The Place of Creativity in Copyright Law

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I. INTRODUCTION

The link between wealth creation and growth of knowledge is a shared theme in a variety of writings of economists, evolutionary economists in particular.[1] From Marshall to Schumpeter and Hayek, the dynamics of economic progress and its connection to innovation and economic adaptation to emergent novelty apprehended extensive investigation.[2] From the perspective of these evolutionary economists, knowledge and information are critical economic resources in modern economy.[3] To this end, a recent report (the *Venturous Australia Report*) affirms that information is central to the functioning of the economic system.[4]

Hayek believes that compared to governments, markets act more effectively to optimize the generation and handling of information; however other economists disagree with this assertion.[5] The best approach is likely to be produced by some appropriate hybrid of the two.[6] Modern copyright law (and other laws of intellectual property), as a legal instrument (if not the only one[7]) regulating the production and flow of information,[8] endeavors to sustain this hybrid. Without copyright excluding those who have not paid for the production of information and knowledge from profiting from it, markets (in theory) cannot afford sufficient incentives for the creation and dissemination of useful information and knowledge. However, the changing social context, such as the application of new media and communication technologies, new production of knowledge, [9] and especially the democratisation of creativity, has brought about continuing challenges to this regulatory framework. In this networked information society, the prevalence of a participatory and read/write culture and the rise of everyday creativity are reflections of the transformation of the dynamics of knowledge generation and the flow of information. Accordingly, copyright

[1] See generally, Alfred Marshall, *Principles of Economics* (8th edition, Macmillan and Co., Ltd. 1920. First edition published 1890); Joseph Schumpeter, '*Capitalism Socialism and Democracy*' (Routledge, London, 1943); Joseph Schumpeter, '*The Theory of Economic Development*' (Harvard University Press, Cambridge MA, 1934); Friedrich A. Hayek, *Individualism and Economic Order* (1948).

[2] '[These] diverse writers are linked by a thread of evolutionary reasoning made evident in their treatment of the dynamics of economic development, its connection to innovation and economic adaptation of emergent novelty and, more deeply, to the link between wealth creation and the growth of knowledge.' See further, J.S. Metcalfe, '*The Broken Thread: Marshall, Schumpeter and Hayek on the Evolution of Capitalism*' (Presented at the International Workshop "Marshall, Schumpeter, and Social Science", 17-19th March 2007, Sano Shoin, Hitotsubashi University, Tokyo).

[3] For further discourses on the importance of knowledge and information in the contemporary economy, see Daniel Belll, *The Coming of Post-Industrial Society: a Venture in Social Forecasting* (Basic Books, Inc., 1976); Fred L. Block, *Postindustrial Possibilities: A Critique of Economic Discourse* (University of California Press, 1990); Ernest Mandel, Late Capitalism (New Left Books, 1975); Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Duke University Press, 1991).

[4] Cutler & Company Pty Ltd, *Venturous Australia: Building Strenght in Innovation* (2008) 88-91.

[5] Ibid, 88.

[6] In examining the enabling role of government in promoting innovation, the *Venturous Australia Report* considered two primary issues: First, when designing regulations, defining property rights, promoting standards and, indeed the terms of market interaction, governments can encourage innovation by ensuring that pioneer firms and entrepreneurs can receive the appropriate reward in the market-place from their innovative efforts. Second, governments can promote good information flows both by finessing the 'rule of the game' in markets and by ensuring that the information and other content that they fund is widely and freely available to be used by consumers, and to be re-used and transformed into new value-added products by firms further down the production chain. See further, ibid 81-98.

[7] '[Copyright] is not the only area of law that governs information practices. For instance, securities laws, privacy laws, defamation laws, right of publicity, and the laws of black mail and unfair competition all regulate information practices. Copyright's regulation of information practices, however, is more fundamental and considerably more expansive.' See Dan Hunter and F. Gregory Lastowka, 'Amateur-to-Amateur' (2004) 46 (3) *William and Mary Law Review* 959.

[8] See further, Benedict Atkinson and Professor Brian Fitzgerald, '*Copyright as an Instrument of Information Flow and Dissemination:the case of ICE TV Pty Ltd v Nine Network Australia Pty Ltd*' (2008) <http://eprints.qut.edu.au/archive/00015208/> at 18 October 2008.

[9] On how the production of knowledge and the process of research were being radically transformed, see further Michael Gibbons et al, *The New Production of Knowledge* (Sage Publications Ltd, 1994). See also James Curry, 'The Dialectic of Knowledge-in-Production: Value Creation in Late Capitalism and the Rise of Knowledge-Centered Production' (1997) 2 (3) *Electronic Journal of Sociology* <http://www.sociology.org/content/vol002.003/curry.html> at 18 October 2008.

law more than ever plays an increasing role (in both a positive and negative sense) in the assurance of the flow of information, and thus in promotion of the growth of economy.[10]

In a positive sense, as empirical studies show, copyright has generated profound economic rewards for labour and investment in the production and dissemination of information and knowledge. Consequently, the economic contribution of copyright-based industries[11] to the world economy continues growing in the past years. For example, the value added by the total copyright industries accounted for $1.254 trillion or 12% of the U.S. GDP in 2002,[12] $1.3 trillion or 11.09% in 2004 and $1.38 trillion or 11.12% in 2005.[13] Notably, a recent report on fair use in the U.S. economy indicated that industries that rely on "fair use" exceptions to copyright contribute $4.5 trillion or 1/6 of U.S. GDP annually.[14] The total copyright industries contributed 5.38% to the Canadian economy in 2002, compared to 3.87% in 1991.[15] In Australia, the contribution of copyright industries increased from 2.2% of its GDP in 1980-81 to 3.3% in 1999-2000.[16] In China, copyright sector contributes 6 percent of its GDP in 2005.[17]

On the other hand, the negative effects of copyright (and other intellectual property) on the generation and flow of information and knowledge have raised universal concern.[18] In particular, the danger of threatening and stifling creativity caused by the law of copyright has been pointed out and investigated extensively by scholars.[19] The initial intention of

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[10] As a result, recent decades see ongoing debates as to how intellectual property laws help or hurt a society in any particular situation. See further, Michael A. Gollin, *Driving Innovation: Intellectual Property Strategies for a Dynamic World* (Cambridge University Press, 2008) 36 -59.

[11] According to the World Intellectual Property Organization (WIPO), copyright-based industries include: (1) Core copyright industries, defined as wholly engaged in the creation, production, performance, exhibition, communication or distribution and sales of copyright protected subject matter. These include literature, music, theatre, film, the media, photography, software, visual arts, advertising services and collective management societies. (2) Inter-dependent copyright industries, which deal with products jointly consumed with the core industries, or with facilitation equipment. They include the manufacture and sale of equipment such as television sets, CD recorders and computers; of musical and photographic instruments; of photocopying and recording material, etc. They provide the means for the production, dissemination and consumption of copyright goods and services. (3) Partial copyright industries, in which only part of the production is linked to copyright protected material, such as design, architecture, jewelry, furniture and other crafts., etc. (The element attributable to copyright varies according to the extent to which they are protected by copyright legislation). (4) Non-dedicated support industries, which only remotely rely on copyright material, and where copyright generates a very small portion of their business, such as telephony, transportation and general wholesale. The copyright-related contribution of these industries is calculated on the basis of an appropriately weighted copyright factor. See further, WIPO, *Guide on Surveying the Economic Contribution of the Copyright-Based Industrie* (2003).

[12] See further, Stephen E. Siwek, *Copyright Industries in the U.S. Economy (the 2004 Report)*.

[13] See further, Stephen E. Siwek, *Copyright Industries in the U.S. Economy (the 2006 Report)*.

[14] See further, Thomas Rogers and Andrew Szamosszegi, *Fair use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (Prepared for the Computer & Communication Industry Association, 2007).

[15] See further, Wall Communications Inc., *The Economic Contribution of Copyright Industries to the Canadian Economy* (prepared for Canadian Heritage, March 31, 2004).

[16] See further, The Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries* (Prepared for Australian Copyright Council and Centre for Copyright Studies, 2001).

[17] People's Daily Online <http://english.people.com.cn/200505/25/eng20050525_186756.html> at 19 October 2008; see also <http://nigeria2.mofcom.gov.cn/aarticle/chinanews/200506/20050600109293.html> at 19 October 2008.

[18] 'Critics seek to restrict or even eliminate some types of intellectual property protection, using eight different afruments based on concerns about negative consequences. These arguments may be summarized as theories based on restricted access to technology, increased cost, monopolization inappropriate investment incentives, competition, expense, institutional requirements, and ethics.' See further, Michael A. Gollin, *Driving Innovation: Intellectual Property Strategies for a Dynamic World* (Cambridge University Press, 2008) 40-47. See also, Marci A. Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective' (1996) 29 (3) *Vanderbilt Journal of Transnational Law* 613-634; Jerome H. Reichman, 'Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System', (1995) 13 *Cardozo Arts & Entertainment Law Journal* 475-520; Joseph Stiglitz, 'Scrooge and Intellectual Property Rights: A medical prize fund could improve the financing of drug innovations' (2006) 333 *British Medical Journal* 1279-1280; Commission on Intellectual Property Rights (UK), *Integrating Intellectual Property Rights and Development Policy* (2002) <http://www.iprcommission.org/graphic/documents/final_report.htm> at 18 October 2008; Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Book, July 2008).

[19] See generally, Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*

copyright law was to encourage learning and continued production of books;[20] however, it 'has developed as a way to reward the haves' [21] and has in fact departed from its original purpose.

The aberration of copyright's effects may be attributed to many factors among which the changing social context is a prominent one. The purpose of copyright law is to optimize creativity of people including both authors and users of creative materials. To accomplish this aim, copyright law must maintain a balance between stimulating creativity of authors (and potential authors) through rewarding creation with monopoly rights and enhancing creativity of individual users through encouraging access to information and knowledge. The ways in which such a balance could be sustained may vary in different social contexts. After examining the incentive structure and effect of copyright and arising new possibilities to enhance public literacy and individual creativity, this chapter articulates the purpose of copyright law for this networked information society and furthermore investigates how this aim could be accomplished.

II. Creativity in a Participatory Culture – the Changing Social Context for Regulating Information Flow

A participatory culture is a society in which people can grow up and play with creativity in their daily life. This has not only changed our conception of creativity but also changed how our culture can be produced, distributed, used and re-used. This is of significant implications to a vast variety of area such as education, media, sociology and law, especially the law of copyright.

A. Creativity in Theory

a) Creativity: Definitions, Characteristics and the Dark Side

Most research has implied that creativity is beneficial as 'it facilitates and enhances problem solving, adaptability, self-expression, and health'. [22] However, creativity is easy to be perceived but hard to be defined.[23] In *Jacobellis v. Ohio*, realising the impossibility to define hardcore pornography adequately, Justice Potter Stewart couldn't help but contended, 'I know it when I see it, and the motion picture involved in this case is not that.' [24] Similarly, it also seems hardly possible to define what creativity exactly is. As Hausman commented, 'Creativity is a bit like pornography; it is hard to define, but we think we know it when we

(NYU Press, 2003); Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin Press, 2005); Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (Basic Books, 2006); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press, October 2008).

[20] See generally, Ronan Deazley, *On the Origin of the Right to Copy: Creating the Movement of Copyright Law in Eighteenth-Century Britain (1695 – 1775)* (Hart Publishing, 2004).

[21] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (NYU Press, 2003) 5-6.

[22] Mark A. Runco, 'Creativity' (2004) 55 *Annual Review of Psychology* 677.

[23] For definitions of 'creativity', see C. W. Taylor. 'Various approaches to and definitions of creativity' in Robert J. Sternberg (ed.), *The nature of creativity: Contemporary Psychological Perspectives* (1988), 99-121; H. J. Eysenck, 'Creativity and personality', in Mark A. Runco (ed.), *The creativity research handbook* (Volume 1) (1997), 41-66; Carl R. Hausman, 1998, 'Creativity: Conceptual and Historical Overview' in Michael Kelly (ed.), *Encyclopedia of Aesthetics* (Vol. 1) (1998), 453-456; Robert J. Sternberg and Tood I. Lubart, 'The Concept of Creativity: Prospects and Paradigms' in Robert J. Sternberg (ed.), *Handbook of Creativity* (1999), 3-15.

