

# Licensing the Cloud

Daniel Gervais

ALAI Congress  
Kyoto, October 2012



**VANDERBILT**  
LAW SCHOOL

# The Cloud

- Almost every bit of human culture, every song, book, document and movie ever made will be in the Cloud
- Reduces the perceived need for individual copies
- General depository for both commercial and private content
- Increasing amount of user-generated content

# Regulatory Challenges

- Mainframe -> Client/server
  - Both communication infrastructure
  - Separation of “content”/carrier
- Cloud
  - Amalgamation paradigm
  - Service providers and content increasingly close

# Cultural Challenges

- Culture defined here as the *store of meanings* that we have available to make sense of and critique our world
  - Think of meanings embedded in films, music, books, and newer formats of cultural dissemination
- At no point in history has there been a wider and more open “store”
- This should/could lead to more global or at least non-geographically bounded memes to emerge
- Authors have access and are influenced by “foreign” memes in a way that might make “foreignness” itself a very different notion

**COPYRIGHT, YOU ASK?**

# The traditional view of economic rights

“No” or transaction

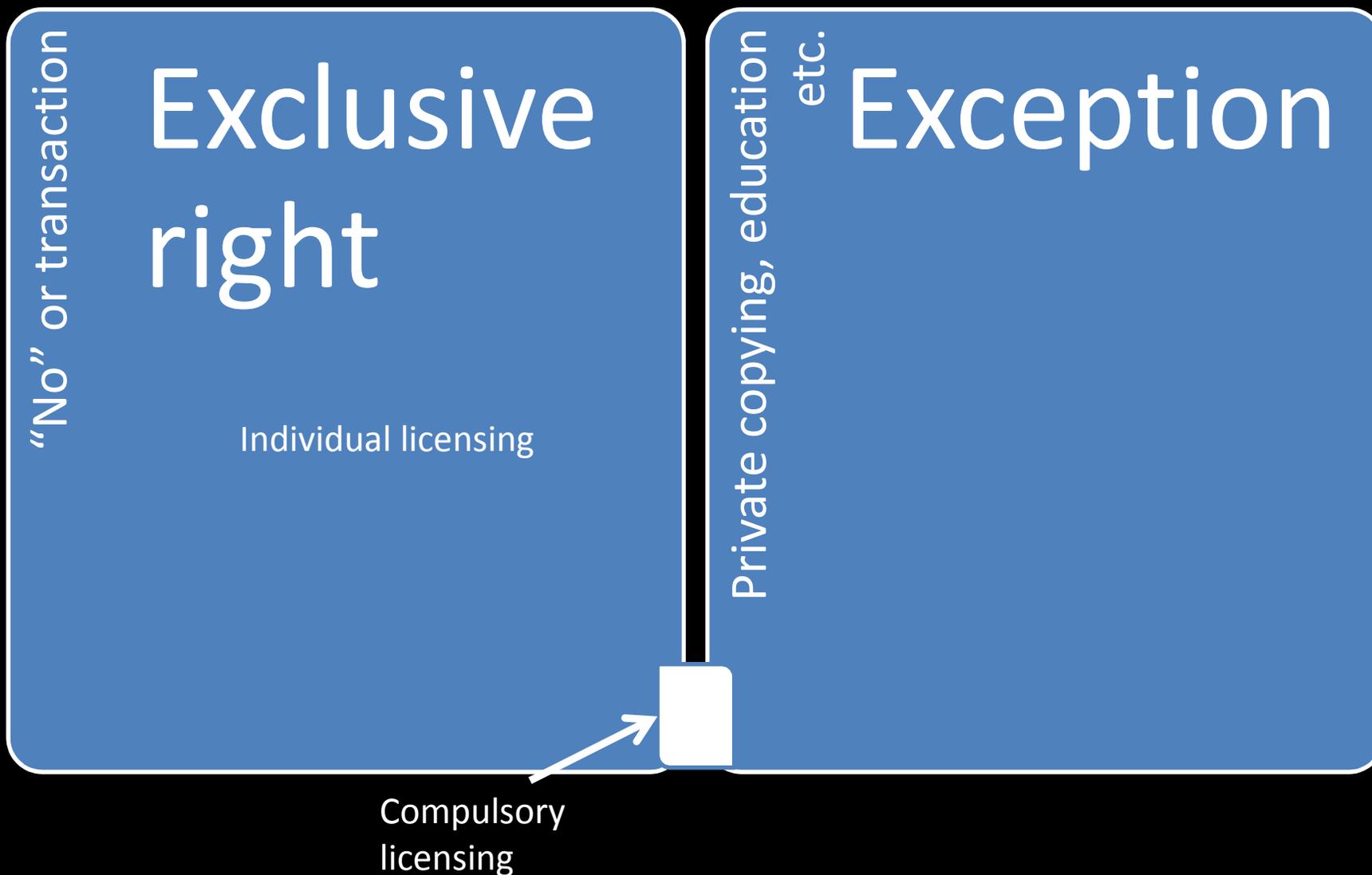
## Exclusive right

Individual licensing

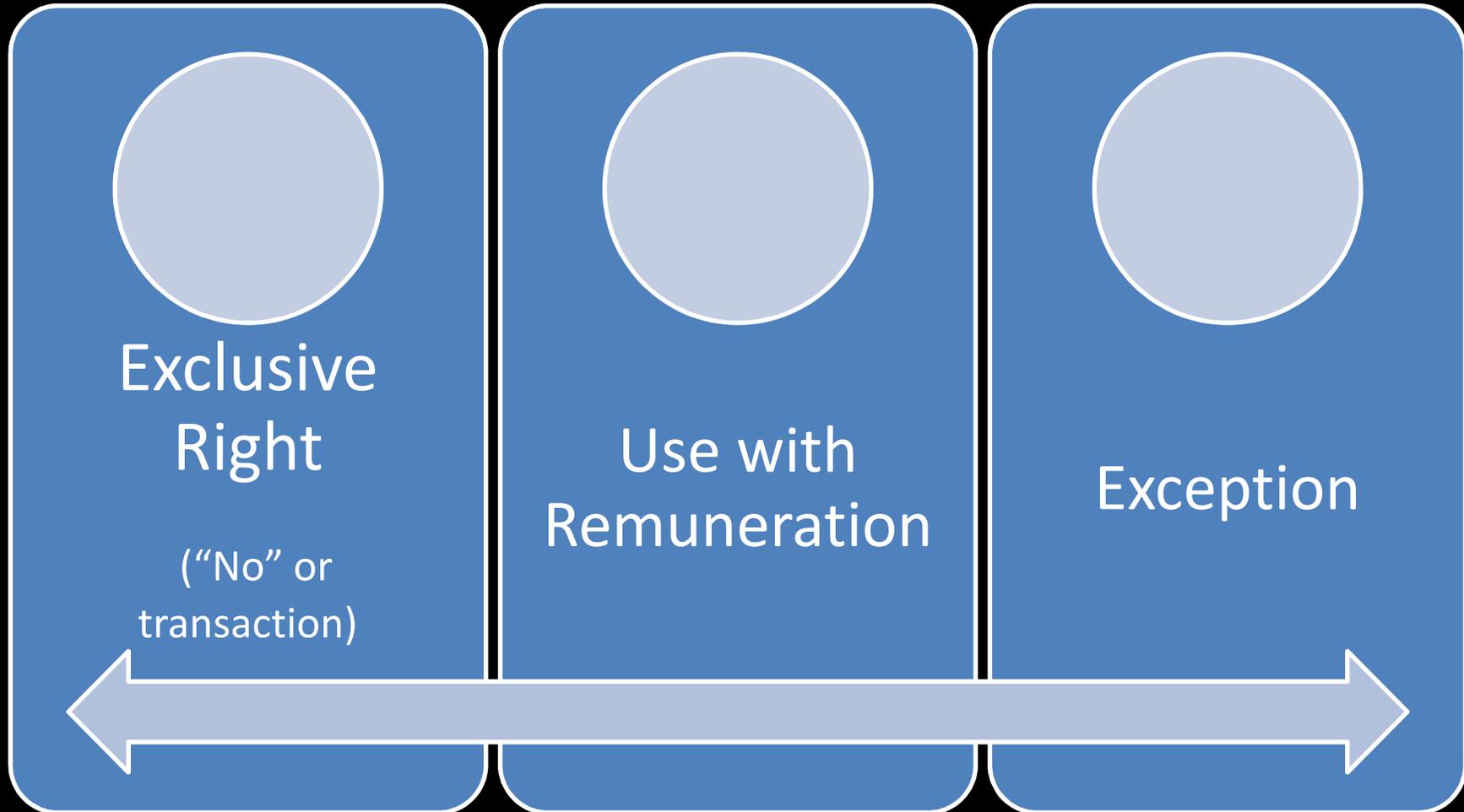
Private copying, education  
etc.

