rights (at least those allotted by today’s IP legal systems) might not be the only way to promote creation, progress, and efficient distribution of ideas. On the contrary, the existence of such property rights can potentially stall the dynamics within social networks”).

³³⁹ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 125 (describing how UGC is “increasingly shaped by market forces”).

³⁴⁰ See Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 118 (discussing the problem of distinguishing between amateur and professionally created UGC).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ See *generally id.* at 118–119 (describing how the quality of UGC content between professionals and amateurs can be similar, and how high quality content can be created by users from basic means).

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media content makers deserve the initial recognition of the copyright law (although we can question the scope of such protection), and we take into account the importance of UGC as a cultural commodity and as content that can be qualitatively at the same level as mass media content, there is no plausible reason not to acknowledge users' rights and abolish their copyrights.

To clarify, by calling for the acknowledgement of copyright protection for UGC, I oppose the idea that users should not have any copyright recognition and that when it concerns the UGC arena, copyright law should be abolished or standardized through the TOU without the users' consent. Although there are great benefits to remix, the solution should not ignore the starting point—users' rights in their content, —and should not abolish the right to derivative work in these types of works which in some cases, like YouTube's TOS, can result in the de facto elimination of the entire bundle of economic rights, because other users are already permitted to use all others' copyrights.³⁴⁴ Adopting such an approach places the UGC at a lower level than mass media content, in spite of UGC's more central role in our cultural discussion.³⁴⁵

For these reasons I do not support Niva Elkin-Koren's argument that in a system of too many licenses, the decision regarding what use should be permitted should not be left to the users.³⁴⁶ This, in my opinion, goes directly against the personality interest of original UGC creators, and can be perceived as an indication that original UGC is worthy of less protection, is on a lower level than other intellectual property content, and that the authors who create UGC are worthy of less protection than authors of mass media content.³⁴⁷

Nonetheless, although I argue that original UGC should be awarded full copyright protection, I think that remix of original UGC should be promoted and encouraged as it promotes expression, engagement in culture, and the development of a more participatory society.³⁴⁸ The considerations for the

³⁴⁴ YouTube TOS, *supra* note 85.

³⁴⁵ See Halbert, *supra* note 11, at 938 (arguing that “people desire to be creative and socially connected . . . [and] [i]t is time the law is changed to reflect the habits and actions of everyday people”).

³⁴⁶ See Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 130, 133.

³⁴⁷ See discussion *supra* pp. 329–31.

³⁴⁸ Lee, *supra* note 14, at 24; Fisher, *User Innovation*, *supra* note 168, at

personality interest of original UGC and the placement of UGC on the same level as any other intellectual property content sets boundaries to the methods of facilitating remix. Yet, the question still stands as to the form of promoting more remix among users. The reforms suggested thus far by remix supporters are less relevant to the practice of the sharing platform as a tool to promote remix.³⁴⁹ This promotion requires a change not through legislation but rather from a bottom up approach.³⁵⁰ Moreover, while legislative reforms have more merit vis-à-vis mass media players who play their “game” in the legislative field³⁵¹, the situation among users and UGC, in my opinion, is quite different. In contrast, behavioral changes and patterns can be developed from the bottom up, not by the help of legislation but by creating a sense of commitment and ideology.³⁵² Although users are becoming more aware of copyright issues (as well as copyright defenses like fair use) in this kind of environment, the practices among users and the patterns of behavior developed among them is the part, when it concerns remix in the original UGC realm, that is in need of reform.

V. SHARING PLATFORMS’ PRACTICES—CRITICAL VIEW

A. *Regulatory Contracts—Term of Use*

Sharing platforms fulfill a regulatory role by reorganizing and redistributing users’ rights.³⁵³ Sharing platforms redistribute rights by granting some permissible uses to themselves and some to other users through the TOU, that users are required to accept or “click on” when they are registering to use the sharing

1459.

³⁴⁹ See *supra* Part C for a discussion on the reforms suggested.

³⁵⁰ See generally Elkin-Koren, *User-Generated Platforms*. (suggesting an overall skepticism about the ability of traditional structures of legal authority to properly shape the law in this field because the value of UGC is inherently created from the bottom up).

³⁵¹ See, e.g., Mathew Schwartz, *SOPA Backers Lose Ground*, INFORMATION WEEK, <http://www.informationweek.com/news/security/government/232500136> (last visited March 25, 2012) (illustrating the point that among the most ardent supporters of recent antipiracy legislation like SOPA and PIPA are the Motion Picture Association of America and other mass media institutions).

³⁵² See generally *How the Grassroots Works*, RENEWAMERICA.COM, <http://www.renewamerica.com/grassroots.htm> (last visited March 8, 2012) (discussing the manner by which political and legal change can be affected from the bottom up, as opposed to through traditional legislative measures).

³⁵³ See, e.g., YouTube TOS, *supra* note 85.

platform's services.³⁵⁴ However, the use of the TOU to attribute consent to users and contractually bind users is highly criticized.³⁵⁵ This issue of the digital TOU raises contracts law difficulties pertaining to the issues of consent, awareness, and enforceability.³⁵⁶ In this part, I will present the difficulties concerning the TOU practices in general and specifically, in their applicability to the sharing platform's practices.

In the digital world, TOU agreements can appear in three forms, the first being "clickwrap" licenses, which are enforced by courts as valid contracts, under which users are expected to read the TOU and click "I agree" to the terms.³⁵⁷ The second kind of digital TOU agreements are "browsewrap" licenses, under which the users do not see the license but according to the license, using the site constitutes an agreement to the license.³⁵⁸ The third kind of agreements are "shrinkwrap" licenses which are attached to a physical copy of the product or loaded with the software, which provide that opening the shrinkwrap or using the software constitutes acceptance of the contract.³⁵⁹ Sharing platforms usually contract under the "clickwrap" model.³⁶⁰ When users register for the sharing platforms they are required to click that they have accepted the TOU as part of the registration process.³⁶¹

³⁵⁴ See, e.g., *id.* (offering an example of a sharing platform (YouTube) that requires users to accept its terms of use before contributing).

³⁵⁵ See, e.g., Elkin-Koren, *Governing Access*, *supra* note 7, at 3–10 ("Opponents of private ordering disagree with [the] market for licenses. They challenge the proposition that private ordering will lead to greater efficiency in governing access to creative works. Many scholars . . . warned against the widespread enforcement of EULAs [End-User License Agreements] and mass licenses for copyrighted materials (Elkin-Koren 1998; Lemley 2006; Cohen 1998; Radin 2006).").

³⁵⁶ See, e.g., *id.*

³⁵⁷ Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459-60 (2006); Elkin-Koren, *Governing Access*, *supra* note 7, at 3.

³⁵⁸ Lemley, *supra* note 357, at 459-60 (2006); Elkin-Koren, *Governing Access*, *supra* note 7, at 3.

³⁵⁹ Elkin-Koren, *Governing Access*, *supra* note 7, at 7. See also Lemley, *supra* note 357, at 467.

³⁶⁰ Lemley, *supra* note 357, at 459.

