TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW

Reconfiguring Author's Economic Rights to Facilitate Knowledge Growth in Networked Information Societies

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Copyright law; author's right; exclusive rights; economic rights; Chinese copyright law; digital challenge; digital copyright; peer production; everyday creativity; evolutionary economics; knowledge growth; relational theory; the right of public dissemination; the right of adaptation; the right to remuneration; romantic authorship; relational authorship; pre-first contributor; first contributor; post-first contributor; compulsory licensing; voluntary licensing; blanket licensing; fair use; access to knowledge; recreation; creativity; innovation; benefit sharing; default licence; copyright registration; copyright renewal; and copyright formalities.

ABSTRACT

This research provides a systematic and theoretical analysis of the digital challenges to the established exclusive regime of the economic rights enjoyed by authors (and related rightholders) under the law of copyright. Accordingly, this research has developed a relational theory of authorship and a relational approach to copyright, contending that the regulatory emphasis of copyright law should focus on the facilitation of the dynamic relations between the culture, the creators, the future creators, the users and the public, rather than the allocation of resources in a static world.

In this networked digital world, the creative works and contents have become increasingly vital for people to engage in creativity and cultural innovation, and for the evolution of the economy. Hence, it is argued that today copyright owners, as content holders, have certain obligations to make their works accessible and available to the public under fair conditions. This research sets forward a number of recommendations for the reform of the current copyright system.

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STATEMENT OF ORIGINAL AUTHORSHIP

The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

Signature Xiaoxiang Shi

Date 25.5.2010

CHAPTER 1

INTRODUCTION

1.1 RESEARCH OBJECTIVES AND QUESTIONS

Challenges to the long established copyright regime have always been there, however they have become more apparent than ever with the prevalence of civic engagement in cultural activities. Powered by Internet-based media, civic engagement generates revolutionary impacts on the paradigms of information dissemination and most importantly on the patterns of knowledge growth.

From the perspective of evolutionary economics, it is suggested that the growth of knowledge and thus the evolution of the economy can be facilitated through optimising the expression and dissemination of novel ideas and through encouraging their adoption and retention. Copyright is an institutional arrangement governing the production, distribution and utilisation of knowledge-based works; its intervention in the 'trajectory of knowledge growth' and thus in economic change must be closely scrutinised in accordance with the changing social, economic and technological contexts.

Therefore, the objectives of this thesis are to:

- analyse the digital challenges to copyright raised by the potential of Internet-based media for the dissemination of information and access to knowledge;
- examine the digital challenges to copyright raised by the popularity of civic

engagement in cultural and knowledge creation;

- propose possible solutions to the problems caused by these challenges.

In order to accomplish these objectives, this thesis adopts a systematic analysis approach with emphasis on the entire panoply and structure of economic rights conferred on authors. The primary research problem is to what extent the established regime is in conflict with the reality in digital age and how to reconfigure it in order to facilitate knowledge growth in a networked information society. Accordingly, the research problem can be broken down into the following questions:

1. What are the impacts of copyright's intervention in the 'trajectory of knowledge growth', particularly from the perspective of evolutionary economics? (For further introduction to evolutionary economics, see chapter 2 of this thesis.)
2. How has the structure of authors' economic rights already been generally formulated under international conventions and domestic legislation of specific jurisdictions?
3. How to best address conflicts between authors' exclusive rights to distribute creative works and the necessity in the digital age for public access to knowledge?
4. How to deal with conflicts between authors' exclusive rights to make derivative works and the potential of civic engagement in cultural creation in a networked information society?
5. How can the romantic notion of authorship be reconceptualised to accommodate the rise of everyday creativity and civic engagement in cultural creation?
6. How can the established structure of authors' exclusive rights be recalibrated in order to harness the disruptive power of the digital media revolution and to facilitate creativity in a networked information society?

1.2 BACKGROUND TO THE RESEARCH

1.2.1 THE RESILIENCE OF COPYRIGHT LAW

In 2005, a funny flash song *I Don't Want to Say I'm a Chicken*[1] spread over the Internet (hereafter referred to as the *Chicken Song Case*). People were sharing it among friends, downloading it and using it as a mobile phone ring tone[2] and singing the song on KTV.[3] The flash song was the lament of a chicken that was happy to be a source of eggs and meat, but was unfortunately facing extermination because of the threat of bird flu.[4] The lyrics of the 'Chicken Song' are very creative and humorous; but it bears an 'original sin'. The melody of the song was lifted entirely from a famous Chinese song *I Don't Want to Say*, written by Li Haiying who sued the wireless content provider Kongzhong.com where the 'Chicken Song' first appeared, for copyright infringement.[5] Li claimed he was owed an apology, 2 million Yuan in compensation, court costs and 50 000 Yuan for mental suffering.

In 2006, a video spoof of a big-budget film produced by a Chinese blogger triggered a heated debate among Chinese legal academics on copyright law. Hue Ge in his short video titled *The Bloodbath That Began with a Steamed Bun*, mocks much more

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1 This song can be accessed at Youtube <http://www.youtube.com/watch?v=HxgXtloKLyI> at 15 August 2007.

2 Ring tone (or Caller Ring Back Tone 'CRBT') is a personalised mobile music service where the caller hears songs and other sound clips instead of the traditional switchboard ringtone when he or she dials the number of a CRBT auto scriber.

3 KTV (also known as the Karaoke Box) is a type of karaoke popular in East Asia. It features a small to medium-sized private room containing karaoke equipment for a group of people to rent in timed increments. A monitor in the room displays lyrics on top of a themed music video.

4 In 2005, the global battle against bird flu led to tens of millions of fowl being killed and live poultry markets closing. People refused to eat chicken for fear of being infected with the deadly disease. Through the 'Chicken Song', the creator expressed his or her sorrow for the misfortune of the chicken being slaughtered.