## Exception

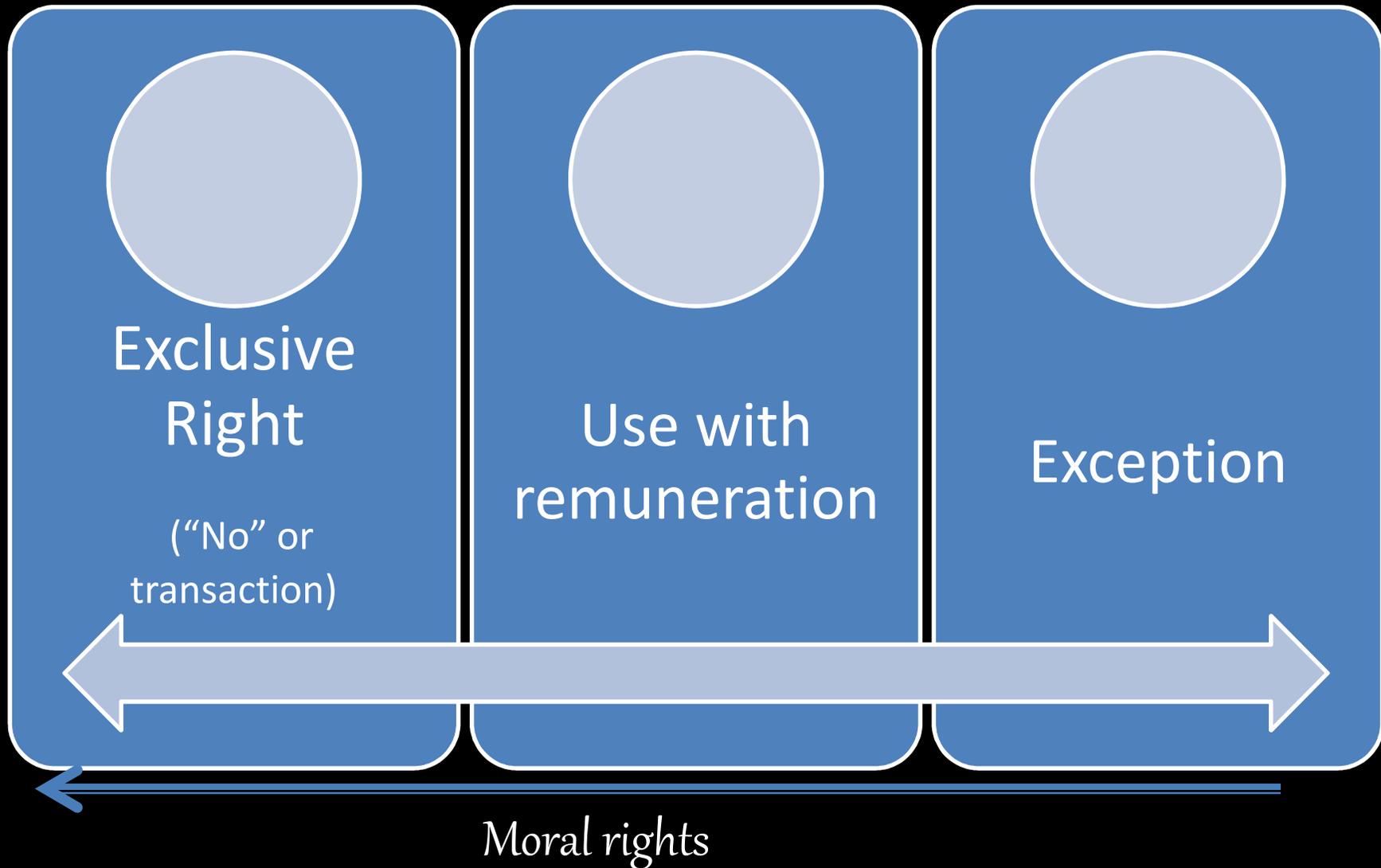
# The traditional view of economic rights