³⁶¹ See, e.g., *Create a New Google Account*, YOUTUBE.COM, http://www.youtube.com/create_account (last visited March 25, 2012) (requiring YouTube.com users to make a google.com account in order to use YouTube services); *Create Your Account*, MYSPACE, <https://www.myspace.com/signup> (last visited March 25, 2012); *Create a New Google Account*, BLOGGER, <http://www.blogger.com> (follow "Get Started" hyperlink) (last visited March 25, 2012). A user who wants to join Blogger has to create a Google account and accept the terms of use as part of that registration and as part of the registration for Blogger itself as well. *Id.* See, e.g., *Create My Account*, FLICKR, <https://>

Many question the practice of digital TOU as valid under contract law.³⁶² In contract law consent and meeting of the minds is required to form a valid enforceable contract.³⁶³ Yet, digital TOUs contradict this basic principle of contract law since users do not know or understand the terms of the contract and thus, they are, in reality, missing the consent or meeting of the minds factor.³⁶⁴ In some of the forms of the TOU, users are not required to read the TOU in order to be bound under the contract and the mere use of the site can create obligation.³⁶⁵ In other forms, users are bound through a ‘click on’ legal contract that they rarely read or cannot understand the meaning of, since the TOU is written in a legal language not accessible to the ordinary user, thus, making the principle of consent a fictional principle.³⁶⁶ The clickwrap license contributes to the deterioration of the traditional consent principle by imposing a blanket contract of “take it or leave it” on a large number of anonymous users.³⁶⁷ There are no negotiations between the parties regarding the terms of use and thus, there is no representation of actual considerations being given to the contract terms, and what results is merely a standardized contract.³⁶⁸

www.flickr.com (follow “Sign Up” hyperlink; then follow “Create New Account” hyperlink) (last visited March 25, 2012). Similar to Blogger, a user has to create an account with Yahoo or through other services (Google or Facebook), but has to authorize the Yahoo TOS. *See id.*

³⁶² Elkin-Koren, *Governing Access*, *supra* note 7, at 3–10. *See also* Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006).

³⁶³ *Id.*

³⁶⁴ Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155, 1180–81 (1998) [hereinafter Elkin-Koren, *Copyrights in Cyberspace*] (describing how often times, in standardized market contracts, there is no ‘meeting of the minds’ because consumers do not read or understand contract terms or they simply do not know that they are entering into a contract).

³⁶⁵ *See* Lemley, *supra* note 357, at 460 (explaining browsewrap contracts).

³⁶⁶ Radin, *supra* note 362, at 1231. *See generally*, Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 503 (2004); Lemley, *supra* note 357, at 465 (“[T]he requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms.”).

³⁶⁷ Lemley, *supra* note 357, at 465–66 (“Clickwraps put some pressure on the classical notion of assent derived from bargained agreements, because they substitute a blanket, take-it-or-leave-it assent for the classical notion that the parties actually thought about and agreed to the terms of the deal.”).

³⁶⁸ *Id.*

Moreover, users do not have freedom to choose between alternatives and are therefore, placed at a disadvantage vis-à-vis the sharing platforms.³⁶⁹ Competition concerning the TOU is less likely to occur as the information market is governed by standard form contracts.³⁷⁰ These tendencies, for the most part, lead to uniformity amongst the TOUs and thus, users do not have a real choice since site owners can prevent unlicensed access to the site.³⁷¹

Although users do not have the opportunity to negotiate the TOU governing their use of sharing platforms, it does not mean that users are completely powerless.³⁷² Niva Elkin-Koren's claim is that in the context of sharing platforms, the complex connection between sharing platforms and users does influence the TOU.³⁷³ Since content that users share on the platform gives the platform its economic value, it can be expected that although the sharing platforms draft the TOU without consulting or negotiating with users, their reliance upon the users makes them susceptible to negotiation of the terms, so sharing platforms are likely to pay attention to users' preferences in order to build trust with the users.³⁷⁴ As Elkin-Koren demonstrates, this was reflected in a few incidents where users opposed certain terms imposed by the sharing platforms and pressured the platforms to modify the terms.³⁷⁵ Such instances include Yahoo's and MySpace's TOUs that were revisited after opposition from users.³⁷⁶ Nonetheless, in light of platforms' stickiness and lack of option to transfer assets such as users' content and reputation, users are unable to switch platforms as they wish, and the balance of power tilts in favor of sharing platforms.³⁷⁷

The TOU are part of the process a user needs to go through in

³⁶⁹ See Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 364, at 1183.

³⁷⁰ *Id.*

³⁷¹ Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 364, at 1183–84.

³⁷² Elkin-Koren, *Governing Access*, *supra* note 7, at 14.

³⁷³ *Id.*

³⁷⁴ Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 130–33. See, e.g., Elkin-Koren, *Governing Access*, *supra* note 7, at 14.

³⁷⁵ Elkin-Koren, *Governing Access*, *supra* note 7, at 14.

³⁷⁶ *Id.*

³⁷⁷ Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 133; Elkin-Koren, *Governing Access*, *supra* note 7, at 13–14. See also Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 618 (2010) (presenting a case where Facebook users opposed an attempt by the social network to gain control of the users' contributions).

order to register for the sharing platform service.³⁷⁸ Users of UGC might tend to be more aware of a given sharing platform's efforts to control users' rights or otherwise impose terms that users find unjust, however, many users of UGC still do not actually read the terms.³⁷⁹ Moreover, the sharing platforms' TOUs are written in legal terms and as legal documents not accessible to ordinary users who lack legal education; thus, TOUs can create confusion as to the legal rights and obligations of users.³⁸⁰ It should be noted that users typically do not know what privileged rights they are granting to the platform or other users in the process of agreeing to a TOU.³⁸¹

This is important in the context of original UGC for three reasons. First, taking rights through the TOU while knowing that users are not usually familiar with the terms hurts users' personality interests because such behavior does not recognize the connection between the original UGC and the author-user.³⁸² Second, it sends a message about the value of UGC as compared with other content. Original UGC is at the same level and value as other intellectual property content, but taking rights from unaware users indicates otherwise. Third, TOUs, in this case, play a legislative role through which the sharing platforms redistribute and divide rights, and as such, fall under the same criticism I suggested concerning the regulatory reforms proposed by the remix culture supporters.³⁸³ In my opinion, the bottom up approach to promoting sharing for remix is preferable, especially when the redistribution is not only for the sharing platform, but also concerns other users as well.³⁸⁴ The efficient and appropriate way to promote sharing among users is not through legislation, but through the users themselves: encouragement to share rather than regulate. Furthermore, from a moral aspect, the sharing platforms' TOUs have a similar effect as legislation, taking and reorganizing users' rights through legally binding documents that are not necessarily understood by the people it

³⁷⁸ See *supra* note 361 and accompanying text.

³⁷⁹ Elkin-Koren, *Governing Access*, *supra* note 7, at 13–14; Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 364, at 1180–81.

³⁸⁰ Elkin-Koren, *Governing Access*, *supra* note 7, at 7; Radin, *supra* note 362, at 1231.

³⁸¹ See Elkin-Koren, *Governing Access*, *supra* note 7, at 7.

³⁸² See Fisher, *User Innovation*, *supra* note 168, at 1451–52 (explain the personhood theory).

³⁸³ See *supra* Part III, IV.C, V.A.