5 Kongzhong Inc (NASDAQ:KONG) provides advanced second generation wireless interactive entertainment, media and community services, including CRBT searching and downloading. Users can download for approximately 2 Yuan, the song *I Don't Want to Say I'm a Chicken* from the Kongzhong website to their mobile phone, to use as a ring tone. However, it is free to watch or listen to online.

than Chen Kaige's movie *The Promise*[6] (hereafter referred to as the *Steamed Bun Case*).[7] The video pokes fun at the movie in which a hungry girl lies to a boy and steals his steamed bun. The boy grows up hating the world and becomes a cold-blooded killer.[8] Chen was so infuriated by the *Steamed Bun* that he declared that he would definitely seek litigation against the Chinese blogger.

The abovementioned cases are just two examples of the increasing tension between copyright protection and the prevalent civil engagement in cultural activities. The advent of the Internet triggered vigorous debates on whether the copyright system would survive in the new digital environment, particularly since online copying and distributing copyrighted works were not only an effective way of disseminating the works, but were also uncontrollable. As John Perry Barlow argued, this is an age of 'selling wine without bottles' and 'almost everything we think we know about intellectual property is wrong'.[9]

Nevertheless, in light of the introduction of new legislative initiatives[10] and successful cases brought by major U.S.-based entertainment companies against

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6 *The Promise* is an epic fantasy movie directed by Chen Kaige and starring Jang Dong-gun, Hiroyuki Sanada, Cecilia Cheung and Nicholas Tse. It was first released in mainland China on 15 December 2005, as well as being released in Hong Kong and Singapore. The Weinstein Company (TWC) adapted it for North American distributions and 3-day preview screenings, but they sold the movie to Warner Independent Pictures. While under the control of TWC, they trimmed out 19 minutes of scenes and renamed it *Master of the Crimson Armour*. Eventually it was released on 5 May 2006 as *The Promise*. See *The Promise (2005 film)*, Wikipedia <http://en.wikipedia.org/wiki/The_Promise_%282005_film%29> at 19 August 2007.

7 See *Chen Kaige*, Wikipedia <http://en.wikipedia.org/wiki/Chen_Kaige> at 19 August 2007.

8 Ching-Ching Ni, 'China's Clash of Cultures in Cyberspace', *Los Angeles Times* (Los Angeles, U.S.), 28 March 2006, <http://articles.latimes.com/2006/mar/28/world/fg-spoof28> at 2 May 2010.

9 John Perry Barlow, 'Selling Wine without Bottles: The Economy of Mind on the Global Net' in Peter Ludlow (ed), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (1996) 9, 33.

10 The *Digital Millennium Copyright Act 1998* of the U.S. (*DMCA*) is presented as a landmark in digital copyright legislation and has been followed by most national and international copyright legislations. For example, in Australia the Copyright Amendment (Digital Agenda) Bill 2000

individuals and companies who, without authorisation, uploaded or facilitated the online distribution of copyrighted music files on the Internet, 'the resilience of copyright law in the digital online environment is now established'.[11]

China, while 'being digital', realised that a strong economy in the digital age is impossible without a competitive and innovative information industry sector, and that the information industry cannot survive without a well-established intellectual property regime.[12] On 29 December 2006, China officially joined the *WIPO Copyright Treaty* (*WCT*)[13] and the *WIPO Performances and Phonograms Treaty* (*WPPT*).[14] China has now acceded to all mainstream international treaties in regard to copyright protection and has established comprehensive digital copyright protection laws.

1.2.2 GROWING CONFLICTS BETWEEN THE LAW AND REALITY

When Hu Ge was blamed for copyright infringement by Chen Kaige, he defended *Steamed Bun*, disclosing that it was made for fun while he *practiced his digital skills*, and that it was never meant to be uploaded to the Internet. Mr Hu said he only sent the video to several of his friends, however the video became so out of his control that it had already been widely spread over the Internet. Chen sought to commence

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(Cth) was passed on 17 August 2000, and came into effect on 4 March 2001. Moreover, on 22 May 2001 the European Union passed the *European Union Copyright Directive* (also known as the *EUCD*) which has similar features to the *DMCA*.

11 Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (2004) 83.

12 Pamela Samuelson, 'Intellectual Property and Economic Development: Opportunities for China in the Information Age' (Paper prepared for the International Symposium on the Protection of Intellectual Property for the 21st Century, Beijing China, 28-30 October 1998) <http://people.ischool.berkeley.edu/~pam/papers.html> at 17 August 2007.

13 See *Decision of the Standing Committee of the National People's Congress on Acceding to the WIPO Copyright Treaty* issued by the Standing Committee of the National People's Congress on 29 December 2006.

14 See *Decision of the Standing Committee of the National People's Congress on Acceding to the WIPO Performances and Phonograms Treaty* issued by the Standing Committee of the National People's Congress on 29 December 2006.

legal action against Hu, which ironically 90% of netizens criticised as *'violating the spirit of the Internet*'.[15]

Under the current *Copyright Law of China,*[16] individuals are immune from copyright infringement for private use of copyrighted works under several conditions enumerated in the law.[17] Such private use includes the use of creative works for the purpose of study, research, self-entertainment and sharing works among family or friends. However, the established rules are problematic in the new networked information society. *To what extent can the networked individuals share and communicate the works that are beloved by them within their social networks? How can the growing tension between the 'spirit of the Internet' and the interests of various stakeholders be reconciled?*

In the academic sector, some scholars argue that the *Steamed Bun* is a kind of literary comment which enjoys the fair use exemption under the law.[18] Others suggest that the short video is parody which is a new form of creative work and is legally

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15 Xinli Zhao, 'From 'egao' to 'shangzhai': On the Merits of the Internet' [trans of: *Cong 'egao' dao 'shanzhai'*: Xishu Wangluo Gong Yu Guo,], *The Young Journalists*, 3 February 2009) [trans of: *Qingnian Jizhe*] <http://www.qnjz.com/gcypp/200902/t20090203_4258457.htm> at 13 September 2009.

16 It was adopted at the 15th session of the Standing Committee of the seventh National People's Congress on 7 September 1990. This law set out the modern legal framework for copyright protection in China.