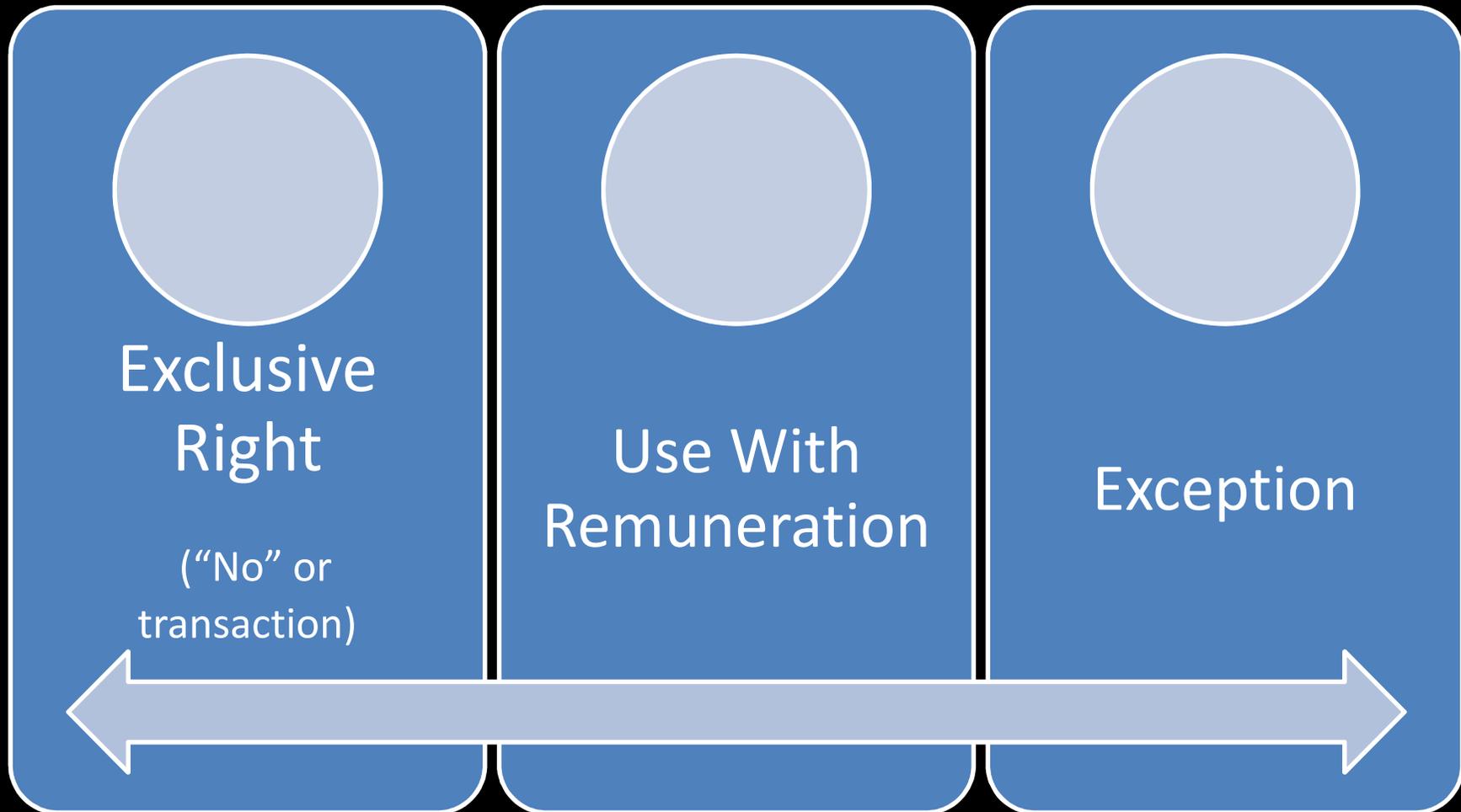
# The traditional view (corrected)