[24] 378 U.S. 184 (1964)

see it.'[25] According to their main themes, Taylor has divided over 60 different definitions of creativity into five classes.[26] Franken defines creativity as 'the tendency to generate or recognize ideas, alternatives, or possibilities that may be useful in solving problems, communicating with others, and entertaining ourselves and others.'[27] Csikszentmihalyi sees creativity as 'any act, idea, or product that changes an existing domain or that transforms an existing domain into a new one.'[28] Misztal notes that '[any] attempt to define creativity is faced with the question as to whether creativity is a property of people, products or cognitive process.'[29] She continues '[dictionary] definitions present it as the ability to bring something new into existence, the ability to use the imagination to make new syntheses and the ability to produce something that is considered both novel and original, while also stressing that the notion is connected with unusual brightness or intelligence.'[30]

Creativity is observed and investigated in a variety of contexts and fields, such cognitive science, psychology, human intelligence, social and cultural studies. Studies show, although the problem of creativity is beset with mysticism, confused definitions, different definitions are reflection and manifestation of different types of creativity.[31] It is also asserted that '[creativity] is a topic of wide scope that is important at both the individual and societal levels for a wide range of task domains.'[32] Therefore, '[at] an individual level, creativity is relevant, for example, when one is solving problems on the job and in daily life. At a societal level, creativity can lead to new scientific findings, new movement in art, new inventions, and new social programs.'[33]

One interesting observation is that if you 'ask most people to define creativity as a generic term', they will 'nearly always think of some form solitary artistic endeavor.'[34] However, research reveals that 'most modern creative projects are collective'. [35] In most cases, 'one or two individuals may "spark" off the process but the ideas that make the project "real" come from a variety of other people at various stages of the project.'[36] In addition, another observation is that most people 'tend to associate creativity with the arts and to think of it as

[25] Inouye Alan S. et al., *Beyond Productivity: Information, Technology, Innovation, and Creativity* (2003), 16; Carl R. Hausman, 1998, 'Creativity: Conceptual and Historical Overview' in Michael Kelly (ed.), *Encyclopedia of Aesthetics* (Vol. 1) (1998), 453-456. Unsurprisingly, the Court are also unwilling to attempt further to define creativity. For example, although it affirmed that a work must contain a modicum of creativity to obtain copyright protection, in *Feist v. Rural Telephone Service Company*, 499 U.S. 340 (1991), U.S. Supreme Court refused to define what creativity actually is. But a Feist definition of "creativity" could be deduced from the Court's judgment. See further, Russ VerSteeg, 'Originality and Creativity in Copyright Law' in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Vol. 1 Copyright and Related Rights) (2007) 4-6.
[26] Calvin W. Taylor. 'Various approaches to and definitions of creativity' in Robert J. Sternberg (ed.), *The nature of creativity: Contemporary Psychological Perspectives* (1988), 99-121.
[27] Robert E. Franken, *Human Motivation* (2001), 396.
[28] Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention* (1997), 28.
[29] Barbara A. Misztal, *Intellectuals and the Public Good* (2007), 38.
[30] Ibid.
[31] Judith Gluck et al., 'How Creatives Define Creativity: Definitions Reflect Different Types of Creativity', (2002) 14 (1) *Creativity Research Journal*, 55-67.
[32] Robert J. Sternberg and Tood I. Lubart, 'The Concept of Creativity: Prospects and Paradigms' in Robert J. Sternberg (ed.), *Handbook of Creativity* (1999), 3.
[33] Ibid.
[34] Michel Syrett and Jean Lammiman, *Creativity* (2002), 6;
[35] Ibid, 11.
[36] Ibid.

the expression of highly original ideas'.[37] Unsurprisingly, in the area of arts and literature, creativity is heavily related to originality.

In many circumstances, creativity is the interpretation of the past and the rearrangement of the existing elements (materials, ideas and values). The historical analyses concern a bit about the self-destructive power of creativity.[38] Creativity, form the historical perspective, 'leads to things that have some value, but value varies from group to group and era to era'.[39] 'While creativity has been associated with problem solving and value enhancing through proactive actions, it has also been linked with potential costs to the individual and to the society at large.'[40] As McLaren observes, there exists a dark side to creativity and it represents 'a quest for a radical autonomy apart from the constraints of social responsibility'.[41] In a recent featured article and ensuing commentaries, Cropley et al have also revealed the same concerns in their very insightful discourses of malevolent creativity.[42]

b) Creativity, Innovation and Economy

Creativity could be distinguished from innovation in many ways; but none of them are perfect as there are always likely to be some overlaps. Something that helps to solve problems or has some utility of some sort could be 'creative'; but it could also be called 'innovative'. Researchers suggest that creativity is often self-expressive and intrinsically motivated however innovation is often driven by extrinsic incentives and the need to destruct old standards.[43] From the perspective of Schumpeterism, innovation is essentially a new production function. In other words, innovation is an introduction of new elements and conditions or new combination of existing elements and conditions to the production and economy system.[44] Furthermore, Schumpeterism argues that innovation is the force that drives economic progress when it is propagated to the point of "creative destruction" by successful entrepreneurship.[45]

Another distinction between creativity and innovation is suggested in the light of originality. For example, Runco argued that innovation often requires that the result is maximally effective however originality is secondary, though necessary. In contrast, 'creative

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[37] Teresa M. Amabile, 'How to Kill Creativity', (1998) 76 (5) *Harvard Business Review*, 78.
[38] For further discussion on the historical analyses of creativity, please see Mark A. Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (2006), 215-220.
[39] Ibid, 217.
[40] Wikibooks <http://en.wikibooks.org/wiki/Systems_Theory/Creativity> at 9 September 2008.
[41] Robert B. McLaren, 'Dark side of creativity', in Steven R. Pritzker and Mark A. Runco (eds), *Encyclopedia of Creativity* (Vol. 1) (1999), 483-491.
[42] David H. Cropley, 'Malevolent Creativity: A Functional Model of Creativity in Terrorism and Crime', (2008) 20 (2) *Creativity Research Journal*, 105-115; Keith James and Damon Drown, 'Whether "Malevolent" or "Negative," Creativity Is Relevant to Terrorism Prevention: Lessons From 9/11 and Hazardous Material Trucking', (2008) 20 (2) *Creativity Research Journal*, 120-127; Marc T. Spooner, 'Commentary on Malevolent Creativity', (2008) 20 (2) *Creativity Research Journal*, 128-129; Jeffrey J. Walczyk and Diana A. Griffith-Ross, 'Commentary on the Functional Creativity Model: Its Application to Understanding Innovative Deception', (2008) 20 (2) *Creativity Research Journal*, 130-133; David H. Cropley, 'Rejoinder to Commentaries on Malevolent Creativity: A Functional Model of Creativity in Terrorism and Crime, Cropley, Kaufman, and Cropley', (2008) 20 (2) *Creativity Research Journal*, 134-136.
[43] Mark A. Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (2006) 380-382; see also G. Clydesdale, 'Creativity and Competition: The Beatles' (2006) 18 (2) *Creativity Research Journal* 129-139.
[44] Joseph Schumpeter, '*The Theory of Economic Development*' (Harvard University Press, Cambridge MA, 1934). See also Joseph Schumpeter, '*Capitalism Socialism and Democracy*' (Routledge, London, 1943).
[45] Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (New York: Harper, 1975), 82-85.

performances that are not innovative, such as the arts, originality may be much more important, whereas effectiveness is secondary.'[46]

Many researchers have seen 'creativity as a prerequisite for innovation'[47] and innovation 'springs from the creative application of knowledge'.[48] Amabile et al define that creativity is the production of novel and useful ideas, approaches or actions, while innovation is the process of successful implementation of creative ideas. It is thus argued that, '[in] this view, creativity by individuals and teams is a starting point of innovation; the first is a necessary but not sufficient condition for the second Successful innovation depends on other factors as well'. [49] Therefore, the occurrence of for innovation requires something more than the generation of a creative idea or insight.

B. Democratisation of Creativity and the Rise of Participatory and Read/Write Culture

a) Participatory and Read/Write Culture

According to studies from the Pew Internet Project in U.S., 44% of U.S. Internet users have contributed their thoughts and their files to the online world[50] and more than half of online teenagers have created content for the Internet.[51] A more recent study has found that 64% of online teens have participated in one or more among a wide range of content-creating activities on the Internet, up from 57% of online teens in a similar survey at the end of 2004.[52] In Australia, a newly released report has found just under a quarter of Internet users (23.3%) posted on discussion or message boards with around half of these people (13.8%) doing so at least weekly, nearly 12.1% of people kept a personal website, less than 8% kept a blog, under a quarter of users posted pictures or photographs (24.8%) and only 4.8% posted videos.[53] In People's Republic of China, the latest CNNIC *22nd Statistical Survey Report on the Internet Development in China* has found that by the end of June 2008, the amount of netizens[54] in China had reached 253 million, surpassing that in the United States to be the

[46] Mark A. Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (2006), 383.
[47] Stefan Seidel et al., *A Conceptual Framework for Information Retrieval in Pockets of Creativity* (Proceedings 16th European Conference on Information Systems, Galway, Ireland, 2008), <http://eprints.qut.edu.au/archive/00013888/> at 18 Sep. 2008.
[48] Shahid Yusuf, '*From Creativity to Innovation*' (World Bank Policy Research Working Pater 4262, June 2007)
[49] Teresa M. Amabile et al., 'Assessing the Work Environment for Creativity', (1996) 39 (5) *The Academy of Management Journa*l, 1154-1155.
[50] Amanda Lenhart et al, '*Content Creations Online*' (Pew Internet and American Life Project, February 2004) <http://www.pewinternet.org/PPF/r/113/report_display.asp> at 20 September 2008.
[51] Amanda Lenhart and Mary Madden, '*Teen Content Creators and Consumers*' (Pew Internet and American Life Project, November 2005) <http://www.pewinternet.org/ppf/r/166/report_display.asp> at 20 September 2008.
[52] 39% of online teens share their own artistic creations online, such as artwork, photos, stories, or videos, up from 33% in 2004; 33% create or work on webpages or blogs for others, including those for groups they belong to, friends, or school assignments, basically unchanged from 2004 (32%); 28% have created their own online journal or blog, up from 19% in 2004; 27% maintain their own personal webpage, up from 22% in 2004; 26% remix content they find online into their own creations, up from 19% in 2004. Therefore, the Report concludes that the use of social media gains a greater foothold in teen life as they embrace the conversational nature of interactive online media. See further, Amanda Lenhart et al, 'Teens and Social Media' (Pew Internet and American Life Project, December 2007) <http://www.pewinternet.org/pdfs/PIP_Teens_Social_Media_Final.pdf> at 20 September 2008.
[53] Scott Ewing et al, 'CCi Digital Futures Report: The Internet in Austuralia' (July 2008) <http://www.cci.edu.au/sites/default/files/pbrowne/AuDigitalFutures2008.pdf> at 20 September 2008.
[54] Netizen is defined by CNNIC as any Chinese citizen aged 6 and above who have use the Internet in the past half a year. See China Internet Network Information Center (CNNIC), '*22nd Statistical Report on the Internet Development in China*' (July 2008) <http://www.cnnic.cn/uploadfiles/pdf/2008/8/15/145744.pdf> at 20 September 2008.

first place in the world.[55] The report has also revealed that 'the ownership rate of blog/personal space and access rate of forum/BBS have ascended into the top ten Internet applications (42.3% of netizens owned blog or personal space; 38.8% visited online forum/BBS and 23.4% published posters).[56] Moreover, according to an earlier report, the number of network video users in China has reached 160 million.[57]

In many cases, these people (Internet users in the above studies) are actively involved in what has been called 'participatory culture'. In contrast to a consumer culture, a participatory culture is a culture in which individual persons do not only act as consumers but also as contributors or producers. Being acting as both consumers and producers, these individuals are called 'prosumers'.[58] In 1972, McLuhan and Nevitt suggested that with the advance of digital technology, the consumer would become a producer.[59] Eight years later, Toffler coined the term 'prosumer' and predicted the rise of the prosumer. He pointed out that the role of producers and consumer would become to blur and even merge.[60]

Jenkins et al have defined participatory culture as one: (1) with relatively low barriers to artistic expression and civic engagement; (2) with strong support for creating and sharing one's creations with others; (3) with some type of informal mentorship whereby what is known by the most experienced is passed along to novices; (4) where members believe that their contributions matter; (5) where members feel some degree of social connection with one another (at the least they care what other people think about what they have created).[61] Furthermore, in such a world, 'not every member must contribute, but all must believe they are free to contribute when ready and that what they contribute will be appropriately valued'.[62]

From the perspective of technological development, the prevalence of the participatory culture is enabled and afforded by the popularity of a *participative web*. According to studies and reports from the Organisation for Economic Co-operation and Development (OECD), participatory web refers to the Internet which has been powered by intelligent web services and new Internet-based software application and, therefore, allows the active participation of users in creating, extending, rating, commenting on and distributing digital content and even customizing and developing Internet applications.[63] What is the most insistent phenomenon generated by the participatory culture and participative web is the rise of "user-created content" (UCC) or "user-generated content" (UGC).[64]

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[55] Ibid.
[56] Ibid.
[57] China Internet Network Information Center (CNNIC), '*Research Report on the Network Video Market and Netizens' Video Consumption in China 2008*' <http://www.cnnic.cn/html/Dir/2008/06/20/5198.htm> at 20 September 2008.
[58] Wikipedia <http://en.wikipedia.org/wiki/Prosumer> at 20 September 2008.
[59] Marshall McLuhan and Barrington Nevitt, *Take today; the executive as dropout* (Harcourt Brace Jovanovich, 1972) 4.
[60] Alvin Toffler, *The Third Wave* (1980), 265-288.
[61] Henry Jenkins et al, 'Confronting the Challenges of Participatory Culture: Media Education for the 21st Century' (MacArthur Foundation, 2007) 7-11.
[62] Ibid, 7.
[63] OECD, *Information Technology Outlook 2006* (OECD Publishing, November 2006) 246; OECD, *Participatory Web and User-Created Content* (OECD Publishing, 2007) 17-18.
[64] See further the cultural, economic, social and legal implications of UCC/UGC, OECD, *Participatory Web and User-Created Content* (OECD Publishing, 2007).