17 *Copyright Law of China 1990* (revised 2001) art 22 (1): 'In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (l) use of a published work for the purposes of the user's own private study, research or self-entertainment'. Under Chinese copyright law, private use is covered by fair use; however, in other copyright theory and legislations, private use and fair use are independent from each other as copyright limitations.

18 See the *Copyright Law of China 1990* (revised 2001) art 22(2): 'In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: … (2) appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point'.

protected in various countries, for instance the U.S., the U.K. and Australia; however it is not currently covered by Chinese copyright law. Consequently, this has raised demands for copyright law to be amended to include parody as a fair use exception.[19]

Additionally, the advance of technology and development of new business models have significantly diverfied stakeholder communities. In the 'Chicken Song' case, the song was produced by members of 'K Ring Studio' which is supported and financed by the defendant company Kongzhong. The defendant argued that 'K Ring Studio' produced the song not for profit, but in the public interest. The flash song could be watched, shared and freely downloaded from the defendant's website konghong.com, and other video sharing websites such as Tudou.com and YouTube.[20] The *Regulations on the Protection of the Right of Communication via Information Networks* provide safe harbours for Internet Service Providers (ISPs) who provide information storage space and search or link services;[21] however the extent to which new network intermediaries like video sharing websites (for instance, YouTube and Tudou), digital libraries and search engines, should be immune from copyright infringement under the Chinese copyright regime remains uncertain.[22]

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19 See generally, Suli Zhu, 'The Legal Protection of Parody and Limitation: from the The Bloodbath That Began with a Steamed Bun Case' (2006) 3 *Chinese Jurisprudence* 3 [trans of: *Zhong Guo Fa Xue*]; and Wang Qian, 'A Study on the Legal Rules of Parody as Fair Use' (2006) 1 *Science, Technology and Law* 18 [trans of: *Ke Ji Yu Fa Lv*].

20 Tudou.com is a leading video sharing website in China, which promises to share advertisement revenue with copyright owners instead of those who upload the video. It seems that sharing the revenue with copyright owners is wishful thinking on the part of Tudou.com because such a small income would not draw interest from the majority of copyright owners. As such Tudou is still blamed for infringing copyright.

21 See the *Regulations on the Protection of the Right of Communication via Information Network of PRC 2006*, arts 14-17.

22 For example, in 2005, 2006 and 2007 there have been several cases in China involving copyright infringement disputes between 'baidu.com', 'Yahoo! China' and record labels. The court in these cases has handed down completely different and even contradictory judgments. In November 2006, Baidu won a Chinese court case against seven record labels that accused Baidu of facilitating the illegal download of 137 songs owned by them. However, in September 2005, Baidu lost a similar case before a Chinese court. See the civil judgments of *Hai Min Chu Zi No 14665* (2005) made by the People's Court of Haidian District, Beijing on 16 September 2005,

Consequently doubts are raised by lawyers, industry and academia as to whether the current copyright regime is too 'old' to be accommodating this 'new' world. The copyright regime is a product of commercial culture,[23] which has, in the past centuries of the western commercial world, dominated how information and knowledge are produced, exchanged and consumed. In the context of commercial culture, creativity and innovation are based on the market and led by popular demand of the public. As a result of being encompassed by such a legal framework, creative works generated by creators are marketed as the products and property of media entrepreneurs.

The 'new' world is accessible through peer production, collaborative creativity and social networks which are spawned in the web-based media and interactive information environment. It is a new world, characterised by a non-commercial culture, and a non-market based and user-led innovation.

The research focus of this thesis is thus driven by the need for legislative solutions to the increasing tensions between the current legal framework and the potential of this 'new' world. This study is contextualised in the theoretical propositions identified as follows:

I. **Creative Destruction Raised by the Information and Communication Technologies (ICTs):** Schumpeter's theory on innovation argues that the

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and *Yi Zhong Min Chu Zi No 7978* (2005) made by the Beijing No 1 Intermediary People's Court on 17 November 2006. Ironically, Yahoo! China lost a similar case in 2007, see Xinhuanet, Yahoo! China loses music download court case, must pay damages (25 April 2007) <http://www.cctv.com/program/bizchina/20070425/101094.shtml> at 3 March 2008.

[23] As Professor Lessig said, 'By "commercial culture" I mean that part of our culture that is produced and sold, or produced to be sold. By "non-commercial culture" I am referring to the rest of our culture.' See Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), 7.

growth of economy is a process of creative destruction.[24] The ICTs, as Christensen points out, are disruptive technologies and the associated 'destruction power' has brought about profound social, cultural and economic implications.[25]

II. **Participatory Culture:** The rise of participatory culture as Jenkins described is illustrative of the renaissance of Read/Write culture that was advocated by Professor Lessig.[26]

III. **Everyday Creativity:** Empowered by participative web applications, everyday creativity is becoming increasingly prevalent which is the major driving force for user-led innovation.[27]

1.3 CONTEXT OF THE RESEARCH

1.3.1 CREATIVE DESTRUCTION RAISED BY ICTS

According to Schumpeter, economic development is an evolutionary process of creative destruction 'that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one'.[28] This process is characterised by the invention and application of novelties (innovation). Therefore, innovation represents the destruction of old practices, processes and production methods; it is an introduction of new elements and conditions or new combinations of existing ones to the 'economy system'.[29]

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[24] See generally, Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (first published 1942, 3rd ed, 1950), 81-86; Schumpeter, *The Theory of Economic Development: An Inquiry Into Profits, Capital, Credit, Interest and the Business Cycle* (1982).

[25] Clayton M Christensen, 'Disruptive Technologies: Catching the Wave', (January 1995) *Harvard Business Review*, 43. See also Clayton M Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997).

[26] See generally, Henry Jenkins et al, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (2007); Lessig, , above n 23, 26-47.

[27] See generally, Eric von Hippel, *Democratizing Innovation* (2005).

[28] Schumpeter, *Capitalism, Socialism and Democracy*, above n 24, 83.

[29] See further, Schumpeter, *The Theory of Economic Development: An Inquiry Into Profits, Capital, Credit, Interest and The Business Cycle*, above n 24.