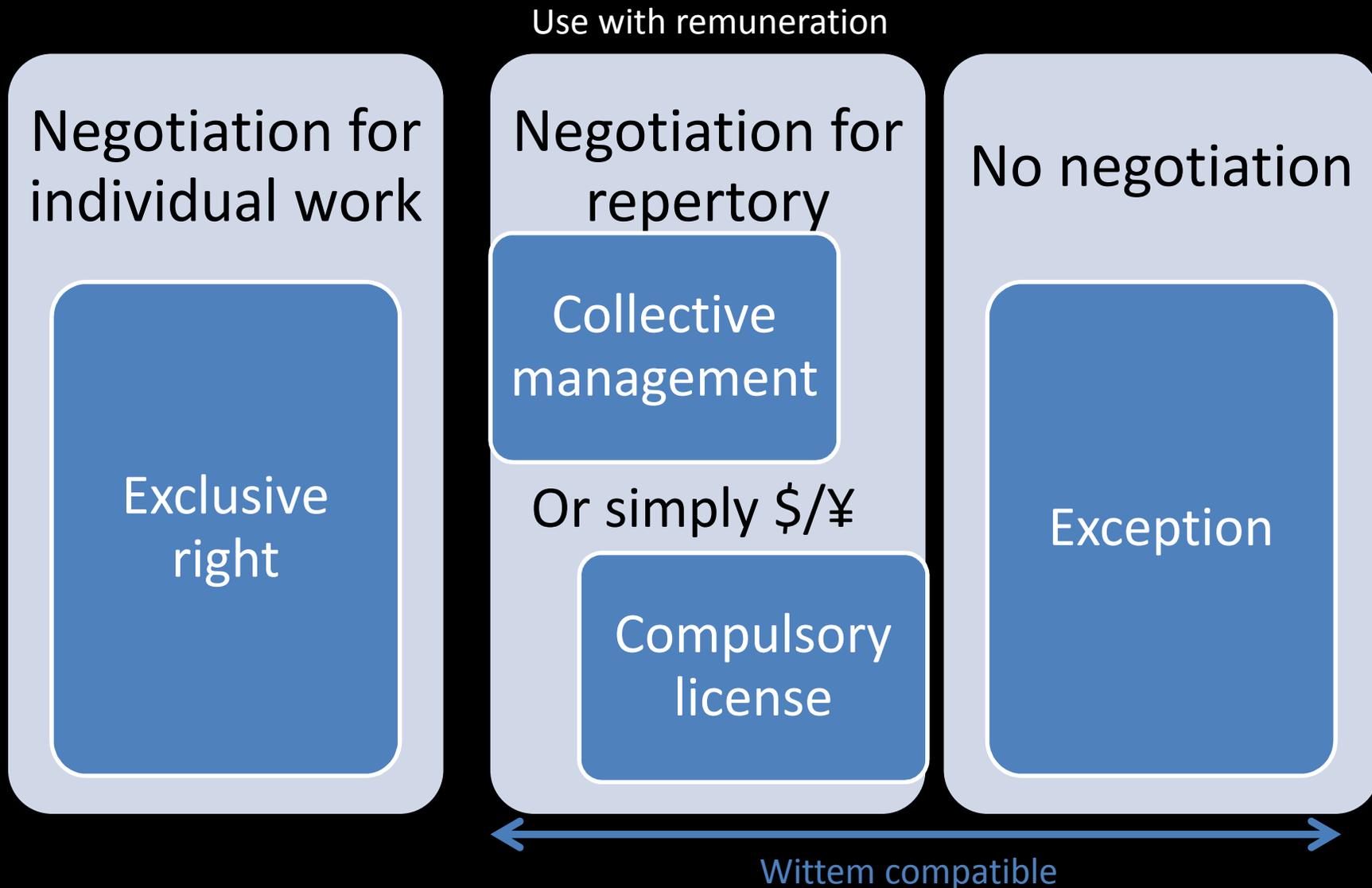
# The traditional view (corrected)



# The traditional view (corrected)



# The traditional view (completed)



# What should be our “Guiding Assumption”?

- Should our guiding assumption be:
  - We say “No”
    - Because all works may be commercially exploited and anything other than “no” interferes with normal exploitation
  - In the Cloud, can and should “no” continue to be the default?
    - i.e., technological and normative inquiries
  - Should we maintain this assumption if a work is out-of-print, not commercially published etc.?

# Guiding assumption

- Shouldn't we assume that Authors wish to have their works used?
- But that many of them want
  - Attribution, and
  - Remuneration
- Should our default be “no”, or “yes but”?

# In other words

- Should the priority be to maximize authorized uses or minimize unauthorized uses

# Lessons from File-sharing

- The Internet is difficult to stop
  - It was designed that way!
- “3 strikes” / graduated response has lowered illegal activity
  - But much less than anticipated (France)
  - And it is driving certain users below the radar (DarkNet & Usenet accounts, cyberlockers, IP proxies etc.)
  - By how much has it increased industry income?
  - At what cost?