What significantly differentiates it from popular culture is that participatory culture, by its very nature, is a "Read/Write culture".[65] Popular culture is brought about and raised by mass media that is specifically envisioned and designed to reach a very large audience. The products of mass media such as books, newspapers, television, radio and broadcasting are received and passively read or watched by their consumer (reader and audience). The popular culture, especially before the digital age, is characterized as being a "Read-Only culture". As Professor Lessig has pointed out, the world of media from the 20th century is read-only; however, in the 21st century it could be both read and write.[66]

It is read-only because the mass media technology is primarily targeted at passive recipients of culture. Furthermore, it is read-only because it is, meanwhile, a permission culture. Such a culture was spawned in a society in which copyright monopoly over creative cultural works is so pervasive and copyright restrictions are enforced to the extent that most re-use of cultural elements and re-creation are subject to 'the permission of the powerful, or of creators from the past'.[67]

On the contrary, read/write culture is a culture in which creativity based on the past is allowed and encouraged. Such a culture is, by default, permissive of efforts to re-use, improve upon, modify, integrate and remix the existing creative works and cultural elements. Read/write culture is a participatory medium, far larger and it certainly involves more people, but can also be economically larger.[68]

Likewise, it is read/write because media technology nowadays has become practically interactive and had made culture extremely amendable, modifiable and manipulable. This media technology is represented by the Internet and emerging participative web. It empowers users to modify, remix and manipulate the cultural objects they have received and thus create their own versions. In the area of music creation, this process is called "versioning" which is at the heart of reggae, jazz, blues, rap, r&b, calypso, soca, salsa, Afro-Cuban and so on.[69] In addition, it is read/write because in practice such modification, remixing and manipulation are tolerated, permitted and even welcomed by copyright owners in many instances, for example, the creation of fan fictions has been tolerated in many cases, and moreover, many copyright owners have utilized open access licences to grant users and downstream creators the right to reproduce and modify their copyright works. However, as this thesis will demonstrate in the following chapters, in many other cases, these copyright owners' tolerance and permission still cannot satisfy the needs of users and downstream creators and therefore stifle creativity in this networked information society for the long run.

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[65] The terms and ideas of "Read-Only culture", "Read/Write culture", "remix culture" and "free culture" have been demonstrated by professor Lessig on many occasions. Here are two talks given by Lessig: Ted Talk: How creativity is being strangled by the law <http://www.ted.com/index.php/talks/larry_lessig_says_the_law_is_strangling_creativity.html> at 21 September 2008; and Final Free Cuture Talk at Stanford University <http://blip.tv/file/get/Esfwork-LawrenceLessigJanuary31st2008StanfordUniversity175.mov> at 21 September 2008.

[66] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) 37.

[67] Ibid, xiv.

[68] Lawrence Lessig, *The Read-Write Society* (a talk at Wizards of OS4, 2006), download the video and audio of this talk here <http://www.wizards-of-os.org/programm/live_stream.html> at 21 September 2008. You also can read a brief script of this talk here <http://lwn.net/Articles/199877/> at 21 September 2008.

[69] On the notion of "versioning" in music creation, see Dick Hebdige, *Cut 'N' Mix: Culture, Identity and Caribbean Music* (1987).

b) Everyday Creativity vs. Eminent Creativity

Creativity plays a role in many of our everyday activities and in each of our lives, and 'it does so very frequently'.[70] However, 'there is a debate about this, with some scholars focusing on eminent or unambiguous rather than everyday creativity'.[71] But now it suffices to say that 'creativity is a potential each of us shares and a talent each of us should employ, probably every day'.[72]

The subjects of studies of eminent creativity are "eminent creators". Eminent creators are 'those well-known individuals who have received widespread public acclaim for their contributions to society'.[73] And these are 'the people who have had an impact on our lives, who have made a difference'.[74] Biological perspectives on creativity have raised the question: do exceptional or eminent creators have genes or brains or something that the rest of us do not? [75] Research has found that 'brain provides humans with a productive, proactive, and generative mind'.[76] And also it has come to confirm the assumptions that the human brain supports different kinds of creativity and different human brains lead to different kinds of creativity.[77]

Departing from the "Greek myth of the Muses" and "ancient theory" that regard creativity as a gift of the gods [78] and the Romantic notion that views creativity mysterious, [79] an unromantic notion on creativity has become prevalent, especially with the popular application of the Internet and associated technology. It has articulated the idea that everyone is creative and creativity can be seen everywhere in our daily life.

Everyday creativity is regarded as 'the originality of everyday life, the doing of something new in the course of one's activity at work or at leisure.'[80] It is further defined that everyday creativity is about 'making an original contribution of some sort, and one that communicates to others and is thus meaningful, rather than being random or idiosyncratic.'[81] Richards reminds us that everyday creativity is a fundamental survival capability and it 'is about everyone, throughout our lives, and fundamental to our very survival. It is how we find our lost child, get enough to eat, make our way in a new place and culture'.[82]

It has also been noted that the focus on exceptional or "genius" level creators can 'lead one to associate "true" creativity with privileged populations representing only a small segment of society, rather than with the very wide range of people who actually can (and do)

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[70] Mark A. Runco, *Creativity: Theories and Themes* (2006) x.
[71] Ibid.
[72] Ibid.
[73] Mark A. Runco and Ruth Richards, Eminent *Creativity, Everyday Creativity, and Health* (Ablex Publishing Corporation, 1997) 3.
[74] Ibid.
[75] Mark A. Runco, *Creativity: Theories and Themes* (2006), 73.
[76] Ibid, 108.
[77] Ibid.
[78] This view still remains influential in our culture today, especially as far as the arts are concerned. See further, Michael Kelly (ed.) *Encyclopedia of Aesthetics*, Vol. 1 (1998) 456-457.
[79] Ibid 457-458.
[80] Mark A. Runco and Ruth Richards, Eminent *Creativity, Everyday Creativity, and Health* (Ablex Publishing Corporation, 1997) 97.
[81] Ruth Richards, 'Everyday Creativity and the Arts' (2007) 63 (7) *World Futures: Journal of General Evolution*, 502 – 523.
[82] Ruth Richards (ed), *Everyday creativity and new views of human nature: psychological, social, and spiritual perspectives* (2007).

contribute'.[83] 'Fortunately,' Richards continues, 'we are now entering an age of increased artistic awareness' and it is the time to 'promote a new artistic literacy in the population at large – in the schools and in society at large – for personal fulfillment, growth, and deeper meaning, for the fullest education in all domains of knowledge, for effectiveness in our communities, and perhaps even for our ultimate survival in a complex and increasingly threatened world.'[84]

c) Decentering Situated Creativity

More recently, with the democratisation of technologies for content creation and dissemination, concerns about commons-based peer production and associated everyday creativity or so-called "vernacular creativity"[85] have arose from many fields such as cultural, social and economic studies.[86] The increasing 'availability and power of digital technologies, combined with the Internet, allow every to be a media participant, if not producer'.[87] As a result, everyday creativity is being 'remediated in new media contexts in specific ways', and most notably, the process of remediation 'are clearly not one-way, but dialectical'.[88] Therefore, from the perspective of the popularity of remediated everyday creativity, creativity has become decentering, democratized and more situated.[89]

III. Creativity and Copyright

The relationship between copyright, creativity and public interest has always been arguable. Seemingly, the law declares the primary purpose of copyright is to promote culture and public interest through incentives to creativity. For instance, the full title of the first copyright act, British *Statute of Anne 1710*,[90] states that it is '*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*'.[91] To some copyright scholars, the title itself

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[83] Ruth Richards, 'Everyday Creativity and the Arts' (2007) 63 (7) *World Futures: Journal of General Evolution*, 500 – 501.
[84] Ibid 501.
[85] 'The idea of "vernacular creativity" is a centre of gravity in relation to new configurations of the aesthetic and the social that are most sharply realized in the context of new media.' See further, Jean Burgess, 'Vernacular Creativity and New Media' (PhD thesis, Queensland University of Technology, 2007) 29 <http://adt.library.qut.edu.au/adt-qut/public/adt-QUT20070727.112603/> at 22 September 2008.
[86] See generally, Eric Von Hippel, *Democratizing Innovation* (2005); Yochai Benkler, The Wealth of Network: How Social Production Transforms Markets and Freedom (2006); Jean Burgess, 'Vernacular Creativity and New Media' (PhD thesis, Queensland University of Technology, 2007) <http://adt.library.qut.edu.au/adt-qut/public/adt-QUT20070727.112603/> at 22 September 2008.
[87] Jean Burgess, 'Vernacular Creativity and New Media' (PhD thesis, Queensland University of Technology, 2007) 2 <http://adt.library.qut.edu.au/adt-qut/public/adt-QUT20070727.112603/> at 22 September 2008.
[88] Ibid, 74.
[89] See further, Julie E. Cohen, 'Creativity and Culture in Copyright Theory', (2007) 40 *UC Davis Law Review* 1177-1192.
[90] The *Statute of Anne* is the short title of "*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*". It was the first copyright law in the Kingdom of Great Britain, enacted in 1709 and entering into force on April 10, 1710. 'Despite its failures', Harry Ransom commented, it successfully introduced further developments in literary property, such as 'a general acceptance of the author as the source of property rights in literature and an increase in the rewards of authorship'. See Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encourage of Learning, 1710* (University of Texas Press, 1956) 105-106.
[91] Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encourage of Learning, 1710* (University of Texas Press, 1956), 3.

already suffices it to say that the ultimate purpose of copyright is to benefit the public through stimulating creativity.[92]

However, other arguments are doubtful of the above proposition, with debates that copyright is first and foremost a right of authors and the primary function of the law is to raise protection for creative expressions[93] and thus generates proprietary rights for creators.[94] Moreover, even if copyright purposes to promote creativity and culture, however, actually how? Does copyright really stimulate but not stifle creativity?

A. Creativity and the Purpose of Copyright Law

The popular open online encyclopedia *Wikipedia* explains '[the] purpose of copyright law is to stimulate the creation of as many works of art, literature, music, and other "works of authorship" as possible, in order to benefit the public.'[95] However, there is a debate about this proposition, with some people arguing that they cannot find one piece in the legislation supporting the notion that the intent or design of copyright law is to benefit the public rather than to protect the author.

a) Contextual Investigation

After the literary property debate in late 18th century,[96] the court has made it very clear that copyright is not a natural right; instead it is a legal right granted by statute. However, the ensuing question is why the law confers such a set of monopoly right on the author? The paths paved to answer this question and thus to justify the granting of copyright could be classified in many ways. For example, these arguments may be classed as utilitarian (copyright provides an incentive for the creation and dissemination of works) and non-utilitarian (the author simply deserve recompense for their contribution);[97] and another classification is: (a) natural justice arguments; (b) creative incentive arguments; (c) general public interest arguments; (d) social contract arguments; (e) moral arguments.[98]

It has been reiterated for centuries in many cases and laws that 'the primary object in conferring the rights associated with copyright lies in the general benefits derived by the

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[92] See generally, L. Ray Patterson and Stanley W. Lindberg, The Nature of Copyright: A Law of User's Right (The University of Georgia Press, 1991); Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encourage of Learning, 1710* (University of Texas Press, 1956); Ronan Deazley, *On the Origin of the Right to Copy: Creating the Movement of Copyright Law in Eighteenth-Century Britain (1695 – 1775)* (Hart Publishing, 2004).

[93] For example, some writers suggests, '[t]he object of copyright is the protection of "works"; that is intellectual creations in the field of literature, music, art and science.' See further, Edward W. Ploman and L. Clark Hamilton, *Copyright: Intellectual Property in the Information Age* (1980) 31.

[94] This is believed to be a misunderstanding about copyright and therefore it is the dark side of copyright. 'Modern-day copyright harbors a dark side. The misunderstanding held by many who believe that the primary purpose of copyright law is to protect authors against those who would pilfer the author's work threatens to upset the delicate equilibrium in copyright law. This misunderstanding obviously works to the benefit of the content owning industries, such as the publishing industry, the music and motion picture industries, and the computer software industry. This fundamental misunderstanding is perpetuated by the stern FBI warnings at the beginning of video tapes, by overly broad assertions of the rights in the copyright notices, and by the general lack of public discourse about the balance required in copyright law if copyright is to fulfill its constitutionally mandated goal of promoting knowledge and learning.' Lydia Pallas Loren, 'The Purpose of Copyright', (2000) 2 (1) *Open Spaces Quarterly* <http://www.open-spaces.com/article-v2n1-loren.php> at 25 September 2008.