The disruptive power of ICTs has significant implications far beyond technological advance. ICTs, as Christensen points out, are disruptive technologies that eventually overturn the existing dominant technology or products in the market.[30] At the same time, the relationship between technology and artistic creation has also profoundly been changed. Kim Cascone suggests that in the music production sector digital tools have become so ubiquitous that they are taken for granted by today's composers and producers; what is interesting is not the tools themselves but rather the new horizons of artistic possibility that they provide.[31]

A 2003 study suggests that ICTs extend far beyond productivity as is usually understood and measured, and the benefits have economic, social, political, and cultural components. The application of ICTs can transform how goods are produced and how services are delivered; even more significantly it can also:

> reframe and redirect the expenditure of human effort, generating unanticipated payoffs of exceptionally high value … [supporting] new inventive and creative practices in the arts, design, science, engineering, education, and business, and [enabling] entirely new types of creative production.[32]

The social structure of human beings has experienced a shift away from neighbourhood communities towards flexible partial communities based on

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30 See generally, Christensen, 'Disruptive Technologies: Catching the Wave', above n 25; Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*, above n 25.

31 See *Postdigital*, Wikipedia <http://en.wikipedia.org/wiki/Postdigital> at 17 August 2007; Kim Cascone, 'The Aesthetics of Failure: "Post-digital" Tendencies in Contemporary Computer Music' (Winter 2000) *Computer Music Journal* 12.

32 William J Mitchell, Alan S Inouye and Marjory S Blumenthal (ed), *Beyond Productivity: Information Technology, Innovation, and Creativity* (2003) 15..

networked households and individuals.[33] It is a networked societal structure, mobilised by demands for individual freedom and open communication, and empowered by the proliferation of participative web applications.[34] The networked individuals and households through associations brought about by, for example, the values, visions, ideas, friendship, kinship, dislikes, trade, web links, are acting as 'nodes' of various social networks.

Given the Web 2.0 structure of the Internet,[35] the decentralising nature of the social networks is of importance to knowledge growth, and the production and dissemination of knowledge-based works. As John Hartley contended, cultural production has evolved from a one-way causal chain into a complex open system in which 'individuals originate ideas; networks adopt them; and enterprises retain them'.[36] This new approach to cultural production is as follows: (i) agents (who may be individuals or firms) are characterised by choice, decision-making and learning (origination); (ii) social networks, both real and virtual adopt this choice; and (iii) market-based enterprise, organisations and coordinating institutions retain these choices.[37]

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[33] See generally, Barry Wellman et al, 'The Social Affordances of the Internet for Networked Individualism' (2003) 8(3) *Journal of Computer-Mediated Communication* <http://jcmc.indiana.edu/vol8/issue3/wellman.html> at 9 March 2009.

[34] See generally, Manuel Castells, *The Rise of the Network Society* (2000).

[35] Web 2.0, refers to a perceived second generation of web-based communities and hosted services — such as social-networking sites, wikis and folksonomies — which aim to facilitate collaboration and sharing between users. See Tim O'Reilly, *What Is Web 2.0：Design Patterns and Business Models for the Next Generation of Software* (2005) O'Reilly <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html> at 2 October 2007.

[36] John Hartley, 'The Evolution of the Creative Industries – Creative Clusters, Creative Citizens and Social Network Markets' (Paper presented at the Creative Industries Conference, Asia-Pacific Forum, Berlin, 19 September 2007) 21-2 <http://eprints.qut.edu.au/12647/1/12647.pdf> at 13 September 2009.

[37] Ibid.

Yochai Benkler calls it commons-based peer production[38] which raises a networked information economy.[39] In other words, it is a decentralising paradigm for the production of information.[40] Individuals and households are able to be more positively involved in the invention of novelties and in the production of knowledge-based works. For example, the proliferation of grassroots internet journalists (bloggers) has changed the way how news is produced, and citizen journalists who used to be *audiences* can now play an active role in news production.[41] Furthermore, being empowered by Web 2.0 technology[42] and strengthened network infrastructure, new internet intermediaries such as YouTube,[43] Revver,[44] Wikipedia,[45] Myspace[46] and JumpCut[47] have also produced a

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38 This term, coined by Yochai Benkler, is referring to a new model of economic production in which the creative energy of large numbers of people is coordinated (usually with the aid of the internet) into large, meaningful projects, mostly without traditional hierarchical organisation or financial compensation. He compares this to firm production (where a centralised decision process decides what has to be done and by whom) and market-based production (when tagging different prices to different jobs serves as an attractor to anyone interested in doing the job). See Yochai Benkler, 'Coase's Penguin, or, Linux and the Nature of the Firm' (2002) 112(3) *Yale Law Journal* 420.

39 It refers to system of production, distribution, and consumption of information goods characterised by decentralised individual action carried out through wildly distributed, non-market means that do not depend on market strategies. See Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, 35-132.

40 They underlie the shift from an information environment dominated by proprietary, market-oriented action, to a world in which non-proprietary, non-market transactional frameworks play a large role alongside market production. See ibid 18.

41 Dan Gillmor, *We the Media: Grassroots Journalism by the People for the People* (2004) O'Reilly <http://www.oreilly.com/catalog/wemedia/book/index.csp> at 23 September 2007.

42 Web 2.0, a phrase coined by O'Reilly Media in 2004, refers to a perceived or proposed second generation of Internet-based services — such as social networking sites, wikis, communication tools, and folksonomies — that emphasise online collaboration and sharing among users. Commentators see many recently-developed concepts and technologies as contributing to Web 2.0, including weblogs, linklogs, wikis, podcasts, RSS feeds and other forms of peer-to-peer publishing; social software, Web APIs, Web standards, online Web services, and many others. See *Web 2.0*, Wikipedia <http://en.wikipedia.org/wiki/Web_2.0> at 30 December 2006.

43 'YouTube' is a popular free video sharing website which allows users to upload, view, and share video clips.

44 'Revver' is a video sharing website that hosts user-generated content. Revver attaches advertising to user-submitted video clips and evenly shares all ad revenue with the creators.

fundamental change in the business model as to how information and knowledge are produced and exchanged, and how creative works can be used and exploited.