# Learning from the Lessons

- Each user *may* need a license
  - Should more unlicensed use will become norm?
- Revenue is up
  - Where institutional or other forms of licensing is available
- Revenue is down
  - When behavioral changes are required
  - Especially those that do not conform to “social norms”
- The market does not work well for re-uses
  - UGC is huge licensing challenge (and raises fair use issues)
  - Collectives must cooperate or new licensing entities will emerge from market forces
  - This is not easy to do

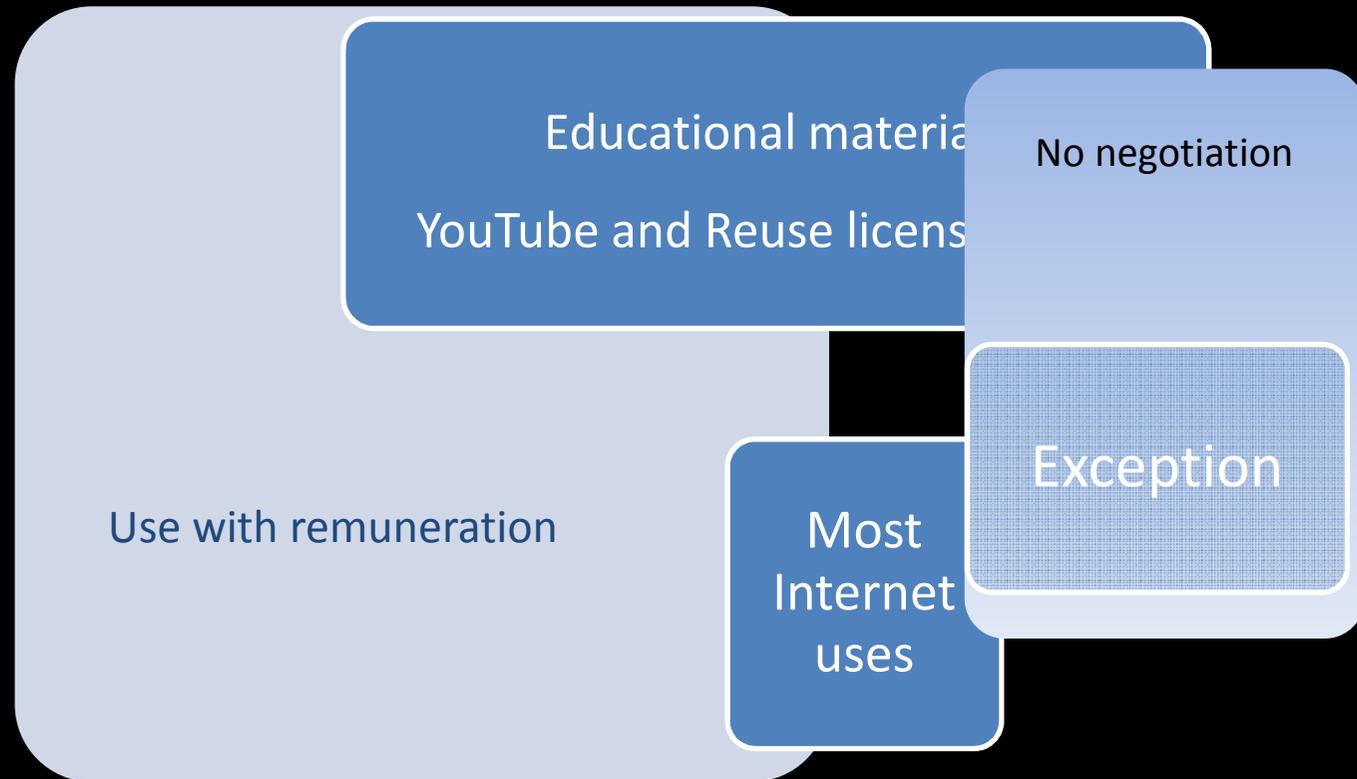
# Coase Theorem

- “Transaction costs may lead to a different allocation of rights”
- Normatively, what allocation works best here?
  - Saying “no” because one cannot say “yes” due to transaction costs
  - Or letting it be used for free (the current rule for most online uses)
  - Or something else?

# The proposed view: The collective model

Negotiation for individual work

Exclusive right



# My “axiom”

- Value on the internet is not created by scarcity (the traditional paradigm applicable to physical embodiments of copyright works) but by the number of connections between works and users who value them most
- Huge long tail
- Challenge for authors is to be found
- Social sites are key; but how much
  - Frictionless sharing/
  - Isn't “sharing” deliberate act of self-actualization?

# Conclusions

- Collective management should grow fast
  - But transparently and efficiently
  - Requires focused regulation
- If CMOs fail, then the Internet as a market is likely to fail for many types of works and many authors
  - Especially professional authors
- Yet the Internet is the largest and most efficient repository and distribution infrastructure ever made available
- Collective management can greatly reduce transaction costs
- In many cases, “yes, but” is a better alternative to free than “no”

どうもありがとう