³⁸⁴ See *supra* Part IV.C.

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binds and is, therefore, morally inappropriate.

Moreover, it can be argued that the sharing platforms engage in excessive “takings” of rights through the TOU.³⁸⁵ While some of the rights that sharing platforms license through the TOU are required for the ordinary operation of the platform, such as the right to display and perform the content, sharing platforms do not need all of the economic bundle of copyright rights that they take in order to operate the platform.³⁸⁶ For instance, using the TOU to license the right to make derivative work is not justified (especially when such right is granted to the sharing platform’s affiliates as well).³⁸⁷ Similarly, while it can be argued that the licensing of some of the rights to other users is necessary for the ordinary operation of the site by making the platform attractive to other participants (like YouTube does in its TOU), the reality that most other sharing platforms analyzed do not grant other users privileged uses through the TOU places this argument on shaky ground.³⁸⁸ Although it can be argued that the permission to perform, display and use the UGC created by other users is implied by the mere uploading of the content to a sharing platform, it still does not justify the licensing of all rights.³⁸⁹ In

³⁸⁵ See, e.g., YouTube TOS, *supra* note 85 (showing that YouTube’s TOU grants their platforms worldwide, nonexclusive, royalty-free, and transferable rights over the ability to use, reproduce, and prepare derivative works of the UGC that are submitted, and further grants most of the aforementioned rights to all other users of the platform); Yahoo TOS, *supra* note 115 (noting how Yahoo’s TOU grants similar rights as YouTube to itself).

³⁸⁶ See Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 846 n.18 (2010) (providing an example of how Myspace keenly amended their TOU after a public backlash from users who found that the licensing rights taken by the TOU were too far reaching); Van Houweling, *supra* note 377, at 617 (explaining that when too many ownership rights of the content creators are taken via TOUs, it can effectively amount to “digital sharecropping,” where the sharing platforms wrongly exploit and reap the economic rewards from the creators’ hard work, and are no longer only providing a medium for people to share their UGC).

³⁸⁷ E.g., YouTube TOS, *supra* note 85 (showing that YouTube’s TOU is one that grants its unlisted business successors and affiliates the right to make derivative work from submitted UGC, and that might allow for a large number of parties—unknown to the content submitter—to take advantage of that right).

³⁸⁸ See *supra* Part III. Most of the surveyed platforms do not provide other users license to use the content uploaded to the platform. See Yahoo TOS, *supra* note 115; Myspace TOS *supra* note 149; Google TOS, *supra* note 145.

³⁸⁹ Elkin-Koren, *Governing Access*, *supra* note 7, at 14 (citing an example of how one website went as far as to state in its TOU that submissions of UGC “carry with it an implied assignment of the entire copyright interest in” that submission; but its unreasonableness also led to public backlash).

addition, the argument does not suggest that the TOU is the proper place, or the *only* place, to effect this redistribution of rights. In any case, a better and more visible notice drafted in a manner that the original user would understand should be issued.

B. Educational Shortcomings

Moreover, while sharing platforms may make users aware of some copyright issues, they also present no information that encourages sharing.³⁹⁰ Despite the desirability and necessity of sharing, they do not elaborate upon the importance of such sharing or the benefits of licensing under licensing schemes such as Creative Commons.³⁹¹ Sharing platforms provide some information (in different levels of details) about copyright law and ownership,³⁹² but if there is no sufficient and coherent education for sharing at the sharing platforms' level, the chances that there will be diversity in licenses' formats are greater. Informing users about the existence of Creative Commons' licenses, by itself, is not enough.³⁹³ For example, YouTube informs users that they can license their rights under a Creative Commons license, that Creative Commons provides several different licensing options, and also provides a link to the Creative Commons site.³⁹⁴ Flickr also enables users to share under a Creative Commons license and informs users that Creative Commons is an alternative to the regime of full copyright while providing a detailed explanation of the different types of terms a user can choose from.³⁹⁵

As can be seen from the above examples, sharing platforms specifically do not *really* explain what Creative Commons is and what the ideology of Creative Commons is, and generally do not explain the general ideology of sharing for purposes of remix. All that is provided is a link and somewhat "dry" and limited information that Creative Commons is a way to enable sharing.³⁹⁶ Standing alone, however, this is not enough. Users

³⁹⁰ See *supra* Part III.

³⁹¹ See *supra* Part III.

³⁹² See *supra* Part III (detailing the surveyed sharing platforms' practices).

³⁹³ See *infra* Part C (explaining why creative commons licenses are effective); *YouTube Help, Level 3—Authorization*, YOUTUBE, *supra* note 99.

³⁹⁴ *YouTube Help, Level 3—Authorization*, YOUTUBE, *supra* note 99.

³⁹⁵ *Creative Commons*, *supra* note 119.

³⁹⁶ See, e.g., *id*; *YouTube Help, Level 3—Authorization*, YOUTUBE, *supra* note

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still need to click on the link directing them to the Creative Commons' website and in order to do so, they need something that will encourage them and incite them to do so and the information provided to date is not enough.

Since, as demonstrated above, sharing is a desirable outcome for the sharing platforms, in order to motivate such sharing they need to explain to the users why sharing is important, what kind of sharing is good (e.g., what is Creative Commons, and why is it important to use this license?). The sharing platforms analyzed do fulfill some educational role by informing users about Creative Commons and they raise awareness, somewhat, about the existence of alternatives to the 'all rights reserved' regime (Flickr also adds some statistics about the sharing practices of users and the different terms of use that users can choose from)³⁹⁷ and that is a good start; but sharing platforms need to present the ideology behind sharing. They need to explain to the users why they should move from an 'all rights reserved' regime to a 'some rights reserved' or 'no rights reserved' regime.

C. Creative Commons Licenses and Effectiveness

As referred to above, some of the sharing platforms that I survey offer the ability to license the content under a Creative Commons license as a partial solution to the default copyright regime of 'all rights reserved'.³⁹⁸ Creative Commons is a nonprofit organization that was established by Lawrence Lessig in 2001, aimed at providing free digital licenses which copyright holders could attach to their works, while identifying the terms of use they want to govern their work.³⁹⁹ Creative Commons, according to its mission, "develops, supports, and stewards legal and technical infrastructure that maximizes digital creativity, sharing, and innovation."⁴⁰⁰ Creative Commons' goal is to move from an 'all rights reserve' regime to a 'some rights reserve' or 'no rights reserve' regime and by doing so, enable more access and creativity.⁴⁰¹ Each Creative Commons license is composed of

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³⁹⁷ *Creative Commons*, *supra* note 119.

³⁹⁸ *See supra* text accompanying notes 394–97.

³⁹⁹ Lee, *supra* note 14, at 1485–1486.

⁴⁰⁰ *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last modified Apr. 23, 2012) [hereinafter *About Creative Commons*].