As a result, the creation of artistic and literary works is no longer considered a 'privilege' of the social and cultural elite, but a daily engagement for all networked individuals. The line between consumption and creation of cultural goods becomes less distinguishable with the proliferation of various pathways to consumption.[48] The 'situatedness' of the creators and users of works becomes a prominent characteristic of creativity.[49] Innovation has been democratised as Eric Von Hippel described,[50] to the extent that the users are 'picking up the creative ball and running with it, making their own version with remixes, mash-ups and derivative works.'[51]

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45 'Wikipedia' is a multilingual, web-based, free-content encyclopedia project. The name is a fusion of the words wiki and encyclopedia. Wikipedia is written collaboratively by volunteers, allowing most of its articles to be edited by almost anyone with access to the website.

46 'MySpace' is a social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos.

47 'Jumpcut' is a website that provides free video editing and hosting services. It was founded in 2005 and is currently (since October 2006) owned by Yahoo. The name is derived from the jump cut, a video artifact that results from the splicing together of two separate parts of the same shot, or similar sections from two different shots.

48 'Some consumption of cultural goods results from directed effort by the user, or from advertiser supported content directed at the user, but much other consumption does not follow either of these pathways. Some occurs fortuitously, as a result of following links created by physical or virtual juxtaposition. Still other consumption occurs as a result of the user's situatedness within a larger

network of family, friends, colleagues, teachers, students, and acquaintances, any of whom may share, recommend, or mention any number of things for any number of reasons'. See Julie E Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham Law Review* 347, 370.

49 'Situatedness does not refer to a "situation" in the prescriptive sense (that is, one that might give rise to a legal defense or an ethical obligation), but more minimally and descriptively to the fact that individuals and groups are located within particular cultural contexts.' See Julie E Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 *UC Davis Law Review* 1151, 1178.

50 'When I say that innovation is being democratised, I mean that users of products and services – both firms and individual consumers – are increasingly able to innovate for themselves.' See von Hippel, above n 27, 1.

51 Suw Charman and Michael Holloway, 'Copyright in a Collaborative Age' (2006) 9(2) *Media/Culture Journal* <http://journal.media-culture.org.au/0605/02-charmanholloway.php> at 28 December 2006.

The decentralised production of information and knowledge marks the renaissance of a 'non-commercial culture',[52] within which consumers and end-users rather than suppliers are leading the innovation.[53] As Eric von Hippel suggests, it is a user-led innovation,[54] facilitated particularly by the proliferation of the web-based media.

1.3.2 THE RISE OF THE PARTICIPATORY CULTURE

According to studies from the Pew Internet Project in the U.S., 44% of U.S. Internet users have contributed their thoughts and their files to the online world[55] and more than half of online teenagers have created content for the Internet.[56] A more recent study has found that 64% of online teenagers have participated in one or more among a wide range of content-creating activities on the Internet, up from 57% of online teenagers in a similar survey at the end of 2004.[57] In Australia, a 2008 report

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52 By 'commercial culture' I mean that part of our culture that is produced and sold, or produced to be sold. By 'non-commercial culture' I am referring to the rest of our culture. See Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 7.

53 There are two main sources of innovation, namely manufacturer innovation and end-user innovation. The former is a traditionally recognised source; and the latter is only now becoming widely recognised. See generally, Eric von Hippel, *The Sources of Innovation* (1988).

54 See von Hippel, above n 53, 11-27; see also generally, von Hippel, above n 27.

55 Amanda Lenhart et al, *Content Creations Online* (2004) Pew Internet and American Life Project <http://www.pewinternet.org/PPF/r/113/report_display.asp> at 20 September 2008.

56 Amanda Lenhart and Mary Madden, *Teen Content Creators and Consumers* (2005) Pew Internet and American Life Project <http://www.pewinternet.org/Reports/2005/Teen-Content-Creators-and-Consumers.aspx> at 20 September 2008.

57 Thirty-nine percent 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* (2007) Pew Internet and American Life Project

has found just under a quarter of Internet users (23.3%) posted toptics 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.[58] In the People's Republic of China, the China Internet Network Information Center's (CNNIC) *22nd Statistical Survey Report on the Internet Development in China* found that by the end of June 2008, the number of netizens[59] in China had reached 253 million, surpassing that in the U.S. to be the largest in the world.[60] The report also revealed that 'the ownership rate of blog/personal space and access rate of forum/BBS had ascended into the top ten Internet applications' (42.3% of netizens owned a blog or personal space; 38.8% visited online forums/BBS and 23.4% published posters).[61] Moreover, according to an earlier report, the number of network video users in China reached 160 million.[62]

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. Acting as both consumers and producers, these individuals are called 'prosumers'. In 1972, McLuhan and Nevitt suggested that with the advance of digital technology, the consumer would

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<http://www.pewinternet.org/Reports/2007/Teens-and-Social-Media.aspx> at 20 September 2008.

58 Scott Ewing et al, *CCi Digital Futures Report: The Internet in Australia* (2008) 39-41 <http://www.cci.edu.au/sites/default/files/pbrowne/AuDigitalFutures2008.pdf> at 20 September 2008.

59 Netizen is defined by CNNIC as any Chinese citizen aged 6 and above who have used the Internet in the past half a year. See CNNIC, *22nd Statistical Report on the Internet Development in China* (2008) <http://www.cnnic.cn/uploadfiles/pdf/2008/8/15/145744.pdf> at 20 September 2008.