[95] Wikipedia, <http://en.wikipedia.org/wiki/United_States_copyright_law#Scope_of_copyright_law>, at 8 September 2008.

[96] See further, Stephen Parks (ed), *The Literary Property Debate: Six Tracts 1764-1774* (New York: Garland Publishing, 1975); see also Rocque Reynolds and Natalie Stoianoff, *Intellectual Property: Text and Essential Cases* (2008) 6-12.

[97] See further, Stewart E. Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 *Michigan Law Review*1197-1249. See also David McGowan, 'Copyright Nonconsequentialism' (2004) 69 (1) *Missouri Law Review* 1-117.

[98] See further, J.A.L. Sterling, *World Copyright Law* (2003) 61-70.

public from the labours of authors; the rights are given by the public in exchange for the benefits bestowed by the genius and skill of individuals and as an incentive to encourage such efforts'.[99] This theme has even being explicitly stated in many laws about copyright in a variety of national and international legislation. For example, the contracting parties of WCT explicitly declare to emphasize 'the outstanding significance of copyright protection as an incentive for literary and artistic creation'[100]

Moreover, the Article 1 of *copyright law of China* says, '[t]his law is enacted … for the purpose of protecting the copyright of authors…encouraging the creation and dissemination of works…, and promoting the progress and flourishing of socialist culture and sciences.'[101] *Copyright Act of South Korea* says, 'Article 1 (Purpose): The purpose of this Act is to protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture'.[102] *Copyright Law of Japan* also says, '[t]he purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon with respect to works as well as performances, phonograms, broadcasts and wire diffusions, to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture.'[103]

The Article I Section 8 of *U.S. Constitution* claims, '[the] Congress shall have power … [to] promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'. Similarly, it is believed that the constitutional statement is fairly clear that copyright law's actual end goal is to promote learning and creativity but not to protect authors.[104] To pursue the intention and purpose of the Constitution, the Supreme Court of U.S. has produced many opinions. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court claims, '[t]he primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts". To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.'[105] The theme in the *Feist* case is reiterated by the Supreme Court three years later.

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[99] John S. McKeown, *Fox Canadian Law of Copyright and Industrial Design* (3rd ed, 2000) 3.
[100] *WIPO Copyright Treaty* (adopted in Geneva on December 20, 1996) <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> at 27 September 2008.
[101] *Copyright Law of People's Republic of China* (Enacted in 1990 and Revised in 2001) <http://www.sipo.gov.cn/sipo_English/laws/relatedlaws/200204/t20020416_34754.htm> at 27 September 2008.
[102] *Copyright Act of South Korea* (Revised 2004) <http://en.wikisource.org/wiki/Copyright_Act_of_South_Korea> at 27 September 2008.
[103] See Article 1 of *Copyright Law of Japan* (Revised 2006)<http://www.cric.or.jp/cric_e/clj/index.html> at 27 September 2008.
[104] See further the purpose of U.S. copyright law, Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (2002) §1.03. These propositions are so widely accepted that the following statements are very typical writings about the purpose of copyright law, especially in U.S.: 'In the long term, however, the purpose of copyright law is to promote learning and creativity.' See the University of Delaware, '*What is the purpose of copyright law?*' <http://www.udel.edu/topics/techtalk/1998/March/purpose.html> at 25 September 2008. In a copyright tutorial design by the BRIGHAM YOUNG UNIVERSITY to educate its faculty, staff and students about copyright law how it relates to them, it is claimed, 'The primary purpose of copyright law is not so much to protect the interests of the authors/creators, but rather to promote the progress of science and the useful arts —that is — knowledge. To accomplish this purpose, copyright ownership encourages authors/creators in their efforts by granting them a temporary monopoly, or ownership of exclusive rights for a specified length of time. However, this monopoly is somewhat limited when it conflicts with an overriding public interest, such as encouraging new creative and intellectual works, or the necessity for some members of the public to make a single copy of a work for non profit, educational purposes.' See BRIGHAM YOUNG UNIVERSITY <http://www.lib.byu.edu/departs/copyright/tutorial/module1/page3.ht > at 25 September 2008.
[105] 499 U.S. 340 (1991)

In *Fogerty v. Fantasy, Inc.*, the Supreme Court of U.S. admits that copyright law 'reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts'. Therefore, it asserts that '[t]he immediate effect of our copyright law is to secure a fair return for an "author's" creative labor'. 'But,' it continues, 'the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.' [106]

The opinions which suggest that the primary purpose of copyright is to advance public welfare and further see reward to the author as 'a second consideration' could be traced back to many earlier Supreme Court's cases. For example, in *Fox Film Corp. v. Doyal*, [107] Chief Justice Hughes said '[the] sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects"'. In *U.S. v. Paramount Pictures, Inc.*, [108] the Court explicitly pointed out, '[the] copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' Additionally, this statement was repeated by the Court years later in *Mazer v. Stein*.[109]

b) Is it just a Myth?

The theory about the purpose of copyright law could be articulated as following: The primary objective (ultimate aim) is to 'promote the progress of science and useful arts' through rewarding the creator with limited proprietary rights on their creations. However, it has been correctly pointed out that this theory followed by the above legislation and cases has dissolved into mythology.[110] It is full of paradoxes and myths as David Vaver suggested: Is copyright designed to protect authors? Does copyright law encourage art and literature? Does copyright law encourage dissemination of works?[111]

The "primary objective/ultimate aim – immediate effect" approach that has been adopted by the Court and followed by legislation is, indeed, very arguable as it does not actually and explicitly set up a priority rule while "assure author's right"/"stimulate artistic creativity" and "promote the progress"/"public good" are competing against each other. Law is regulation; so is copyright law. It is easy to see that copyright law regulates the acts of creating and disseminating of creative expressions, the outputs of creativity. However, regulating is not easy, especially when it intervene in conflicting interests.

First of all, if the reward offered by the law for the author fails to stimulate creativity, could copyright be abolished? Although copyright owners may waive their rights by means of explicit contractual statement, the law by default thrusts a set of exclusive rights upon the author without considering the variety of their personal preferences. For example, in many cases, the creation and production of intellectual and artistic content are not motivated by pursuit of economic interest but by many other factors such as reputation, desire for

[106] 510 U.S. 517 (1994)
[107] 286 U.S. 123 (1932)
[108] 334 U.S. 131 (1948)
[109] 347 U.S. 201 (1954)
[110] See further, David Vaver, 'Intellectual Property Today: of Myths and Paradoxes' (1990) 69 (1) *Canadian Bar Review* 98-128.
[111] Ibid.

communication and just a gift-giving. As a result, the rise of open access licensing in the past years could be regarded as an attempt to offer creators a negotiable institutional arrangement that has been overlooked by copyright law.

Secondly, the progress of science and useful arts 'can be promoted in various ways, not solely through incentives for new creation'.[112] The incentive raised by the law is at many social costs, such as the cost for judicial enforcement and the restricted public access to information and knowledge. 'Like patents', it is suggested, 'copyrights impose a deadweight social cost in the form of lost opportunities to use a public good: the expressions protected by the Copyright Act.'[113] Many people view copyright laws as restrictions on what they can do with someone else's creative work. As copyright expert Kenneth Crewes pointed out, copyright law 'promotes creativity and publication, while inhibiting research and learning'.[114]

Thirdly, to the very end, the Court does not say whose interest should prevail if 'reward the labor of authors' is immediately in conflict with 'public good'. This conflict is very real as Macaulay stated that copyright was 'a tax on readers for the purpose of giving a bounty to writers'.[115] Copyright law tries to harmonize these conflicting interests;[116] thus it carefully balances 'property rights that gives author and their publishers sufficient inducements to produce and disseminate'[117] original works and meanwhile allows 'others to draw on these works in their own creative and educational endeavors'.[118] However, nowadays it has been complained that in the real world there is no longer any meaningful balance between the rights of the creator (actually major media conglomerates) and the rights of the public. The industries have many lobbies to which the increasingly expanding scope of copyright protection should ascribe;[119] however, as professor Lessig appealed on many occasions, the pubic don't have one yet. Nevertheless, although already seeing there is an apparent conflict between the public interest and the interest of copyright owner, some scholars yet argues, 'the reality seems to be that any conflict is more imaginary than real'.[120] Moreover, recently commentator suggested that 'both public theory and empirical evidence suggest that some

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[112] Shira Perlmutter, 'Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Atrs' (2002) 36 *Loyola of Los Angeles Law Review*, 324.
[113] Tom W. Bell, 'Prediction Markets for Promoting the Progress of Science and the Useful Arts' (2006) 14 (1) *George Mason Law Review* 37-92.
[114] Cited in Dickinson, Dennis, 'Copyright Dilemma: The Need for Local Policy' (1996) 16 (4) *Library Issues* 1.
[115] This statement 'reveals the conflict of interest between the reader and the book producer'. See Stephen Breyer, 'The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 (2) *Harvard Law Review* 281.
[116] The conflict of interest can arise in many forms as summarized by Sterling: 'Such conflicts include: (a) internal rightowner conflicts: conflicts between rightowners or would-be rightowners themselves; (b) rightowner/disseminator conflicts: conflicts between rightowners and those who disseminate their productions (publishers, phonogram and film producers, broadcasters, etc.); (c) representative organization conflicts: conflicts between organizations representing rightowners; (d) rightowner/user conflicts: conflicts between rightowners and their representative organizations on the one hand and users of protected material on the other, as to the conditions of , and amounts of money to be paid, for use of protected material; (e) rightowner/particular public interest conflicts: conflicts between the interests of rightowners and particular areas of the public interest'. See further, J.A.L. Sterling, World Copyright Law (2003) 95.
[117] Paul Goldstein, '*Copyright: Principles, Law and Practice* (vol. 1)' (1989) 4-9.
[118] Ibid.
[119] As Loren complained, '[from] increasing the basic term of a copyright to increasing the types of activities that a copyright owner can control, copyright law has evolved into a profit maximizing tool for the powerful content industry'. See Lydia Pallas Loren, 'Digitization, Commodification, Criminalization: The evolution of criminal copyright infringement and the importance of the willfulness requirement' (1999) 77 (3) *Washington University Law Quarterly* 838-839. Tom Bell also pointed out that the record of expansion of copyright law under the influence of special interests 'proves worrying enough'. See Tom W. Bell, 'Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works' (2001) 69 *University of Cincinnati Law Review* 786-787.
[120] Gillian Davies, *Copyright and the Public Interest* (2nd ed., Seet & Maxwell Ltd., 2002) 354.

types of intellectual property [especially copyright] legislation may be prone to excessive private-interest influence, or rent-seeking'.[121]

In addition, the Court says that creative work should be encouraged and rewarded; and it is accomplished by the means of securing 'a fair return for an author's creative labor'. However, two further problems remain. Firstly, would 'a fair return' be capable of getting the author 'encouraged and rewarded'? The most notable 'fair return' offered by the law is economic potentials that, in many cases, could only be achieved through the intermediation of media conglomerates. However, in practice, economic return received by the author is extremely up to the discretion of these greedy media companies. Secondly, how much return is 'fair' so that incentive would be sufficient? Would copyright protection term of life plus 50 years be 'fair' enough? Obviously, U.S. Congressman Sonny Bono, Mickey Mouse and their supporters did not think so. As a result, the Sonny Bono Copyright Term Extension Act (Sonny Bono Act) extended the term to life of the author plus 70 years and for works of corporate authorship to 120 years after creation or 95 years after publication, whichever endpoint is earlier.[122] Likewise, The European Commission did not think so as well. In July 2008, the Commission adopted a proposal to extend the term of protection for performers and sound recordings to 95 years.[123] 'It is difficult to see how these endless copyright terms "promote the progress of science and useful arts."', critics argue, '[it] is not so difficult, especially for librarians, to see how they retard that progress.'[124]

It has been proposed by copyright advocates since the birth of modern copyright law that copyright is an incentive which stimulates production of more creative works and it would thus eventually benefit the public. Therefore, copyright law ultimately serves the public instead of individual creators. However, this proposition is not perfectly convincing till today.