⁴⁰¹ *Id.*

three layers.⁴⁰² The first is a “legal code” layer, which is the legal format of the license; the second layer is the “human readable” layer, which is a summary of the main issues mentioned in the license in lay terms; and third, the license is distributed in a “machine readable” version so that other software and search engines can read it.⁴⁰³ The creator can choose between a combination of different standardized terms: attribution (give credit to the original author), no derivative work (authorizes verbatim copies but not derivatives), noncommercial (authorizing all noncommercial uses), and share alike (subsequent users have to license their derivative work under the same license as the original).⁴⁰⁴

Creative Commons views the current copyright regime as an access barrier to creative works and aims at eliminating such barriers.⁴⁰⁵ Access barriers are created in the current copyright regime by the ability of each owner to restrict access and seek an injunction thus, creating a chilling effect through prohibitive information costs for seeking permission and licensing, and through creating high transaction costs due to the expansion of the copyright regime and the elimination of formalities.⁴⁰⁶ Creative Commons is trying to overcome the barriers problem relying on the assumption that people want to share their works, and will support the reuse of their works.⁴⁰⁷ It focuses on empowering the individual owner rather than the intermediate, and is trying to reduce transaction costs by reducing both the cost of creating a license, and the cost of securing a license to reuse existing work.⁴⁰⁸ Creative Commons and other independent licensing schemes are becoming more important as mobility and the freedom to transfer content becomes more important to users.⁴⁰⁹

This may lead to the conclusion that using Creative Commons is an optimal solution; however, this hypothesis is not without its

⁴⁰² *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited March 25, 2012).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *See About Creative Commons*, *supra* note 400.

⁴⁰⁶ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 378-84 (2005) [hereinafter Elkin-Koren, *What Contracts Cannot Do*].

⁴⁰⁷ *Id.*, at 383.

⁴⁰⁸ Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406, at 385-86.

⁴⁰⁹ Elkin-Koren, *Governing Access*, *supra* note 7, at 13.

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weaknesses, as the compatibility of this license regime to the UGC world is questionable.⁴¹⁰ In the UGC and sharing platform context there are weaknesses to such licensing scheme's efficiency and effectiveness in promoting sharing among users.⁴¹¹

As with any contract, Creative Commons' licenses have to be enforceable and clear, but Creative Commons' legitimacy and enforceability is in fact, unclear. The terms of the licenses raise interpretation and practical problems. For example, noncommercial use forbids use "that is 'primarily intended for or directed toward commercial advantage or private monetary compensation,'" but as Adrienne Gross demonstrates, these terms are unclear and raise questions regarding what "primary intended" or "directed toward commercial advantage" means.⁴¹² Is the use of advertisements or only a certain amount of advertisements considered to be "primarily intended" for commercial advantages?⁴¹³ The interpretation problems do not stop there; additional issues concerning intention are also raised. Since Creative Commons is most likely interpreted according to contract law, courts will have to examine the parties' intent in order to understand the meaning of the license's terms, but Creative Commons licenses are not negotiated between two parties, and it is unclear whose intent, then, should be considered.⁴¹⁴

Furthermore, the enforceability of the Creative Commons' licenses is unclear.⁴¹⁵ First, Creative Commons cannot assist users in enforcing their licenses' terms against violations of

⁴¹⁰ See, e.g., Adrienne K. Goss, Note, *Codifying A Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI-KENT L. REV. 963, 983 (2007). See Benjamin Mako Hill, *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, MAKO.CC (July 29, 2005, 1:39 PM), http://mako.cc/writing/toward_a_standard_of_freedom.html (stating some of Creative Commons' weaknesses).

⁴¹¹ See Hill, *supra* note 410 (explaining that the license options Creative Commons offers are too lax for some users and that Creative Commons has been unable to come up with a license that is more restrictive than their current licenses yet less restrictive than the "status quo").

⁴¹² Goss, *supra* note 410, at 982–83 (quoting Creative Commons, Attribution-NonCommercial license 2.5, § 4(b), <http://creativecommons.org/licenses/by-nc/2.5/legalcode>); *Creative Commons Legal Code*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc/3.0/legalcode> (last visited March 24, 2012).

⁴¹³ See Goss, *supra* note 410, at 982–83 (emphasizing the uncertainties surrounding Creative Commons licenses).

⁴¹⁴ See *id.* at 983.

⁴¹⁵ See *id.* at 984–85.

restrictions.⁴¹⁶ Second, a Creative Commons license has never been tested by U.S. courts.⁴¹⁷ Although other licensing schemes like GPL have been litigated in court and not found invalid, it is difficult to apply such ruling to the Creative Commons case since, unlike Creative Commons, GPL is used specifically in the software industry, and therefore it is easier to use industry custom to interpret those licenses.⁴¹⁸ Even if Creative Commons' licenses are enforceable against the direct parties (i.e., the original creator and the first reusers of the work) there is still a question under contract law about the enforcement against subsequent, indirect, reusers.⁴¹⁹ Enforcement against a nondirect party means enforcement of a property right and a return to copyright regime, rather than a consideration of contract law.⁴²⁰ Uncertainty concerning clarity and enforceability deters users from licensing under Creative Commons or using works which are licensed under Creative Commons.⁴²¹ If a user cannot be certain that her use is permitted under a certain license, she will be deterred from use due to liability risk, and if a creator who wants to license her work under Creative Commons cannot be sure that her restrictions are enforceable, she, as well, will be deterred from choosing a Creative Commons license.⁴²²

Although Creative Commons is trying to create a more open regime that will facilitate creativity and enable the reuse of existing works, the regime is dependent on the author's choice and supports the idea that authors should govern their rights.⁴²³ This policy cast doubts as to whether it indeed promotes a regime for remix.⁴²⁴ As the Flickr case demonstrates, when given the choice, more users choose the restrictive Creative Commons license rather than the liberal one.⁴²⁵ Furthermore, users create

⁴¹⁶ See *id.* at 982 n.137.

⁴¹⁷ Goss, *supra* note 410, at 982.

⁴¹⁸ *Id.* at 984–85.

⁴¹⁹ See *id.* at 982–83 (explaining that Creative Commons licenses are governed by contract law, which typically only extends to parties to a contract, even though the licenses are intended to extend to third-party users).

⁴²⁰ *Id.* at 486 (citing Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406, at 404–05).

⁴²¹ *Id.* at 982–83.

⁴²² *Id.* at 983.

⁴²³ Elkin-Koren, *Governing Access*, *supra* note 7, at 5.

⁴²⁴ *Id.* at 18.

⁴²⁵ *Id.* at 13 (demonstrating that only 7.5 million users have chosen the most liberal Creative Commons license while 22 million users have chosen the most restrictive Creative Commons license).

UGC for various reasons and these reasons can lead them to choose not to permit wide access to their works.⁴²⁶ Such reasons as the introduction of commercial interest, privacy, reputation and more, all cast doubts on whether letting users govern access is actually more efficient.⁴²⁷ However, when one views the data from the point of view of derivative work, the picture is different.⁴²⁸ Creative Commons' licenses have a spectrum of permissible uses and most of the users choose some kind of combination that permits derivative work.⁴²⁹ Nonetheless, the statistics demonstrated by Elkin-Koren do raise questions and concerns as to the effectiveness of the Creative Commons licensing in creating a regime that facilitates wider sharing, and also raises the question as to whether we should trust users to create this regime and to leave in their hands the decision of what rights to permit.⁴³⁰

Creative Commons relies on the copyright regime and the notion of property rights as its driving force.⁴³¹ Such reliance has some advantages, such as enabling collaboration between different players, preserving the right of the owner to control her work, and preventing third parties' ability to take and incorporate the work into theirs and offer it under limitations.⁴³² But at the same time, relying on a copyright regime also has disadvantages. Unlike intuitions surrounding property, information goods are not perceived as something that we need to ask permission to use.⁴³³ Information goods are part of our common language, and need to be integrated to become part of the social code.⁴³⁴ In order for creativity to develop, creative works need to be shared and open to engagement.⁴³⁵ They are not a consumable product and cannot be addressed in terms of a transaction.⁴³⁶ By framing information products under property rule, we lose this complexity.⁴³⁷ A proprietary regime leads to a

⁴²⁶ *Id.* at 16–17.