60 Ibid 10-1.

61 Ibid 21-7.

62 CNNIC, *Research Report on the Network Video Market and Netizens' Video Consumption in China 2008* (2008) <http://www.cnnic.cn/html/Dir/2008/06/20/5198.htm> at 20 September 2008.

become a producer.[63] Eight years later, Toffler coined the term 'prosumer' and predicted the rise of the prosumer age. He pointed out that the role of producers and consumer would become blurred and even merged.[64]

Jenkins et al define 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).[65] 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'.[66]

From the perspective of technological development, the prevalence of the participatory culture is enabled by the popularity of a *participative web*. According to the 2007 Organization of Economic Cooperation and Development (OECD) report, participatory web refers to the Internet which has been powered by intelligent web services and new Internet-based software applications and, therefore, allows the active participation of users in creating, extending, rating, commenting on and distributing digital content and even customising and developing Internet applications.[67] What is the most prominent phenomenon generated by the

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63 Marshall McLuhan and Barrington Nevitt, *Take Today; the Executive as Dropout* (1972) 4.

64 Alvin Toffler, *The Third Wave* (1980) 265-88.

65 Jenkins et al, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century*, above n 26, 7-11.

66 Ibid 7.

67 OECD, *Information Technology Outlook 2006* (2006) 246; OECD, *Participatory Web and User-Created Content* (2007) 17-18.

participatory culture and participative web is the rise of 'user-created content' (UCC) or 'user-generated content' (UGC).[68]

What significantly differentiates it from the previous popular culture (mass media culture) is that participatory culture, by its very nature, is a 'Read/Write culture'.[69] The popular culture was shaped by the mass media that was specifically envisioned and designed to reach a very large audience. The products of the mass media such as books, newspapers, television, radio and broadcasting were pushed to a large number of readers and audiences. The popular culture, particularly in the pre-digital age, was characterised 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.[70]

The world of media from the 20th century was read-only because the mass media technology had primarily targeted passive recipients of culture, and more importantly because it was a permission culture. Such a culture was spawned in a society in which copyright monopoly over creative cultural works was so pervasive and copyright restrictions were enforced to the extent that most re-use of cultural elements and re-creation were subject to 'the permission of the powerful, or of creators from the past'.[71] On the contrary, the read/write culture is a culture in which

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68 For further discussion on the cultural, economic, social and legal implications of UCC/UGC, see OECD, *Participatory Web and User-Created Content*, above n 67.

69 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: Larry Lessig, *Ted Talk: How Creativity is Being Strangled by the Law* (2007) TED <http://www.ted.com/index.php/talks/larry_lessig_says_the_law_is_strangling_creativity.html> at 21 September 2008; Larry Lessig, *Final Free Cuture Talk at Stanford University* (2008) <http://blip.tv/file/get/Esfwork-LawrenceLessigJanuary31st2008StanfordUniversity175.mov> at 21 September 2008.

70 Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 37.

71 Ibid xiv.

creativity based on the past is allowed and even promoted. 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'.[72]

Likewise, the world of media in the 21st century is read/write because the technology today has become practically interactive and has made culture extremely modifiable and manipulable. The digital technologies and the emerging participative web applications have empowered users to modify, remix and manipulate the cultural objects they have received and then create their own versions. For instance, 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.[73]

In addition, the world of media in the 21st century is read/write because in practice the modification, remixing and manipulation are tolerated, permitted and even valued by copyright owners in many instances. For example, the creation of fan fictions has been tolerated in many cases; many copyright owners have utilised open access licences to grant users and downstream creators the right to reproduce and modify their copyright works.[74]

1.3.3 THE PREVALENCE OF EVERYDAY CREATIVITY

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[72] Lawrence Lessig, *The Read-Write Society* (2006) Wizards of OS4 <http://www.wizards-of-os.org/programm/live_stream.html> at 21 September 2008. You also can read a brief script of this talk at*: WSO4: Lawrence Lessig on Read/Write Culture* (2006) LWN.net <http://lwn.net/Articles/199877/> at 21 September 2008.

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

[74] 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.

Creativity plays a role in many of our everyday activities and in each of our lives, and 'it does so very frequently';[75] but, 'there is a debate about this, with some scholars focusing on eminent or unambiguous rather than everyday creativity'.[76] With the popularity of the participatory culture, today it suffices to say that 'creativity is a potential each of us shares and a talent each of us should employ, probably every day'.[77]

The subjects of the 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'.[78] These are 'the people who have had an impact on our lives, who have made a difference'.[79] 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?[80] Research has found that 'brain provides humans with a productive, proactive, and generative mind'.[81] And also it has confirmed the assumptions that the human brain supports different kinds of creativity and different human brains lead to different kinds of creativity.[82]

Departing from the 'Greek myth of the Muses' and 'ancient theory' that regard creativity as a gift of the gods[83] and the romantic notion that views creativity mysterious,[84] an unromantic notion on creativity has become prevalent, especially with the popular application of the Internet and associated technology. It has

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75 Mark A Runco, *Creativity: Theories and Themes* (2006) x.

76 Ibid.

77 Ibid.

78 Mark A Runco and Ruth Richards, *Eminent Creativity, Everyday Creativity, and Health* (1997) 3.

79 Ibid.

80 Runco, above n 75, 73.

81 Ibid 108.

82 Ibid.

83 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) 456-7.

84 Ibid 457-8.

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'.[85] 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'.[86] Ruth 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'.[87]

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) contribute'.[88] Richards continues:

> Fortunately, 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 fulfilment, 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.[89]

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85 Runco and Richards, above n 78, 97.

86 Ruth Richards, 'Everyday Creativity and the Arts' (2007) 63 (7) *World Futures: Journal of General Evolution* 500, 502.

87 Ruth Richards (ed), *Everyday Creativity and New Views of Human Nature: Psychological, Social, and Spiritual Perspectives* (2007) 26-7.

88 Richards, 'Everyday Creativity and the Arts', above n 86, 500–1.

89 Ibid 501.

With the democratisation of technologies for content creation and dissemination, concerns about the commons-based peer production and associated everyday creativity or so-called 'vernacular creativity'[90] have arisen from many fields such as cultural, social and economic studies.[91] The increasing 'availability and power of digital technologies, combined with the Internet, allow everyone to be a media participant, if not producer'.[92] Consequently, 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'.[93] As a result, creativity has become increasingly decentralised, democratised and more 'situated'.[94]

1.3.4 REVOLUTIONARY CHALLENGES TO COPYRIGHT LAW

> Today's copyright laws and traditions are dissonant with modern culture and technology, and the dissonance has become more and more apparent in the past few years.[95] … If we want to adapt copyright to our modern world – if we want to protect the good aspects of copyright – we need to do more than repeat slogans about fairness and protecting authors.[96]
>
> — John Ewing

We are now on the threshold of the post-digital age; as John Maeda points out: If we are to consider the book by Nicholas Negroponte *Being Digital* as an affirmation that

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90 See generally, 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.