To this end, some scholars have turned to the historical context of the invention of this existing copyright framework. For instance, after re-examining the history of the *Statute of Ann* and its following cases and legal movements, Ronan Deazley concludes, copyright law 'was primarily defined and justified in the interests of society and not the individual', and moreover 'copyright was fundamentally concerned with the reading public, with the encouragement and spread of education, and with the continued production of useful books. In allocating the right to exclusively publish a given literary work, the eighteenth century parliamentarians were not concerned primarily with the rights of the individual, but acted in the furtherance of these much broader social goals.'[125] Although it has been 'overlooked or perhaps ignored in other historical tales of the origin of copyright', this element of the public interest 'once lay at its very core'.[126]

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[121] Robert P. Merges, 'One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000' (2000) 88 *California Law Review* 2236.
[122] U.S. Code Title 17 § 302; See also Sonny Bono Copyright Term Extension Act <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:s.00505:> at 25 September 2008.
[123] European Commission, *Proposal for a European Parliament AND Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT> at 25 September 2008.
[124] John N. Berry, 'The Real Purpose of Copyright' (7/1/2000) *Library Journal* <http://www.libraryjournal.com/article/CA158872.html> at 25 September 2008.
[125] Ronan Deazley, *On the Origin of the Right to Copy: Creating the Movement of Copyright Law in Eighteenth-Century Britain (1695 – 1775)* (Hart Publishing, 2004) 226.
[126] Ibid.

c) Articulate the Purpose of Copyright for a Networked Information Society

The problem regarding the purpose of copyright law is important. It is important not only because it is the starting and ending point of copyright, but also because it needs to be re-examined and re-calibrated with its changing social context. What was concerned by the age when modern copyright law was invented was the growing reading public. However, the public today are different. Nowadays, they are not just reading; however, they are listening (to music and sounds of any sort), watching (movies, pictures and other kind of videos), and most prevalently they are playing *with/in* them. The traditional definition of literacy is considered to be the ability to read and write. However, in this networked information society, the public literacy gains many facets and many dimensions. Accordingly, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has defined "literacy" as 'the ability to identify, understand, interpret, create, communicate, compute and use printed and written materials associated with varying contexts.' [127] Moreover, literacy 'involves a continuum of learning to enable an individual to achieve his or her goals, to develop his or her knowledge and potential, and to participate fully in the wider society.'[128]

The networked information society affords a wide variety of possibilities for its people to enhance their literacy, and to grow up and play with creativity. Copyright law should help people to harness these possibilities. The affordance and potential of these possibilities can be seen from the rise of the participatory culture and associated democratization of creativity. However, the question is whether copyright law is really relevant to and capable of affording such assistance. The answer, from my point of view, is positive.

Through optimizing literary and artistic creativity, copyright law could promote the production and availability of creative works. The growth of population may and may not lead to an increase in the number of potential authors and thus an increase in the number of potential works.[129] But, copyright law is in the position to encourage existing authors or potential authors to create more works by the means of rewarding their creation.

Meanwhile, the increase in number of works, as cultural raw materials, contributes to educate and transfer more people into qualified potential authors. The use and reuse of creative works not only offer something that future creation could immediately built on; but also contribute something as experience, knowledge, information and taste to the enhancement of individual's creativity. To this end, copyright, on one hand, provides incentives to motivate and stimulate creativity in producing more works (if possible). On the other hand, copyright contribute knowledge, information, and cultural and artistic materials, environment and experiences to the enhancement and cultivation of creativity of the public.

To accomplish its mission, copyright law must maintain a balance between the interest arising from stimulus to creativity in production and the interest deriving from use and reuse of creative works (products) which contributes to the enhancement of creativity of the public. From the point of view of John Howkins, both interests are relevant to the public

[127] The United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Plurality of Literacy and its Implications for Policies and Programmes* (2004) <http://unesdoc.unesco.org/images/0013/001362/136246e.pdf> at 28 September 2008.
[128] Ibid.
[129] Tom W. Bell, '*A short essay on Copyright and Population*' (2002) <http://tomwbell.com/writings/(C)&Pop.html> at 28 September 2008.

interest. The former one is expressed in private property and the later one is expressed in a public domain.[130] To strike this balance, the existing copyright law, on one hand, confers a set of exclusive rights on the author; it, on the other hand, put limitations of some sort on these rights ("*rights plus limitations" approach*). This approach was workable and was unlikely to cause unjust situation when the law stayed away from end user's consumptive use of copyrighted materials and their daily life. In fact, 'copyright was not meant to be used in the private sphere'[131] of end users and it is 'evidenced by the fact that exceptions and limitations to copyright were also written in the days of the professional intermediary as user.'[132] However, while copyright law, more and more often, comes to intervene in end user's private sphere and its enforcement becomes so pervasive in people's everyday life, the "*rights plus limitations*" approach is becoming problematic. The "digital dilemma"[133] is increasingly real with the unstoppable growth of the tension between copyright owners and users.

To sum up, in a networked information society, copyright should purpose to optimize the creativity of people (authors and users of copyrighted materials) and meanwhile promote public literacy. To accomplish this aim, copyright law must balance the interests between authors and users while stimulating creativity through rewarding creation and enhancing creativity through encouraging use and re-use of creative works. As this thesis will suggest and demonstrate, this balance could only be struck through a proper allocation of rights between authors and users.

B. Copyright, and Incentives to and Enhancement of Creativity

As being questioned both by people inside and outside law, 'how do you appropriately reward something as intangible and subjective as "creativity"?'[134] Copyright was born as the result of an endeavor to provide solutions. Whether this attempt is effective and successful or not needs comprehensive examination with its changing social context. But, empirical analysis suggests that 'protection of the rights of the creator … has been shown to favour creativity, and ultimately, therefore, to be of more benefit to the consuming public than if there were no rewards based on copyright'.[135]

a) Rewards, Stimulus and Enhancement of Creativity

Creativity can 'be brought out or cultivated, or encouraged' from the point of view of both the "Romantics" who see creativity mysterious and the "scientific investigators" who see creativity explicable and not mysterious.[136] The belief that creativity could not be enhanced was so widespread in history; however, this perception has changed slightly over the past 20

[130] John Howkins pointed out, '… intellectual property has been described as being a balance between the public domain and private rights.' 'But', he argues, 'it raises several awkward questions. We know what rights are (the law is usually specific) But what is the public domain? What is it and what is it *for*? It is usually described as the absence of private rights. But how can the presence of something be in balance with the absence of something?' Therefore, he proposes 'a different formulation: intellectual property law seeks to balance the public interest expressed in a public domain and the public interest expressed in private property rights.' And furthermore, he defines the public interest as 'optimising creativity.' See John Howkins, 'Is it Possible to Balance Creativity and Commerce?' in Fiona Macmillan (ed), *New Directions in Copyright Law*, Vol. 2 (Edward Elgar, 2006) 311.
[131] Daniel J. Gervais, 'The Purpose of Copyright Law in Canada' (2005) 2 (2) *University of Ottawa Law & Technology Journa*l, 329.
[132] Ibid.
[133] See further, Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (2000).
[134] Katherine A. Lawrence, 'Why be Creative? Motivation and Copyright Law in a Digital Era' (2004) 1 (2) *IP Central. Review* <http://www.ipcentral.info/review/v1n2lawrence.html> at 29 September 2008.
[135] Gillian Davies, Copyright and the Public Interest (2nd ed., Sweet & Maxwell Ltd., 2002) 354-355.
[136] Michael Kelly (Chief ed), *Encyclopedia of Aesthetics* (vol. 1) (1998) 458.

years.[137] Many researchers have argued that creativity could be enhanced through training and anyone with normal cognitive abilities could reasonably aspire to produce work that is creative to some degree in some domain.[138] When an attempt is made to enhance creativity, 'the multifaceted nature of creativity must be recognized with its cognitive, affective, attitudinal, interpersonal and environmental components'.[139]

Many variables including abilities, interests, attitudes, motivation, general intelligence, knowledge, skills, habits, beliefs, values and cognitive styles are believed to play some role in determining how creative a person could be.[140] Therefore, some strategies are proposed to foster creativity, for example, establishing purpose and intention, encouraging acquisitions of domain-specific-knowledge, building basic skills, stimulating and rewarding curiosity and exploration, provide motivation (especially internal motivation), providing opportunities for choice and discovery and so on.[141]

It is extremely notable that motivation that is internally generated (internal or intrinsic motivation) is more effective determinant of creativity than that which comes from source outside oneself (external or extrinsic motivation).[142] Furthermore, some research claimed that external motivation, such as rewards and external incentives, could actually undermine creativity under certain conditions.[143] Therefore, it is suggested that the structure of incentives is very important in determining the nature of creative output.[144]

b) Copyright and Enhancement of Creativity

As already articulated *supra*, the enhancement of creativity of the public is one key purpose of copyright law. Copyright law is designed to achieve this goal through increasing the availability of creative works.

In a society dominated by mass media, such creative works are in most cases available to individual end users as cultural and information products (books, CDs, DVDs, films, motion pictures, photos, paintings, video games and so on). These products play a crucial role in enhancing the creativity of the public with the possibilities allowed by copyright law and copyright owners. For example, people may use these products for the purpose of study, research, education, learning, enjoyment, reviewing and commenting under the rule of "personal use" and "fair use". Meanwhile, this is also a cultural experience and a process of being transformed into civilized and educated citizens sharing common sense of merits and vales with the given society within which they are situated. In this way, user's knowledge, skills, general intelligence, abilities might be increased and cumulated; and their interests, attitudes, beliefs, values and taste might be shaped and developed. Additionally, the current

[137] Mark A. Runco, Steven R. Pritzker, *Encyclopedia of Creativity: A-H* (1999) 670;
[138] Raymond S. Nickerson, 'Enhancing Creativity' in Robert J. Sternberg (ed), *Handbook of creativity* (Cambridge University Press, 1999) 392-430.
[139] Mark A. Runco, Steven R. Pritzker, *Encyclopedia of Creativity: A-H* (1999), 670-671.
[140] Raymond S. Nickerson, 'Enhancing Creativity' in Robert J. Sternberg (ed), *Handbook of creativity* (Cambridge University Press, 1999) 407. See also, Judith Gluck et al, 'How Creatives Define Creativity: Definitions Reflect Different Types of Creativity' (2002) 14 (1) *Creativity Research Journal* 55-67.
[141] See further, Raymond S. Nickerson, 'Enhancing Creativity' in Robert J. Sternberg (ed), *Handbook of creativity* (Cambridge University Press, 1999) 407-421.
[142] Raymond S. Nickerson, 'Enhancing Creativity' in Robert J. Sternberg (ed), *Handbook of creativity* (Cambridge University Press, 1999) 412.
[143] Ibid. See also M. R. Lepper and D. Greene, *The Hidden Costs of Reward: New Perspectives on the Psychology of Human Motivation* (1978); and see also G. Clydesdale, 'Creativity and Competition: The Beatles' (2006) 18 (2) *Creativity Research Journal* 129-139.
[144] See generally, G. Clydesdale, 'Creativity and Competition: The Beatles' (2006) 18 (2) *Creativity Research Journal* 129-139.

legal framework also allows users (potential authors) to create new works based on existing creations under a certain conditions.

However, it has been correctly pointed out that the current legal framework merely allows a Read-Only culture within which creativity could only be enhanced through "reading". But, just like the learning of swimming could not be accomplished by watching; doing it with and by his/her hands is much more effective and desirable. Likewise, the most effective way to enhance creativity is allowing and encouraging people to do creative things. Nowadays, the advance of technologies affords increasing varieties of possibilities to enable users (potential authors) to "write" culture of their own versions rather than merely "read" culture. However, these promising possibilities are impeded by the current legal framework. In this sense, the current copyright law stifles creativity.

For example, after interviewing many teachers and makers of media literacy curriculum materials, it is complained that the fundamental goals of media education today are compromised by unnecessary copyright restrictions and lack of understanding about copyright law.[145] Another recent study identifies nine common kinds of re-appropriation practices in online videos, including parody and satire, negative or critical commentary, positive commentary, quoting to trigger discussion, illustration or example, incidental use, personal reportage or diaries, archiving of vulnerable or revealing materials, and pastiche or collage.[146] This study shows that 'a significant set of creative practices is potentially both legal and at risk of curtailment by currently discussed ways to control online piracy and theft of copyrighted works'.[147]

c) Copyright and Incentives to Creativity

Similarly, as discussed *supra*, another key purpose of copyright legislation is to stimulate creativity through rewarding creation. However, rewards don't always favour creativity; on many occasions, they may even be detrimental to creativity. Therefore, the structure of incentive afforded by copyright should be investigated extensively.