⁴²⁷ *Id.* (identifying privacy and political beliefs as reasons for limiting use).

⁴²⁸ *See* discussion and data on Flickr users' licenses choices *supra* Part III.

⁴²⁹ *Id.*

⁴³⁰ *Id.* (discussing Niva Elkin-Koren's 2008 study which illustrated that the majority of Flickr users elected the most restrictive Creative Commons license).

⁴³¹ *See* Goss, *supra* note 410, at 977.

⁴³² *Id.*

⁴³³ Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406, at 398.

⁴³⁴ *Id.* at 399.

⁴³⁵ *Id.*

⁴³⁶ *See id.*

⁴³⁷ *Id.*

notion that ownership should always be enforced and sharing, or any other use, always needs authorization.⁴³⁸ This, in turn, can change our behavior concerning information goods.⁴³⁹

Moreover, the Creative Commons regime is a regime of choice.⁴⁴⁰ Authors elect what terms will apply to their works and the only standard provision that applies to all licenses is attribution.⁴⁴¹ The Creative Commons strategy provides flexibility and can adapt to developments as authors have the right to choose and amend their licenses.⁴⁴² But, Creative Commons licensing can also create barriers to access for two reasons. First, the diversity of licenses leads to confusion which makes it hard to use others' works and results in raising transaction costs.⁴⁴³ The Creative Commons icon, by itself, does not convey exactly what the permissible uses are; since there is freedom of choice, one cannot assume that the Creative Commons symbol means freedom to copy or make derivative work but instead, users have to investigate the specifics of each Creative Commons contract and what it entails.⁴⁴⁴ Moreover, the process of combining different works to create new works is complicated due to the diversity of licenses, as the new work can incorporate two works that may each contain different, or even contradictory, terms of use, which in turn, would impair the remixing of preexisting works.⁴⁴⁵

Second, the strategy of choice bears with it a normative educational message of authorship and control of right. The Creative Commons regime promotes de facto use of copyright control in the UGC arena.⁴⁴⁶ A policy of choice recognizes the user's choice to select the terms of their choosing without any limitations and in doing, it signals the idea of the sovereignty of the author under which, every use should be licensed—and thus, governance and exclusion is promoted.⁴⁴⁷ Creative Commons has the effect of bringing “copyright into the desktops of individual

⁴³⁸ *See id.* at 399.

⁴³⁹ Elkin Koren, *What Contracts Cannot Do*, *supra* note 406, at 400.

⁴⁴⁰ Elkin Koren, *Governing Access*, *supra* note 7, at 5, 17.

⁴⁴¹ *Id.* at 17.

⁴⁴² *See id.* (describing how modularity creates flexibility within the Creative Commons system).

⁴⁴³ *Id.* at 17–18.

⁴⁴⁴ *See id.* at 18.

⁴⁴⁵ *See* Elkin Koren, *Governing Access*, *supra* note 7, at 17–18.

⁴⁴⁶ *Id.* at 18.

⁴⁴⁷ *Id.* at 18.

writers, bloggers, [and] amateurs.”⁴⁴⁸ It has made the exercise of copyright control, something that was traditionally used mainly by commercial entities, the estate of all.⁴⁴⁹ Users have always had copyright, but they rarely exercised or bothered to assert their rights.⁴⁵⁰ Under the Creative Commons regime, copyright control was brought to the forefront.⁴⁵¹ Additionally, while promoting the author’s right to control, Creative Commons does not supplement authors with any educational plan to guide them on how to control their rights, but instead, leaves the decisions to the authors themselves.⁴⁵²

Niva Elkin-Koren presents interesting arguments on a popular regime that is widely adopted by the sharing platforms.⁴⁵³ Despite our first intuition and understanding about the value of Creative Commons, she states that there exists a fear that the Creative Commons regime *contradicts* the promotion of sharing and remixing.⁴⁵⁴ In my view, however, Elkin-Koren’s theory diminishes the educational efforts of Creative Commons. Creative Commons emphasizes its ideology on its website and through its stated ideology, it teaches the important goals of sharing (remix, innovation, and creativity).⁴⁵⁵ Moreover, Creative Commons also provides some directions as to the how authors should exercise their rights.⁴⁵⁶ Nonetheless, the concerns regarding the increased emphasis on authors’ governance and

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 19.

⁴⁵⁰ Elkin-Koren, *Governing Access*, *supra* note 7 at 19.

⁴⁵¹ *Id.*

⁴⁵² Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406, at 401.

⁴⁵³ *See generally id.* at 376- 378 (discussing her views on the Creative Commons licensing platform); Elkin-Koren, *Governing Access*, *supra* note 7, 17-19.

⁴⁵⁴ Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406, at 401-02.

⁴⁵⁵ *About Creative Commons*, *supra* note 400 (claiming Creative Commons’ mission is one that “develops, supports, and stewards legal and technical infrastructure that maximizes digital creativity, sharing, and innovation”).

⁴⁵⁶ *See e.g., id.* (explaining Creative Commons’ vision as “realizing the full potential of the internet—universal access to research and education, full participation in culture—to drive a new era of development, growth, and productivity”); Creative Commons, *Culture*, CREATIVE COMMONS, <http://creativecommons.org/culture> (last visited March 25, 2012) (explaining to individual authors who create UGC: “Whether you’re a photographer, writer, filmmaker, or DJ, our licenses can help make your work part of the commons. The Internet is a multiplier of cultural innovation. Creative Commons copyright licenses make it easier for individual creators of culture to express themselves and to identify the freedoms they want their creativity to carry on the Internet.”).

the diversity of licenses created by a regime of multiple choices are justified.⁴⁵⁷

Putting the authors to the forefront is consistent, in my opinion, with a bottom up approach that seeks to create a social change.⁴⁵⁸ Acknowledging and respecting the right of the author to exercise control of her work is compatible with this ideology, and is similar to my approach to original UGC sharing.⁴⁵⁹ As users are becoming more aware of the importance of their works, be that as their expression or as subject to commercial interests, depriving them of the rights of control ignores the legal as well as social reality. Acknowledgment of users' ownership and control is done not only through Creative Commons, but also by sharing platforms that clarify to users that they are the owners of their content, as well as, in my observation, by the Internet environment in general.⁴⁶⁰ As users of the Internet are becoming more conscious and UGC is becoming a more and more popular means of expression, the understanding and awareness of uses, rights, and obligations also grows.⁴⁶¹

The sharing platforms' concentration of Creative Commons licensing is not wrong by itself. Creative Commons offers a bottom up approach that is suitable to original UGC and

⁴⁵⁷ Elkin-Koren, *What Contracts Cannot Do*, *supra* note 406 at 392.