91 See generally, von Hippel, above n 27; Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, above n 39; Burgess, above n 90.

92 Burgess, above n 90, 2.

93 Ibid 74.

94 See generally, Cohen, 'Creativity and Culture in Copyright Theory', above n 49.

95 John Ewing, 'Copyright and Authors' (2003) 8(10) *First Monday* <http://firstmonday.org/issues/issue8_10/ewing/index.html> at 9 August 2008.

96 Ibid.

the computer has arrived, then the 'post digital' generation refers to the growing few that have already been digital, and are now more interested in *Being Human*.[97]

Being human represents the increasing reality that *networked individuals* are becoming more actively and creatively involved in cultural innovation and communication. This is largely empowered by the emerging web applications and facilitated by the proliferation of the web-based media service providers (WSPs).[98] The rise of web-based industries together with the popularity of user-led innovation patterns is disruptive to the established copyright regime.

A. Open Network for Public Access to Knowledge

The current scheme is incapable of maintaining a balance between optimising public access to knowledge and compensating creativity and investment. The lack of sensible means to collect and allocate the accompanying commercial profits makes it difficult to harness the unprecedented potential and possibilities for knowledge dissemination enabled by the growing web-based media.

As the existing copyright-related industries are tenaciously resistant to the disruptive power of the web, the potential of web-base media for facilitating access to knowledge are unnecessarily restricted. Under the current legal framework, copyright owners are granted a *de facto* monopoly to control the access to knowledge. As a result, the overblown fear of excessive control of access to digital content, as Professor Merges suggests, is the primary driving force for many

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97 Mark Curtis gives thought-provoking insight on human relationships and the science of social networks, as well as the transforming of communication patterns among people in the networked and mobilised digital society. In his book *Distraction: Being Human in the Digital Age*, Mark Curtis 'steps back to look at our use of new technology and draws some uncomfortable and challenging conclusions about what society may need to do to get the best, not the worst, out of the digital era.' See generally, Mark Curtis, *Distraction: Being Human in the Digital Age* (2005).

98 See generally, Wellman et al, above n 33.

proposals for copyright reforms, including the introduction of compulsory licensing.[99]

On the other hand, the costs to deliver information products from the producers to the consumers or users have become increasingly insignificant. Indeed, the key rationale for copyright protection is not only to reward creativity, but more importantly to compensate for the investment in reproducing and distributing works to the consumers. The cost of the infrastructure for getting the works into the marketplace used to be extremely high, and significant investment was critical to maintain sufficient supply of information goods. However, the web infrastructure has not only revolutionised the paradigm for knowledge dissemination, but more significantly, brought about a dramatic decrease in the costs. The web-based service providers are new intermediaries which have increasingly replaced the mass media for accommodating the flow of information and knowledge.

The networked infrastructure for information dissemination has profound implications for the calibration of the benefit-sharing scheme of copyright. Should a levy be imposed on the use of the infrastructure or web applications and in return copyright works could be freely and publicly accessible? Should the meaning of commercial exploitation be redefined in accordance with the networked use of the copyright works? In the networked society, various forms of revenues might be directly or indirectly generated from the use of the works by different means; however the problem is how the revenues should be allocated and distributed.

B. Civic Engagement and Peer Production

[99] See further, Robert P Merges, 'Compulsory Licensing vs the Three "Golden Oldies": Property Rights, Contracts, and Markets' (2004) 508 *Policy Analysis* 1, 5-6, <http://www.cato.org/pubs/pas/pa508.pdf> at 21 September 2009.

With the popularity of the social computing environment, the instrumental dexterity is no longer a prerequisite for literary and artistic creations. Anyone with a computer or other digital devices is able to contribute to the development of culture; correspondingly, the whole picture is the rise of the civic engagement in cultural innovation.

The prevalence of everyday creativity and user-led innovation is not only challenging the traditional concept of originality[100] but also the entire scheme of copyright. The line between creator, user and consumer is becoming less visible. Subsequently, the distinction between 'works of mine' and 'works of yours' is blurred, whilst new cultural movements envision a third position, 'ours'.[101] What kind of re-/use should be allowed to create 'new' works without compensation? What kind of re-/use should be subject to the condition of the prescribed royalty or privately negotiated licence fees paid?

C. Competing Interests of Industries

The established scheme of copyright protection is unable to reconcile the competing interests between the existing copyright-related industries and the emerging new industries such as search engines, digital libraries, peer-to-peer (P2P) service providers, video sharing platform providers, etc.

In order to maintain the vested interests and economic significance, the copyright-related industries of music, movie, and publishing are struggling to fight against any web applications that might pose threats to their established business. For instance, the entertainment industries have launched full-fledged battles against online piracy and P2P file sharing,[102] and the ISPs are under growing pressure to

[100] See further, ch 5 below of this thesis, s 5.3.1.

[101] Charman and Holloway, above n 51.

[102] See further, ch 4 below of this thesis, s 4.2.

police the web and to prevent copyright infringing acts on the web.[103] Nevertheless, the emergent web-based industries continue investing in those applications to create their own business advantages; their economic significance of remains, growing increasingly.[104] The problem is that their businesses are principally reliant on facilitating the transmission and sharing of copyright works on the Internet, which is also their potential. Consequently, the conflicts are inevitably raised between the business orientations of these new intermediaries and the property rights of the established media industries. The pending litigation between Viacom and YouTube is illustrative of the competing interests of these two camps of industries.[105]

The compulsory licences, as Professor Lessig suggests, brought the music, radio and cable TV industries out of the copyright cold in the early 20th century, and critically contributed to their financial success.[106] Likewise, the arising web-based industries are requesting the same legislative treatment.[107] Unsurprisingly, the outstanding opponents are from the other camp.[108] Whether compulsory licensing is a feasible solution to the copyright cold suffered by the new intermediaries in the digital world? If not, what is the way forward then?