Before the birth of modern copyright law, copyright was a right of publishers and it purposed to protect publishers' perpetual ownership on manuscripts that they purchased from writers and perpetual rights to reproduce these manuscripts. That system was attacked due to many reasons, including appeals from writers to sharing larger proportion of income and unfairness caused by the perpetual monopoly. Most importantly, that system is counter-productivity as 'publishers could earn money indefinitely without soliciting new material'.[148] As a result, the perpetual ownership was replaced by a set of limited exclusive rights conferred on authors who, in practice, will transfer these rights to publishers. The limited duration of the rights, in fact, results 'an incentive for publishers to obtain new pieces of

[145] See further, Renee Hobbs, Peter Jaszi & Pat Aufderheide, *The Cost of Copyright Confusion for Media Literacy* (September 2007) <http://www.centerforsocialmedia.org/resources/publications/the_cost_of_copyright_confusion_for_media_literacy/> at 29 September 2008.
[146] Pat Aufderheide and Peter Jaszi, Recut, *Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video* (January 2008) <http://www.centerforsocialmedia.org/resources/publications/recut_reframe_recycle> at 29 September 2008.
[147] Ibid.
[148] Katherine A. Lawrence, 'Why be Creative? Motivation and Copyright Law in a Digital Era' (2004) 1 (2) *IP Central. Review* <http://www.ipcentral.info/review/v1n2lawrence.html> at 29 September 2008.

literature, and likewise authors had an incentive to create new sources of income for themselves when their copyrights expired'.[149]

However, copyright's capability of stimulating creativity and thereafter enhancing public interest was, in fact, not self-evident and not without question in the first place. In fact, today still can see many doubts questioning the social benefits generated by copyright law. The factual basis and empirical evidence for asserting the desired incentive effect of copyright is ambivalent and is 'not easy to assess, as comparatively little empirical work has been done on the reasons why people engage in creative activity in the first place, and on the role of intellectual property protection in promoting this.'[150] As it has been commented, any attempt to quantify that copyright generates net public benefits 'proves difficult, granted'.[151] The truth of the assertion 'needs careful testing'[152] and therefore 'it is possible that the correct answer may differ from case to case.'[153] Moreover, many discourses for copyright are based on an arguable presumption that 'the author would not have created the work if she had no copyright in it'.[154] It is suggested that initial creator or producer may have many market advantages of "Lead Time" – being first into the marketplace – even without copyright protection available. [155] The claimed needs for the provision of incentives to and stimulus for the production of intellectual and artistic works are 'clearly an economic argument that seeks to overcome the public goods character of the products that such persons create or originate'.[156] But, there are 'established ways other than copyright to compensate authors and creative artists for their efforts'. For example, authors of scholarly research and writing are usually employed by universities and institutions and they 'are compensated by their salaries and rarely expect to receive significant royalties'.[157]

'Nonetheless', although having realized the suspicions discussed above, observers still have some confidence as it is stated, 'copyright does not evidently inflict deep and wide social harm'.[158] As a matter of fact, copyright, in the past and even today, might be one of the few options available for the avoidance of underproduction of creative works in a given society. In 1783, a committee was appointed by the Continental Congress of U.S. to 'consider the most proper means of cherishing genius and useful arts'. The committee reported that it was 'persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce'.[159]

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[149] Ibid.
[150] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 1.50.
[151] Tom W. Bell, 'Prediction Markets for Promoting the Progress of Science and the Useful Arts' (2006) 14 (1) *George Manson Law Review* 43.
[152] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 1.55.
[153] Ibid.
[154] Lloyd L. Weinreb, 'Copyright for Functional Expression' (1998) 111 (5) *Harvard Law Review* 1218.
[155] See further, Stephen Breyer, 'the Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 (2) *Harvard Law Review* 281-351; see also Barry W. Tyerman, '*The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*' (1971) 18 (6) *UCLA Law Review* 1100-1125; and Stephen Breyer, 'Copyright: A Rejoinder' (1972) 20 (1) *UCLA Law Review* 75-83.
[156] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 1.50.
[157] Lloyd L. Weinreb, 'Copyright for Functional Expression' (1998) 111 (5) *Harvard Law Review* 1233.
[158] Tom W. Bell, 'Prediction Markets for Promoting the Progress of Science and the Useful Arts' (2006) 14 (1) *George Manson Law Review* 43.
[159] See further, TYLER T. OCHOA, '*BRIEF AMICI CURIAE OF TYLER T. OCHOA, MARK ROSE, EDWARD C. WALTERSCHEID,*

Actually, from the perspective of a theorist who seeks stimulus to creativity, the grant of copyright in creations is prone to inducing and motivating creativity. Compared to patronage[160] or state funding system[161] which directly provides financial support for authors, copyright is, indeed, a much more effective mechanism to support creativity. [162] Most importantly, copyright empowers authors to be financially independent from patrons or the state and live on their own pens (at least theoretically). Such financial independence is of significant implications to the liberation and encouragement of creativity as less restraint on creation would allow authors and potential authors to develop their own interests, habits and intentions.

Moreover, the incentives afforded by copyright are by its very nature extrinsic, but very likely to be internalized and thus to generate intrinsic motivations. As research has suggested, rewards and external incentives might undermine creativity; but, under some circumstances, they could be transformed to be internal motivations. What the author is rewarded by copyright law is not money or direct financial benefits; instead, copyright awards the author with autonomy to recoup their expense and effort of creating fixed expressive works.

In addition, copyright law also provides other social supports for creativity. For example, such copyright rules as fair use, fair attribution and liability uphold a fair competition environment for creation. More significantly, copyright law ensures social attributions and recognition for creativity. Associated with many other social norms such as academic standards in various domains, values and rules of plagiarism, copyright enable author's creation and contribution to be well attributed and recognized. As theorists have posited, 'creative efforts often would go unrecognized without social attributions and recognition',[163] and very likely 'some creative people work for that recognition'.[164] Furthermore, copyright law is also helpful, more or less, to prevent the dark side of creativity.

Notably, the role in stimulating creativity played by copyright in a given society needs to be re-investigated from time to time notwithstanding the incentive effect can be seen more or less. The changing social context within which the creator and user are situated keeps challenging the incentive structure and its effectiveness afforded by copyright law. The existing copyright legal framework was spawned in a society which was dominated by publishing industries (publishers, book dealers and printers). It should not be ignored that nowadays the dominant media powers are entertainment industries (recording labels, studios, and other multimedia and game producers). What is more, the advance of

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THE ORGANIZATION OF AMERICAN HISTORIANS, AND H-LAW: HUMANITIES AND SOCIAL SCIENCES ONLINE IN SUPPORT OF PETITIONERS' (On Writ Of Certiorari To TheUnited States Court Of Appeals For The District Of Columbia Circuit) <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/historians.pdf> at 30 September 2008.

[160] 'From the ancient world onward patronage of the arts was important in art history. It is known in greatest detail in reference to pre-modern medieval and Renaissance Europe, though patronage can also be traced in feudal Japan, the traditional Southeast Asian kingdoms, and elsewhere—art patronage tended to arise wherever a royal or imperial system and an aristocracy dominated a society and controlled a significant share of resources.' See further, Wikipedia <http://en.wikipedia.org/wiki/Patron> at 30 September 2008.

[161] For example, around ten years ago, most Chinese writers, as members of local or national "Writers' Associations" which are as a matter of fact government agents, are funded by local or central governments. For further discussion about the Writers' Association system and writers in China, please see Eugene Perry Link, *The Uses of Literature: Life in the Socialist Chinese Literary System* (Princeton University Press, 2000) 104-166.

[162] For more investigation on the relationship between patronage and art in history, see Jill Caskey, *Art and Patronage in the Medieval Mediterranean: Merchant Culture in the Region of* Amalfi (Cambridge University Press, 2004); See also F. W. Kent and Patricia Simons (eds), *Patronage, Art, and Society in Renaissance Italy* (Oxford University Press, 1987).

[163] Mark A. Runco, *Creativity: Theories and Themes: Research, Development, and Practice* (2006)154.

[164] Ibid. See also, J. Kasof, 'Explaining Creativity: The Attributional Perspective' (1995) 8 *Creativity Research Journal* 311-366.

information and communication technology also empowers both creators and users to produce, distribute, use and reuse, share and communicated ideas and creative expressions more effectively in increasing dynamic ways. Within such social contexts, it has been complained that copyright law works well to provide incentives for entertainment industries but not for individual literary and artistic individuals, especially in a networked information society.[165]

C. Creativity, Originality and Copyrightability

Copyrightability refers to the conditions of being copyrightable and it determines the creative work for which one can obtain copyright and associated legal protection. Within copyright law, there are several requirements setting the threshold for copyright protection. For example, the work must be fixed in a material form; the work must fall in the categories of subject matter of copyright; and most importantly the work must be *original*.

The last one is overwhelmingly but controversially relevant to the topic of creativity and copyright here. It raises an important issue of what commentators have called the "innovation threshold" which means the quantum of innovation or differences from what has gone before that is required under copyright law before protection is accorded to the works.[166] This issue has been addressed in a variety of manners in different countries. Although the variables might be comparatively slight, they are of significant implications to the investigation of the place of creativity in copyright law.

a) Originality and Copyrightability/Subsistence of Copyright

In copyright legislation of many countries, it is expressly stated that copyright subsists only in so-called "original works",[167] especially in the cases of literary, dramatic, musical and artistic works.[168] But, what constitutes an "original" work? Most copyright legislation

[165] However, it is also argued that the arising challenges are not always copyright law's faults but faults of someone/something else. 'There is a tendency to attribute problems to copyright law that are actually caused by something else. Copyright often gets blamed for things that are not its fault. These other matters include: 1. Private contract law; 2. Corporate behaviour; 3. Bands that lower the costs of sales and therefore increase a brand-owners' bargaining power; 4. Weaknesses in competition law to cope with monopolies; 5. The inbuilt inherent volatility of any new technology, whether of carbon materials or digital copying; 6. The lack of workable business models in new media.' See futher, John Howkins, 'Is it Possible to Balance Creativity and Commerce?' in Fiona Macmillan (ed), *New Directions in Copyright Law*, Vol. 2 (Edward Elgar, 2006) 313.

[166] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 7.35. The writing by Ricketson was cited by the Court in Desktop v Telstra: 'The principal issue in this case concerns the "innovation threshold" which must be satisfied if a compilation of the names, addresses and telephone numbers of subscribers to a telephone service is to be accorded copyright protection.' See *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112, 335.

[167] For example, *U.S. Code* Title 17 § 102 (a) states, 'Copyright protection subsists, in accordance with this title, in ***original works*** of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.' (emphasis added); *U.K. Copyright, Designs and Patents Act 1988* § 1 says, 'Copyright is a property right which subsists in accordance with this Part in the following descriptions of work— (a) ***original*** literary, dramatic, musical or artistic works, (b) sound recordings, films, broadcasts or cable programmes, and (c) the typographical arrangement of published editions.' (emphasis added); Australian *Copyright Act 1968 (Cth)* s32 also states, 'copyright subsists in an ***original*** literary, dramatic, musical or artistic work'(emphasis added); and moreover, *Regulation for the Implementation of the Copyright Law of the People's Republic of China* (2002) art. 2 states, 'The term "works" as referred to in the Copyright Law means intellectual creations ***with originality*** in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form'(emphasis added).

[168] For other subject matter including sound recordings, cinematograph films, television broadcasts and sound broadcasts, and so on, the originality requirement is not expressly stated in the copyright law. For example, in Australia, for sound and TV broadcasts, 'the originality requirement does not apply as copyright subsist by reference to the broadcaster's output rather than by reference to originality; copyright subsists as soon as the broadcast is made, provided the connecting factors in s 91 are satisfied.' See further, Anne Fitzgerald and Brian Fitzgerald, *Intellectual property in principle* (2004) 86-87. 'The first and most important requirement for subsistence of coyright in literary, artistic, dramatic and musical works is that they be "original". There is not such similar requirement applying to Part IV films, sound recordings, broadcasts and printed editions of works.' See Rocque Reynolds and Natalie Stoianoff, *Intellectual Property: Text and Essential Cases* (2008) 36.

deliberately leave this term undefined in order to allow the Court to exercise their discretion. For example, in enacting the *Copyright Act of 1976*, U.S. Congress explained, '[the] phrase "original works of authorship", which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.'[169] Therefore, any attempt to investigate the rules of originality must turn to the courts and decided case law.

The distinction between the lines followed by U.S. courts and Australian courts is not difficult to see.[170] The departure is particularly remarkable while the courts are encountered with the "sweat of the brow" test. The elements of originality considered by the U.S. Supreme Court, especially after *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*,[171] are "independent creation" plus "modicum of creativity";[172] however, the prevalent factor considered by the courts of Australia is "independent skill or labour" employed to produce the work and consequently 'intellectual creativity is not required' under Australian law.[173]

The rule of "independent creation" could be seen quite consistent through many cases of U.S. courts. As Russ VerSteeg commented, '[U.S. Courts] have long held that in order for a work to be original, it cannot have been copied'.[174] For example, in *Feist* the Court pointed out that 'the work was independently created by the author (as opposed to copied from other works)'.[175] A work satisfies the "independent creation" element as long as it was not literally copied from another, even if it is fortuitously identical to an existing work. In *L. Batlin & Son, Inc v. Snyder*, United States Court of Appeals, Second Circuit affirmed that to be original, a work must be a product of independent creation which 'means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying'.[176] In *Ford Motor Co. v. Summit Motor Products, Inc.* where 'evidence of independent creation was woefully inadequate', copyright infringement was established.[177] In contrast, in *Don Post Studios v. Cinema Secrets, Inc.*, the Court held that the work was independently created by the defendant, and therefore no copyright infringement was found.[178]

On the other hand, whether originality requires an element of creativity was not articulated expressly until the *Feist* case. Prior the *Feist*, many courts found that a work that exhibits a non-trivial variation would satisfy the originality requirement. For example, in *Alfred Bell &*

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[169] H. R. Rep. No. 94-1476, p. 51 (1976)

[170] The key U.S. cases concerning originality test include, for example, *U.S. v. Steffens*, *U.S. v. Witteman*, *U.S. v. Johnson* (these three cases are jointly decided at 100 US 82 (1879)), *Burrow-Giles Lithographic Co. v. Sarony* 111 US 53 (1884), *Bleistein v. Donaldson Lithographing Co.* 188 US 239 (1903), *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951), *Sheldon v. Metro-Goldwin Pictures Corp.* 81 F.2.d 49 (2nd Cir 1936), *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.* 499 U.S. 340 (1991),. The key UK and Anglo-Australian cases are: *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, *Sands & McDougall Pty Ltd v Robinson* [1917] HCA 14; (1917) 23 CLR 49, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171, *Data Access Corporation v Powerflex Services Pty* Ltd [1999] HCA 49, *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112.