⁴⁵⁸ *See id.* (attributing Lessig as “[d]efining the role of Creative Commons’ movement as a crucial bottom-up effort for initiating social change”).

⁴⁵⁹ *See supra* Part IV.C. (discussing the author’s view of UGC).

⁴⁶⁰ *See* Part III, *supra* (discussing the TOU of various sharing platforms).

⁴⁶¹ An interesting example for such awareness concerns the Stephanie Lenz case. Stephanie Lenz uploaded to YouTube a video of her son dancing while Prince’s song “Let’s Go Crazy” is playing in the background. YouTube was asked by the Universal Music Group which represented Prince, to remove the video and so, YouTube removed the video. Stephanie Lenz opposed the takedown and sued Universal for damages, Greg Sandoval, *Mother Protects YouTube Clip By Suing Prince*, CNET News (Oct. 30, 2007, 12:25PM), http://news.cnet.com/8301-10784_3-9807555-7.html?tag=mncol;txt. The indication of users’ awareness is not only seen in Stephanie Lenz’s actions, but the response of users to this case (not only the written responses but mostly the video responses), Video Responses to Let’s Get Crazy Clip, YouTube, http://www.youtube.com/video_response_view_all?v=N1KfJHFWlhQ (last visited March 25, 2012). Some of the responses are videos that mock Prince’s attempt to remove the video by presenting an initial warning explaining that some uses are permissible under the fair use defense and then playing the song in the background while they are riding a bicycle, filming a dog run, filming children run with shopping carts in the store, etc., *see* Let’s Go Crazy.Wmv, YouTube, <http://www.youtube.com/watch?v=7liRP7MeBxI> (last visited March 25, 2012); *Let’s Go Crazy Response*, YouTube, <http://www.youtube.com/watch?v=wuohQxRnhB4> (last visited March 25, 2012); *Let’s Go Crazy Sascha Style*, YouTube, <http://www.youtube.com/watch?v=mKRQIlpK2us> (last visited March 25, 2012).

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therefore, it is a suitable tool for sharing.⁴⁶² The problems set out above cast doubts about the effectiveness of the Creative Commons licensing,⁴⁶³ however, the diversity and choice problems accompanying Creative Commons are interrelated to education.⁴⁶⁴ Creative Commons' education and promotion alone is not enough.⁴⁶⁵ Users need a trigger that will make them use the links to Creative Commons to begin with: they need additional "outside" education as well.⁴⁶⁶ In this case, they need sharing platforms' education that will, at the very least, encourage them to go to the Creative Commons website and choose a license.⁴⁶⁷ The above discussion suggests that reliance upon, and merely the informing of users on Creative Commons licensing alone, is only a partial solution at best.

VI. CONNECTING THE DOTS

Under the current legal regime, sharing platforms license some of the users' copyrights to themselves and sometimes to other users as well. But the right to create derivative work from UGC—which is the crucial right for remix purposes—is still not licensed to other users (i.e., each user who creates original content still retains the choice to enable or prohibit other users from creating derivative works of her content).⁴⁶⁸ Thus, the question is: should we change this regime and if so, how?

Remix culture is thriving; nonetheless, remixing original UGC without the copyright holder's consent is as illegal as remixing mass media content.⁴⁶⁹ Similar to mass media content, the remixing of original UGC is a desirable form of expression containing cultural meanings that cannot be expressed in another way.⁴⁷⁰ And similar to mass media content, UGC is deserving of copyright protection.⁴⁷¹ This indicates that the ability to remix existing UGC is valuable and will become more

⁴⁶² Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689, 721 (2010).

⁴⁶³ See *supra* Part V.C (discussing the enforceability of Creative Commons).

⁴⁶⁴ See *supra* Part V.B (discussing sharing platform's education shortcomings).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ See *supra* Part III.

⁴⁶⁹ See Lee, *supra* note 14, at 1520 (describing the growth of remix UGC).

⁴⁷⁰ Hetcher, *The Kids Are Alright*, *supra* note 268, at 1276.

⁴⁷¹ See *supra* pp. 328–32 (discussing remix in the context of original UGC).

valuable in the future.⁴⁷² Thus, enabling users to remix is a desirable result. Remixing of original UGC should be encouraged and promoted.⁴⁷³

At the same time, original UGC presents distinct characteristics that separate it from the regular discussion on remix in the mass media context.⁴⁷⁴ Users may form a stronger bond with their content, as UGC is often times a singular work that reflects users' personality interest.⁴⁷⁵ Furthermore, UGC can be qualitatively at the same level as any other professional content, especially when considering that the dichotomy between professional and amateur UGC has blurred.⁴⁷⁶ Additionally, UGC can carry with it economic interests.⁴⁷⁷ Given the desire to advance sharing and remix between users on the one hand, but also acknowledging users' rights in their content, the complex set of interests and incentives in the UGC environment which influence the motivation to permit remix, and the fear of diversity in licensing leading to information costs, the question remains how to advance this goal? One possibility is to redistribute rights by licensing the users' right to derivative work to other users as part of the terms of the TOU. However, I do not think that is the right solution. Not only is the use of the TOU highly criticized because it is inaccessible and legally complex for the ordinary user,⁴⁷⁸ but even if the TOU were written in plain language and viewed by most users, it would still be problematic. As discussed, sharing platforms present a high degree of consolidation and weak competition; this coupling with data stickiness and a tendency toward uniformity in terms will leave the users with no choice but to accept them.⁴⁷⁹ Additionally,

⁴⁷² *Id.* Hetcher, *Part One*, *supra* note 37, at 864–865. *See also* Lee, *supra* note 14, at 1517 (NBC General Counsel, Rick Cotton, discusses the exciting future of UGC and its potential to serve customers).

⁴⁷³ *See supra* pp. 328–32.

⁴⁷⁴ *See id.*

⁴⁷⁵ *See* Fisher, *User Innovation*, *supra* note 168, at 1451–52 (claiming that the personality interest argument is weak when “all of the products being modified have been manufactured and distributed in large quantities”, while a destruction of a “unique sculpture” will create outrage).

⁴⁷⁶ *See* Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 118–120 (discussing the problem of distinguishing between amateur and professionally created UGC).

⁴⁷⁷ *See id.*

⁴⁷⁸ *See* Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 364, at 1180–81; Radin, *supra* note 362, at 1231; Lemley, *supra* note 357, at 465.

⁴⁷⁹ *See* Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 364, at 1183–84;

licensing the derivative right through the TOU means, in some cases, the de facto deprivation of users from any copyrights (as in some instances all other economic rights are already licensed) as well as injuring the personality interest of the users and signaling that UGC is a less worthy content than others. Furthermore, we also have to take into account the evolution of commercial interests in this environment and the growing awareness users have of their legal rights.

Although the TOU are not the right medium to advance sharing for remix, one might think that regulation, namely, reforming the copyright law, is the solution to remix of original UGC.⁴⁸⁰ However, in the UGC environment, behavioral changes, rather than regulatory changes, will have more force. I argue that despite the fear of diversity, the decision to permit remix should still reside in the hands of the users. Here, the sharing platforms can play an important role in promoting this kind of sharing as most of the original UGC is uploaded and shared on some form of a sharing platform.⁴⁸¹ This is not a “traditional” bottom-up approach, but a “middle-up” approach. By using the sharing platforms we can advance the behavioral change in the users themselves. Sharing platforms’ regulatory and educational practices should be examined and reformed voluntarily by the sharing platforms according to such features. By using the sharing platforms to educate users, the problem of diversity in licenses’ terms can be mitigated.⁴⁸² Thus, I suggest that sharing platforms should reform their practices and give a substantial weight to their educational role.⁴⁸³ It should be noted here that while sharing platforms are private companies under no obligation to implement the suggested reforms, as I will elaborate upon later, advancing remix sharing will also benefit the sharing platforms themselves.

As such, I suggest two main reforms to the current sharing platforms’ practices. The first reform will concentrate on the

See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 116-18.

⁴⁸⁰ *See*, Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 133 (arguing that standard licensing is a “second best” solution that cannot provide a comprehensive solution, and a legal reform is preferable).

⁴⁸¹ For example, You Tube alone has millions of users who upload days’ worth of content on a daily basis, YOUTUBE, *Frequently Asked Questions*, <http://www.youtube.com/t/faq> (last visited March 24, 2012).

⁴⁸² *See infra* notes 500–502 and accompanying text.

⁴⁸³ *See infra* Part VI.B (suggesting sharing platforms adopt broader educational schemes).

format and method of the regulatory role, namely the redistribution of copyrights through the TOU. The second reform calls for extensive educational reforms that would give the user more information in a meaningful way about the values of sharing. These two reforms are interconnected. Using TOU as a tool for taking rights is inappropriate, but at the same time, as discussed above, there is a reasonable fear that diversity in contracts will lead to transaction costs, and there is also fear that without any “forced” sharing, there will be a tendency toward closure rather than openness, especially when considering the evolution of commercial interests in the UGC environment.⁴⁸⁴ Thus, my proposed educational reform can lead to more coherent rights dissemination and serve to mitigate these fears.

A. *Terms of Use*

Should the sharing platforms leave the decision of what uses to permit to users’ discretion or is it preferable that they reorganize users’ rights unilaterally? The decision to permit remix should reside in the hands of the users, rather than in the hands of the sharing platforms, especially when it concerns other users’ exploitation of the original UGC. As set forth above, the TOU is not the proper place to regulate UGC.⁴⁸⁵

Moreover, one of the reasons to require more informed consent from users is because they are not necessarily opposed to commercial use. They do, however, oppose the way this commercial end is achieved.⁴⁸⁶ As Lessig explains: “But though the objective of profit is not a problem, the manner in which that profit is secured can be. The respect, or lack of respect, demonstrated by the terms under which the remix gets made says something to the remixer about how his work is valued.”⁴⁸⁷ Lessig addresses the issue of creators permitting the remix of their works but reserving ownership rights to the final remixed work.⁴⁸⁸ This is distinguishable from the scenario where the

⁴⁸⁴ See Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 123-24 (discussing how the notion of UGC as nonprofit work is misguided and the appearance of commercial interests in the UGC environment); Elkin Koren, *Governing Access*, *supra* note 7, at 17-18.

⁴⁸⁵ See *supra* Part V.A.

⁴⁸⁶ LESSIG, *supra* note 4, at 247.

⁴⁸⁷ LESSIG, *supra* note 4, at 247.

⁴⁸⁸ See *id.* at 245-46 (using the example of a “Star Wars” mashup site that is keeping all rights to UGC to itself).

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sharing platforms declare that the users own their UGC, nonetheless, the sharing platforms do license through the TOU, all the basic commercial rights granted under the copyright law.⁴⁸⁹ Lessig's observation has some relevance to this situation as well.⁴⁹⁰ Treating users, the bread and butter of sharing platforms, with respect, will benefit sharing platforms in the long run, and might lead users who will feel they are respected or have "a say" about their rights, to be more open about uses—including commercial use.⁴⁹¹

Thus, in the case of the sharing platforms' TOU a better notice should be constructed by the sharing platforms, in order to create more clarity and provide transparency. For example, when the user uploads UGC to the platform, an information box could appear and state, in layman's terms and bullet points, the users' rights and relinquishments. Or, if users have discretion concerning redistribution of rights, especially to other users, the choice to decide what uses are permitted could be presented during the uploading process. During the upload process YouTube gives the users an option to choose between YouTube's TOU or Creative Commons license (attribution only), but this is not optimal.⁴⁹² This is the only Creative Commons license that is offered during the upload process, if a user elects not to choose this specific license, the only other option is the YouTube's TOU, however, YouTube directs the users to its TOU, and thus, the contractual problems stated above still exist.⁴⁹³ Flickr does provide its users with the ability to choose from a variety of Creative Commons licenses. But the default regime is 'all rights reserved', and during the upload process the user cannot choose the preferable licensing regime and only after the upload, she can edit her preferences and thus, users need to care for sharing in order to go and change their preferences.⁴⁹⁴ Similarly, when a user watches a UGC work, up to date information should be presented clearly, explaining what a user is permitted to do with that particular work.

⁴⁸⁹ See *supra* Part III.

⁴⁹⁰ See LESSIG, *supra* note 4, at 244, 247.

⁴⁹¹ *Id.* at 247–48.

⁴⁹² *Upload Your Video*, YOUTUBE, http://www.youtube.com/my_videos_upload, (last visited March 25, 2012).

⁴⁹³ See *supra* Part V.A; *Id.* (noting that the website automatically checks the TOU option when the upload video screen appears).

⁴⁹⁴ *All Rights Reserved*, FLICKR FROM YAHOO, <http://www.flickr.com/photos/no3rdw/3664187720/> (last visited March 8, 2012).

B. Education

At the same time, this should be supplemented with a broader educational scheme that should be developed by the sharing platforms. Here, I suggest that sharing platforms operate in two stages: first in the general ideological frame of remixing, and second, if they offer an option to license the UGC under Creative Commons (or the like), they should also provide more details.

Sharing platforms should further encourage the general idea of sharing, and concentrate on the value of remix and its benefits to the users' community. Users' awareness of their rights and of the importance of sharing and remix to their self-expression will grow, and they will therefore, become more receptive to supporting the ideas of sharing and remix as a goal of users' community. The idea of recruiting users to participate and collaborate in an online project by creating an ideologically mutual cause, and making the users share this cause, is not new; Wikipedia is an example of this.⁴⁹⁵ Wikipedia promotes an ideology of universal encyclopedia, sharing knowledge and information free for all to use and participate in.⁴⁹⁶ Anyone is welcome to participate and contribute to the pool of knowledge, but users do not retain rights to their contribution or to the final collaborative work;⁴⁹⁷ yet, many contribute to the Wikipedia project.⁴⁹⁸ One of the strongest motivations to contribute to Wikipedia is ideology.⁴⁹⁹ The Wikipedia project demonstrates

⁴⁹⁵ LESSIG, *supra* note 4, at 155.