[171] 499 U.S. 340 (1991)

[172] 'The constitutional requirement necessitates independent creation plus a modicum of creativity.' See further, *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)

[173] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 7.35.

[174] Russ VerSteeg, 'Originality and Creativity in Copyright Law' in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Vol. 1 Copyright and Related Rights) (2007) 3.

[175] *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)

[176] 536 F.2d 486 (2nd Cir. 1976)

[177] 930 F.2d 277 (3rd Cir. 1991)

[178] 124 F.Supp.2d 311 (E.D. Pa. 2000)

Co. v. Catalda Fine Arts, Inc.,[179] the Court stated as follows: 'All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'. Originality in this context 'means little more than a prohibition of actual copying'. [180](Footnotes omitted) In *Feist*, the U.S. Supreme Court 'for the first time squarely addressed the issue of the degree of creativity necessary to sustain a copyright in a compilation of factual material'.[181] The court confirmed Professor Nimmer's proposition by saying: 'Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.'[182]

The *Feist* approach to the subsistence of copyright gives rise to much controversy, even within U.S. jurisdiction. It affirms 'originality is a constitutional requirement' which arises out of the use of the terms "Authors" and "Writings" in the Constitution;[183] then it disputably 'goes a step further'[184] by saying that 'the component of creativity is also constitutionally mandated'.[185] However, critics argue that historical evidences make it very clear that the formulations of the originality test, prior to the *Feist*, certainly did not seem to incorporate a standard of creativity.[186]

The approach taken by the U.S. Supreme Court in *Feist* on the issue of the level of creativity in copyrightability test can be contrasted with that taken by the Full Court of the Federal Court of Australia in *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd.*[187] In *Desktop*, a similar issue before the Court is 'whether the word "original" in s 32 of the [*Copyright Act 1968 (Cth)*] requires the intellectual effort or creative spark on which *Feist* insists'. [188] After reviewing the English legislative and judicial tradition [189] and further considering the principle and policy in respect of the *Feist* approach, the Court asserts 'the

[179] 191 F.2d 99 (2d Cir. 1951)
[180] Ibid.
[181] Howard B. Abrams, 'Originality and Creativity in Copyright Law' (1992) 55 (2) *Law and Contemporary Problems* 5.
[182] *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)
[183] Ibid.
[184] Howard B. Abrams, 'Originality and Creativity in Copyright Law' (1992) 55 (2) *Law and Contemporary Problems* 14.
[185] Ibid.
[186] During arguments leading to the birth of the current U.S. *Copyright Act 1976*, the U.S. Congress the standard of originality 'does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.' See further *HR 1496* at 51; *S Rep No 473* at 50. Moreover, the U.S. Register of Copyrights was initially of the opinion that, to be copyrightable, a work must be original and 'must represent an appreciable amount of creative authorship'. See further Register of Copyrights, *Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, printed for the House of Committee on the Judiciary, 87th Cong, 1st Sess., at 9 (Committee Print, 1961) But, the express requirement of "creativity" was abandoned later. '[W]hen it came to drafting, a great deal of concern was expressed about the dangers of using a word like "creative" in this context. It was argued that the word might lead courts to establish a higher standard of copyrightability than that now existing under the decisions, and that any effort to define "original" could bring about the same undesirable result'. See further *Supplementary Report of Register of Copyrights on the General Revision of the US Copyright Law: 1965 Revision Bill*, House Committee on the Judiciary, 89th Cong 1st Sess 3 (Committee Print, 1965).
[187] [2002] FCAFC 112; (2002) 119 FCR 491
[188] [2002] FCAFC 112, 204.
[189] The Court considered UK and Australian cases both prior to and after *Copyright Act 1911* (UK). The pre-1991 cases include *Matthewson v Stockdale* (1806) 12 Ves 270 (33 ER 103), *Longman v Winchester* (1809) 16 Ves Jun 269 (33 ER 987), *Hotten v Arthur* (1863) 1 H & M 603 (71 ER 264), *Scott v Stanford* (1867) LR 3 Eq 718, *Morris v Ashbee* (1868) LR 7 Eq 34, *Cox v Land and Water Journal Company* (1869) LR 9 Eq 324, *Morris v Wright* (1870) LR 5 Ch App 279, *Hogg v Scott* (1874) LR 18 Eq 444, *Dicks v Yates* (1881) 18 Ch D 76, *Ager v Peninsular & Oriental Steam Navigation Co* (1884) 26 Ch D 637, *Macmillan & Co Ltd v Suresh Chunder Deb* (1890) 17 I LR (Calc Series) 951, *Leslie v J Young & Sons* [1894] AC 335, *Walter v Lane* [1900] AC 539. The following are the post-1911 cases considered by the Court: *Blacklock & Co Ltd v C Arthur Pearson Ltd* [1915] 2 Ch 376, *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, *G A Cramp & Sons Ltd v Frank Smythson Ltd* [1944] AC 329, *Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637, *Sands & McDougall Pty Ltd v Robinson* [1917] HCA 14; (1917) 23 CLR 49; *Skybase Nominees Pty Ltd v Fortuity Pty* Ltd (1996) 36 IPR 529. See further, *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112.

course of Anglo-Australian authority recounted earlier shows that it does not'.[190] The Court furthermore points out that the *Feist* approach 'depended on constitutional considerations peculiar to the United States'.[191] The Court expressly endorses the propositions: 'The concept of originality is correlative with that of authorship'[192] and '[a]uthorship (likewise originality) does not require novelty, inventiveness or creativity, whether of thought or expression, or any form of literary merit'.[193] In 2003, the High Court of Australia refused to hear the appeal the Federal Court's decision indicating its unwillingness to follow *Feist* as well.

It is interesting to see how the Australian courts will build on the *Desktop* in another recent case, *Nine Network Australia Pty Ltd v IceTV Pty Ltd* in which the key legal focus is on substantiality/independent creation tests and copyright infringement. At first instance, the Federal Court of Australia rejected Nine's claim that the weekly version of its TV program schedules ("the Weekly Schedule") were infringed by IceTV's electronic program guide ("the IceGuide").[194] The Court affirmed that Nine's Weekly Schedule is qualified for copyright protection as a compilation; but it further held that IceTV had not copied a substantial part of the Weekly Schedule.[195] The Court found that IceTV produced the IceGuide through independent inquiry[196] and therefore it did not infringe copyright in the infringement Weekly Schedule.[197] However, this decision was reversed on appeal with the Full Court of the Federal Court of Australia (notably the same bench that sat on the *Desktop* case – BLACK CJ, LINDGREN & SACKVILLE JJ) finding that when IceTV copied (even indirectly) the most important information and substantial part of the Weekly Schedule to produce the IceGuide, it was infringing copyright.[198] On 26 August 2008, the High Court of Australia, surprisingly, granted IceTV special leave to appeal the Full Court's decision.[199] Consequently, it is reasonable to believe that the High Court is about to re-examine the substantiality test for copyright infringement, especially for factual compilations.

To sum up, U.S. courts hold that 'copyright rewards originality, not effort',[200] and accordingly U.S. law extend very thin copyright, especially to databases and other compilation of facts. It theoretically differentiates U.S. courts' approach from that of Australian courts. In terms of

[190] Ibid, 204; Furthermore, the court saw alternative approach other than *Feist* by saying: 'In view of these matters, the significance of *Feist* for present purposes is whether the reasoning, shorn of issues peculiar to the United States, convincingly establishes a "unitary concept of creative originality for copyright law": J C Ginsburg, "No `Sweat'? Copyright and Other Protection of Works of Information After *Feist v Rural Telephone* (1992) 92 Colum L Rev 338, at 341. The opinion shows that the concept of "originality" in copyright law is capable of being understood as incorporating a "creative spark" requirement. But this is not the only view that can be taken. The English and Australian authorities, to which reference has already been made, demonstrate that the concept of originality can equally be understood as embracing a compilation that is the product of substantial labour or expense, provided that it goes beyond the mere copying of other works. On this approach, originality does not always involve the "creative spark" identified as essential in Feist. This view of originality also accommodates the special characteristics of factual compilations which, by statute, can be the subject matter of copyright.' See ibid, 423.

[191] Ibid, 326. See further debates, ibid 367, 420.

[192] *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, [2002] FCAFC 112, 160.

[193] Ibid.

[194] [2007] FCA 1172

[195] Ibid.

[196] [2007] FCA 1172, 242, 243.

[197] See further [2007] FCA 1172, 243-250. The Court explained as follows: 'It is at law open to a person to ascertain the facts recorded in a compilation by independent inquiry and to compile his or her own compilation containing the results of that inquiry. So long as the second compiler does not copy the first compilation, there would be no infringement of any copyright in that compilation.' See [2007] FCA 1172, 120.

[198] [2008] FCAFC 71

[199] See further, AustLII, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2008/308.html?query=^IceTV> at 7 October 2008.

[200] The court further the argument as follows: 'As this Court noted more than a century ago, "great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way." Baker v. Selden, 101 U.S., at 105.' See *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)

copyrightability, Australian courts primarily consider the labour, skill and expense (so-called "sweat of the brow") that are employed to produce the work.[201] The rationale behind the judicial unwillingness to look at the artistic merit of copyrighted works has been suggested and summarized by Cohen that copyright theorists 'are deeply suspicious of the role of value judgments about artistic merit in justifying the recognition and allocation of rights.'[202]

b) Authorial Contribution and Its Copyrightability

Given that neither novelty/inventiveness nor even creativity is required, what must emanate from the author in order for the work to qualify as 'copyrightable'? Is something more required by way of original authorial contribution than simply the act of giving material expression to something? What is the requirement for the contribution that is authorial?

As discussed *supra*, the place of creativity in the originality test (and thus in copyrightability test) may vary slightly in the copyright laws of different countries. However, the variables are so slight that it might be ignorable in practice as even U.S. courts admit 'the requisite level of creativity is extremely low; even a slight amount will suffice'. [203] As a result, 'the vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be'.[204] Moreover, only on occasions when copyright protection for databases or factual compilations is at issue[205] would the creativity paradox become inevasible. It is because copyright has become so pervasive that it is hardly possible to see any work that is not copyrightable, especially in the cases of literary, dramatic, musical and artistic works. 'Perhaps', Professor Abrams commented, 'the greatest importance of *Feist* rests on a policy perspective. *Feist* prevents copyright from being used to bar public access to facts and data per se, which copyright was never intended to protect.'[206]

In *desktop*, the court agrees '[t]he test of originality is whether the work was not copied, but originated from the putative author'[207] and '[t]his test is not an "all or nothing" one but raises a question of fact and degree as to the extent of the putative author's contribution to the making of the particular literary work in question'.[208] It can be deduced from many courts' opinions that the authorial contribution is the independent application of knowledge,

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[201] Professor Denicola pointed out as follows: 'effort of authorship can be effectively encouraged and rewarded only by linking the existence and extent of protection to the total labor of production. To focus on the superficial form of the final product to the exclusion of the effort expended in collecting the data presented in the work is to ignore the central contribution of the compiler.' The Court in *Desktop* affirmed this analysis to reflect the policy considerations informing the nineteenth century authorities on copyright in factual compilations. See *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, [2002] FCAFC 112, 424; see also *Nine Network Australia Pty Ltd v IceTV Pty Ltd*, [2007] FCA 1172, 46.

[202] Therefore, they have 'struggled mightily to articulate neutral, process-based models of progress that manage simultaneously to avoid enshrining particular criteria of artistic and intellectual merit and to ensure that the "best" artistic and intellectual outputs will succeed.' See further, Julie E. Cohen, 'Creativity and Culture in Copyright Theory', (2007) 40 *UC Davis Law Review*, 1162-3.

[203] *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)

[204] Ibid.

[205] Specific issue about databases protection is out of the topic of this article. But, the possible alternatives that can be seen nationally and internationally for the issue of database and other forms of factual compilations might be: (a) sui generis protection approach as adopted in the *Directive 96/9/EC of the European Parliament* and of the Council of 11 March 1996 on the legal protection of databases; (b) copyright protection approach as being arguably articulated in *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, [2002] FCAFC 112 and *Nine Network Australia Pty Ltd v IceTV Pty Ltd*, [2007] FCA 1172; (c) public domain: no legal protection for those that are not copyrightable as being articulated in *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991). In terms of collections of literary or artistic works, it is notable that the *Berne Convention for the Protection of Literary and Artistic Works* requires creativity in the "selection and arrangement" of the contents as its article 2(5) states, 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.'