⁴⁹⁶ See JOSEPH MICHAEL REAGLE JR., GOOD FAITH COLLABORATION: THE CULTURE OF WIKIPEDIA 1 (2010); Letter from the Founder—April 2005, Wikimedia, http://wikimediafoundation.org/wiki/Founder_letter (last visited March 25, 2012) (“Wikimedia’s mission is to give the world’s knowledge to every single person on the planet in their own language. As part of that mission, Wikipedia is first and foremost an effort to create and distribute a free encyclopedia of the highest possible quality. Asking whether the community comes before or after this goal is really asking the wrong question: the entire purpose of the community is this goal. I don’t know of any case where there is a genuine tension between these two things, either. That is to say, the central core of the community, the people who are really doing the work, are all passionate about this point: that we’re creating something of extremely high quality, not just building an online community for its own sake.”).

⁴⁹⁷ *Five Pillars*, *supra* note 232.

⁴⁹⁸ Wikipedia, *Statistics*, <http://en.wikipedia.org/wiki/Special:Statistics> (last visited March 24, 2012) (presenting statistics about Wikipedia, for example: Wikipedia has 13,969,858 registered users and 3,558,738 content pages).

⁴⁹⁹ Oded Nov, *What Motivates Wikipedians?*, 50 COMMUNICATIONS OF THE ACM 60, 63 (2007) available at <http://www.cs.trincoll.edu/~ram/hfoss/wikipedia-motivations.pdf>.

that users can be pulled together to commit and contribute to the idea of creating a pool of knowledge and free information. Similarly, users can be pooled and persuaded to see remix as a community's ideology, a cause to be promoted by all. A broader ideology of remixing (not only of Creative Commons) will encourage sharing not only through Creative Commons licensing, but will broaden the permission formats, encourage other initiatives for remix sharing, and influence users' behavior not only on that specific sharing platform, but on parallel sharing platforms or networks as well.⁵⁰⁰

Sharing platforms can also encourage remix by informing users about the most downloaded UGC (similar to the way YouTube publishes the most viewed clips) and by technically enabling downloading.⁵⁰¹ Through such activities, users will be exposed to the possibility of downloading and awareness of this custom will grow, which in turn, will encourage users to permit downloading of their own content.

This wider educational scheme will also serve to mitigate the problem arising from effectiveness of the Creative Commons' licenses, as it will lead users to prefer the liberal licenses available.⁵⁰² For the same reason, offering the ability to license the material under Creative Commons' licenses without additional information about Creative Commons, is not enough. Creative Commons (despite the acknowledged disadvantages set forth in part V) can be a helpful tool in promoting remix. But users need to learn about Creative Commons' ideology and by providing a little bit more information about what Creative Commons is, users will be encouraged to go to the Creative Commons site where they will be able to find comprehensive information about sharing in general, and Creative Commons in particular.

Here the question arises, although educational efforts can promote access to original UGC, why would sharing platforms,

⁵⁰⁰ Jude Yew, *Social Performance: Understanding Open Sharing and Remix Culture*, http://research.microsoft.com/en-us/um/redmond/groups/connect/cscw_10/docs/p517.pdf (last visited March 25, 2012).

⁵⁰¹ See, James R. Bughin, *How Companies Can Make the Most of User-Generated Content*, *The McKinsey Quarterly*, 2 (August 2007) ("The presence of tools (such as most-viewed lists or forwarding features) that make it easy for users to see what's popular or to send favorite videos to friends corresponded, by as much as 30 percent, with more downloads for popular videos.).

⁵⁰² See, Jessica Coates, *Creative Commons—The Next Generation: Creative Commons License Use Five Years On*, 4 *SCRIPT-ed* 77 (2007).

which are profit maximizing private companies, facilitate and promote such environment of remix? Establishing broader sharing among users and encouraging remix of original UGC will benefit the sharing platforms.⁵⁰³ As I show in this article, the activity of remix is a desirable activity that we should advance and encourage; UGC is developing and starting to take a central role in our cultural environment. It is a topic of discussion and can lead to fame and exposure. Users are already starting to engage with existing original UGC, such as the “Double Rainbow” case.⁵⁰⁴ As the UGC role increases and users’ need to engage in their online environment increases, so will users’ interest in remix of existing original UGC.⁵⁰⁵ Accordingly, users will be drawn to sites that provide the opportunity to remix original UGC.⁵⁰⁶ Thus, sharing platforms have the incentive to enable remix and make their platform more lucrative to users so that more users will want to move to their platform rather than that of their respective competitors.

Finally, even if users are not yet aware enough of the idea of remix, like any other consumers, they will be drawn to the sharing platform that offers the most applications and “gadgets.” Thus, even if this “gadget” is not vital to their enjoyment at this particular moment, it will draw added value merely by having the application available to them.⁵⁰⁷ At the end of the day, as much as the users need the sharing platform as a service to provide them the tools to share their works, the sharing platforms need the users, because it is the users who generate the content on the platform and create its economic value.⁵⁰⁸ Giving more options to users and increasing the range of uses will benefit the sharing platform by drawing more users and

⁵⁰³ Elkin-Koren, *User-Generated Platforms*, *supra* note 5, at 126-27 (discussing the interest of sharing platforms to enable access to UGC in order to keep and attract users).

⁵⁰⁴ *See Double Rainbow*, *supra* note 57.

⁵⁰⁵ *See generally* Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 120-21 (providing an example of the increasing interest in UGC remixing).

⁵⁰⁶ *See id.*

⁵⁰⁷ DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCE THAT SHAPE OUR DECISIONS 49–54 (2008) (discussing the value of getting items for free, and how free can distort our preferences, but claiming that there are times when getting items for free make sense. “The critical issue arises when free! becomes a struggle between a free item and another item—a struggle in which the presence of free! leads us to make a bad decision”).

⁵⁰⁸ Elkin Koren, *Governing Access*, *supra* note 7, at 13.

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consequently increasing its content and its economic value.⁵⁰⁹

VII. CONCLUSION

Sharing platforms can play an important role in promoting remix of original UGC among users because of their position as the facilities upon which users elect to share their UGCs, and as the ones who govern the users' control on original UGC. The current practices of the sharing platforms do not perform this task optimally, not from the regulatory aspect and not from the educational aspect. We should not support a regime that excessively deprive users from their copyrights without proper notice and without giving them some choice in the matter, but at the same time, we have to acknowledge that a diverse population with diversity of interests can lead to a confusing licensing regime. Understanding the role and evolving importance of original UGC, as well as the evolving awareness and new interests in the UGC environment, will help sharing platforms develop a more comprehensive scheme that will award a choice to the users, show respect to their contribution as the economic value of the platform, but at the same time provide them with enough guidance to direct them to the right choice.

At the end of the day, education connects the dots. Creating an ideology of remix, building on others' experience by attracting users to a common cause, explaining remix, and explaining expression can result in users' willingness to promote remix by allowing their works to be remixed. Education about remix will benefit the sharing platforms by creating more attractive platforms for users and at the same time will respect the users' contributions and choice as well as create more conscious users who are conscious to the UGC environment, and to expression through UGC.

⁵⁰⁹ Elkin-Koren, *User Generated Platforms*, *supra* note 5, at 126–27.