[206] Howard B. Abrams, 'Originality and Creativity in Copyright Law' (1992) 55 (2) *Law and Contemporary Problems* 44.

[207] *Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, [2002] FCAFC 112, 160.

[208] Ibid.

judgment, skill or labour on the part of the author that are represented in the literary or artistic expression.[209] Such contribution 'inevitably involves a mixture of both mental and physical operations on the part of the author: decisions, on the one hand, as to how the idea or subject of the work is to be expressed, and the execution of these decisions, on the other.'[210] 'Consequently', as Ricketson commented, '"authorship" clearly covers a wide spectrum of activities that can result in the production of protected forms of expression. These include the acts of selection, compilation, abridgement, transcription, translation, arrangement and alteration, as well as the more conventional activities of writing, composition and representation'.[211] For instance, In *Nine Network Australia Pty Ltd v IceTV Pty Ltd*, both the Courts of first instance and appeal affirm that the sets of skill and labour (of selecting, arranging and drafting) exercised in the creation of the Weekly Schedule give rise to the subsistence of copyright.[212]

Therefore, for this moment, despite of the slight variables, the originality/copyrightability test (as well as associated test for copyright infringement) could be summarized as a general two step test: Firstly, *independent creation/inquiry* – The work must not be a mere copy of a pre-existing work and it originates with the author.[213] Secondly, *authorial contribution* – There must exist skill, intelligence, knowledge, ingenuity, expertise, labour or expense that is exercised by the author in producing the work (Australian approach),[214] or the work must represent non-trivial variation or author's creativity (U.S. approach).[215] In terms of copyright infringement, as posited by Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, the step to ascertain whether a work is protected by copyright is 'first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to inquire whether the part taken by the defendant is substantial'.[216]

However, such approaches to subsistence and infringement of copyright are very problematic, especially in the case of new forms of creative works (such as music remixing,[217] sampling,[218]

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[209] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 7.60.
[210] Ibid.
[211] Ibid, 7.45.
[212] '[T]here are two sets of skill and labour exercised by Nine and its employees in the creation of the Weekly Schedule. First, the skill and labour of selecting and arranging the programs to be shown on Nine to attract viewers to programs in the different timeslots and to meet competitors' programs. For the purposes of these proceedings, this is the "antecedent" or "preparatory" skill and labour in the sense discussed in Ladbroke at 287–8 per Lord Hodson and *Desktop* at [132] and [160] per Lindgren J, [371] and [409] per Sackville J. Secondly, there is the skill and labour of drafting the synopses, selecting and arranging the additional program information such as classifications and consumer advice and recording, weekly, all of the information into documentary form, the Weekly Schedule.' See [2007] FCA 1172, 46; [2008] FCAFC 71, 60, 61.
[213] This can be seen in both U.S. cases such as *Sheldon v. Metro-Goldwin Pictures Corp.* 81 F.2.d 49 (2nd Cir 1936), *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.* 499 U.S. 340 (1991) and Australian cases, for example *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, *Sands & McDougall Pty Ltd v Robinson* [1917] HCA 14; (1917) 23 CLR 49, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
[214] This can be seen in Australian cases such as *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, *Ogden Industries Pty Ltd v Kis (Australia) Pty Ltd* (1982) 45 ALR 129, *Eric Vale Pty Ltd v Thompson & Morgan (Ipswich) Ltd* (1994) 29 IPR 489.
[215] This can be seen in U.S. cases such as *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951), *Sheldon v. Metro-Goldwin Pictures Corp.* 81 F.2.d 49 (2nd Cir 1936), *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.* 499 U.S. 340 (1991).
[216] [1964] 1 WLR 273 per Lord Reid at 277.
[217] 'A remix is an alternative version of a song, different from the original version. A remixer uses audio mixing to compose an alternate master recording of a song, adding or subtracting elements, or simply changing the equalization, dynamics, pitch, tempo, playing time, or almost any other aspect of the various musical components. Some remixes involve substantial changes to the arrangement of a recorded work, but many are subtle, such as creating a "vocal up" version of an album cut that emphasizes the lead singer's voice.' See further, Wikipedia <http://en.wikipedia.org/wiki/Remix> at 13 October 2008.
[218] 'In music, sampling is the act of taking a portion, or sample, of one sound recording and reusing it as an instrument or element of a new recording. This is typically done with a sampler, which can be a piece of hardware or a computer program on a digital computer. Sampling is also possible with tape loops or with vinyl records on a phonograph.' See further, Wikipedia

and digital mashup of music or video[219]) and new patterns of creativity (such as wiki-like collaborative, distributed and participatory creativity). In many cases, remixing, sampling, mashup and other forms of digital creations are just re-combination, re-editing, representation or re-interpretation of existing materials. Consequently, the entire expressive elements of such creative outputs are usually copied from its pre-existing works. In this way, the borrowed materials are "recontextualized". The possibilities of such practices have been especially facilitated by the advance of information technology. As observers of music sampling in early 1990s had pointed out, '[t]he range of options available either to the consumer or the creator for the recontexualization of existent recordings has been substantially enlarged by computer technology.'[220]

It is arguable which category of subject matter would such works fall into. Adaptation? – It is hardly possible that they could satisfy the statutory definition of "adaptation" under copyright law;[221] Compilation? – Compilation is a collection of short works, most often poetry or short stories. The meaning and functionality of both artistic and factual compilation emanate from each individual parts of the compilation rather than from the compilation as a whole work. In other words, each component of the compilation is used as an independent work. By contrast, remixing, sampling or mashup speaks as a whole work and the meaning given by the work does not emanate from its individual components but from the work as a whole body.

Besides, could the acts of remixing, sampling or mashup gives rise to the subsistence of copyright? It is reasonable to say that such acts are exercise of skill, knowledge, labour, or creativity. Therefore, in this sense, it is very likely that works generated by such acts qualify for copyright protection. It is an established rule that a new work that is derived from earlier works could attract copyright in its own right provided the author has expended sufficient independent skill, knowledge and labour in bringing it into material form.[222] The copyright subsists in remixing, sampling or mashup as a whole and would not extend to its underlying works or any elements borrowed from other works.

In addition, as being derived from earlier works, the new work must be a product of independent creation. It must be something more than a copy and must possess a "distinguishable variation" or "non-trivial variation" from prior works.[223] In relation to derivative works which form a series of evolving productions, Australian courts 'have been

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<http://en.wikipedia.org/wiki/Sampling_(music)> at 13 October 2008.

[219] 'A digital mashup is a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources, to create a new derivative work.' See further, Wikipedia <http://en.wikipedia.org/wiki/Mashup_(digital)> at 13 October 2008; See also 'Mashup (music)' <http://en.wikipedia.org/wiki/Mashup_(music)> at 13 October 2008; 'Mashup (video)' <http://en.wikipedia.org/wiki/Mashup_(video)> at 13 October 2008.

[220] David Sanjek, '"Don't Have to DJ No More": Sampling and the "Autonomous" Creator', (1992) 10 *Cardozo Arts & Entertainment Law Journal*, 608.

[221] For example, under s 10 of *Copyright Act 1968 (Cth)* of Australia, "adaptation" means: (a) in relation to a literary work in a non‑dramatic form a version of the work (whether in its original language or in a different language) in a dramatic form; (b) in relation to a literary work in a dramatic form a version of the work (whether in its original language or in a different language) in a non‑dramatic form; (ba) in relation to a literary work being a computer program--a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work; (c) in relation to a literary work (whether in a non‑dramatic form or in a dramatic form): (i) a translation of the work; or (ii) a version of the work in which a story or action is conveyed solely or principally by means of pictures; and (d) in relation to a musical work--an arrangement or transcription of the work.

[222] See further, *L B (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551.

[223] See general, *Alfred bell& Co. v Catalda Fine Arts, Inc.* 191 F2d 99 (2d Cir 1951); *Alva Studios, Inc. v Winninger* 177 F Supp 265 (SDNY 1959); *L. Batlin & Son, Inc. v Snyder* 536 F2d 486 (2d Cir 1976) (en banc).

prepared to find sufficient originality, even where the work involved may be little more than reproducing a modified or corrected version of an earlier work.'[224] In the case of remixing, sampling or mashup, the variation in the new version of music, picture or video is likely to be sufficient to satisfy the "independent creation" standard for the subsistence of copyright. But, doubts on the cultural merits of these creations remain.[225]

However, in terms of copyright infringement, remixing, sampling, mashup or other forms of digital creations is very unlikely to be able to pass the independent creation and substantiality tests, as such creations, by their very nature, are re-combination of elements and components appropriated from pre-existing works.[226] Although the empirical study of online user-generated videos shows that a substantial amount of this content uses copyrighted works in ways that are eligible for fair use consideration, legal uncertainties in respect of these works cannot be ignored yet. The appeals to the establishment of rules immunizing copyright liability for such creations have arisen in many countries.[227]

IV. Conclusion: The Place of Creativity in Copyright Law

Since the British *Statue of Anne 1710*, the intention of encouraging learning and thus enhancing creativity has found its place in the law of copyright,[228] and many following legislation and case law expressly declare that the primary purpose of copyright law is to stimulate creativity by rewarding creation for the general public good. However, this is not easy. On one hand, the stated purpose and associated theory are full of paradoxes; on the other hand, the changing social context keeps challenging the way in which the stated aim could be accomplished. Furthermore, in contrast with "stimulating creativity", copyright's effect on enhancing creativity through allowing adequate access to creative works and encouraging learning has been overlooked, unconsciously but deliberately.

In a networked information society, the rise of a participatory and read/write culture comes along with the prevalence of everyday creativity. Technologies and information infrastructure have afforded people various possibilities to participate in creative activities,

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[224] S Ricketson, *The law of Intellectual Property: Copyright, Design & Confidential Information* (Lawbook Co., last updated September 2008) 7.100; See also *Namol Pty Ltd v Baulderstone Pty Ltd* [1993] AIPC 39; *New England Country Homes Pty Ltd v Moore* (1999) 82 FCR 500.

[225] For example, while commenting on the creation of Pop, a popular music critic questioned whose song it was. He wrote, 'it sometimes seems that sophisticated copying has overtaken innovation, that an exhausted culture can only trot out endless retreads.' Jon Pareles, 'In Pop, Whose Song is It, Anyway?' (27 August 1989) *New York Times* (Arts & Leisure).

[226] Litigations against music sampling artists have made it very clear that samples that borrow substantial parts of copyrighted works are infringing copyright. Notably, in a 2005 case, U.S. court held that any copying of a sound recourding will amount to a substantial part and infringe upon copyright. See *Bridgeport Music, Inc. v. Dimension Films,*. 410 F.3d 792, 809 (6th Cir. 2005); see also Matthew R. Brodin, 'Bridgeport Music, Inc. v. Dimension Films : The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims – The Sixth Circuit's Flawed Attempt at a Bright-Line Rule' (2005) 6 (2) *Minnesota Journal of Law, Science & Technology* 821-864.

[227] For instance, UK *Gowers Review* suggests, 'Recommendation 11: Propose that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step Test. See further, *Gowers Review of Intellectual Property* (November 2006) 66-68; Moreover, EU commission has recently call for comment on 'Should an exception for user-created content be introduced into the Directive?', see Commission of the European Communities, *Green Paper: Copyright in the Knowledge Economy* (2008) 19-20.

[228] For the birth of modern copyright law and its intension, see Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710* (University of Texas Press, 1956), Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967), Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) and Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart Publishing, 2004).

contribute their own information and knowledge and thus create their own versions of culture. Dick Hebdige called it as a process of "versioning" which is 'a democratic principle because it implies that no one has the final say. Everybody has a chance to make a contribution'.[229] In order to enhance literacy and creativity in such a context, copyright law should allow more room for the use and re-use of copyrighted works. Further, as more and more often, non-monetary incentives suffice to stimulate creativity, the incentive structure and its effect should be re-examined. Therefore, to achieve its purpose, optimizing creativity of creators and users (potential creators) and balancing conflicting interests, copyright should adopt a "*rights vs. rights*" instead of a "*rights plus limitations*" approach. Particularly, copyright law should recognize, for instance, fair use, transformative use, compulsory licensing, etc. as statutory user's right. To reconcile the conflicts of interests, copyright law should develop a flexible benefit sharing scheme desired by all stakeholders.[230]

To this end, this chapter concludes that the established rules in respect of subsistence and infringement of copyright in world copyright legislation may acquire new development, especially in the cases of new forms of creative works and new patterns of creativity. Creative contribution may be perceived and recognized in according to various motivations in different cases and to its specific commercial or non-commercial nature.

[229] Dick Hebdige, *Cut 'N' Mix: Culture, Identity and Caribbean Music* (1987) xv.
[230] See further, Chapter 4: A Relational Theory of Authorship.