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[103] EDRI-gram, *IFPI Continues to Pressure Isps to Act as Internet Police* (2008) <http://www.edri.org/edrigram/number6.9/ifpi-isp-police> at 18 September 2009.

[104] Google's acquisition of YouTube for 1.65 billion US dollars in 2006 is the most remarkable example revealing the value of the arising new media industries. See Time, 'Google Acquires You Tube' (Press Release, 9 October 2006) <http://www.time.com/time/business/article/0,8599,1544289,00.html> at 18 September 2009.

[105] For further discussion on the litigation, see Damien O'Brien, 'Copyright Challenges for User Generated Intermediaries: Viacom v YouTube and Google', in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 219.

[106] See further, Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 55-8.

[107] Grant Gross, *P2P Companies Take Aim at the RIAA: New Group Accuses the Recording Industry of Blaming Consumers for its own Failures* (2003) PC World <http://www.pcworld.com/article/112677/p2p_companies_take_aim_at_the_riaa.html> at 31 August 2009.

[108] See further, ch 4 below of this thesis.

The revolutionary paradigm for knowledge dissemination and cultural innovation, as Lawrence Lessig contends, has made for new conditions that have been both inadequately and incorrectly addressed by law-makers; contemporary copyright protection has raised stifling and chilling effects on cultural production and creativity.[109]

Jessica Litman proposes to reconfigure copyright as an exclusive right of commercial exploitation rather than of reproduction. However, taking the reality of legislative process and the power of relevant stakeholders, she is not optimistic about such a proposal: 'it has seemed to me that consumers' widespread noncompliance (of current copyright law) offers a very real ray of hope'.[110] Harvard law professor William Fisher believes that digitisation and networking have reshaped copyright and generated the need for a new copyright regime which is more social oriented and is responsive to the new era.[111] He proposes three alternative legal and business models, and he believes the third one is the best.[112] This model seeks to introduce an alternative compensation system, and to transform the copyright regime into an effective administrative system. The most ideal situation, generated potentially under this system, is that users will be free to use, share, communicate, and modify copyright works; meanwhile creators will be compensated fairly.

In addition, a 2007 OECD report also articulates a number of important questions related to intellectual property rights and user-created content in the regulatory

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109 See generally, Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23.

110 Jessica Litman, *Digital Copyright* (2001) 171-2.

111 See generally, William W Fisher, '*Promises to Keep: Technology, Law, and the Future of Entertainment*' (2004).

112 The first model, presented in ch 4 of Fisher's book, takes as a starting point the fact that intellectual property rights should reflect traditional notions of property rights in tangible objects. See ibid 134-72. Under the second approach, exploitation of works should be made in such a way that government would play an essential role in distribution, regulation of fees, allotment of income amongst the various players in the chain, and so on. See ibid 173-98.

environment.[113] The general question is what are the effects of copyright law on non-professional and new sources of creativity and whether copyright law may need to be examined, in order to allow the coexistence of market and non-market creation and distribution of content and stimulate further innovation.[114]

This thesis will address two of these revolutionary challenges to copyright law with emphasis focused on: (i) the conflict between the authors' exclusive rights to disseminate the works and the potential of the digital age for public access to knowledge; (ii) the conflict between the authors' exclusive rights to control the re-use of works and the increasing civic engagement in cultural innovation.

1.4 OUTLINE OF THE THESIS

This thesis is comprised of eight chapters which fall within the scope of three key functional parts. Apart from the introduction (chatper 1) and the conclusion (chapter 8), the three parts are theoretical orientations (chapter 2), digital challenges identified (chapters 3, 4, 5), and proposals raised for law reform (chapters 6, 7).

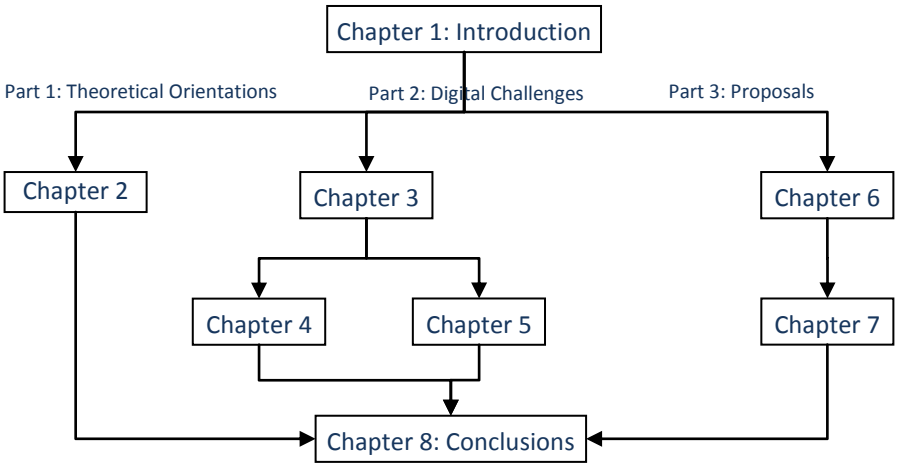

Figure: Thesis Structure

[113] See further, Sacha Wunsch-Vincent and Graham Vickery, *Participative Web: User-Created Content* (Organisation for Economic Co-operation and Development, 2007).

[114] Ibid 81.

Chapter 1 raises the research objectives and research questions of this thesis. Most importantly, this chapter outlines the background and the context of this research. The key contextual points identified in this chapter are the disruptive power of the ICTs, the rise of the participatory culture and the prevalence of everyday creativity.

Chapter 2 assesses the inadequacy of the economic analysis of authorship and copyright law and thus articulates an evolutionary perspective of copyright in the context of evolutionary economics. It is argued in this chapter that the free flow of information and the generation of variations and novelties are the key ingredients of the growth of knowledge and the evolution of economy. This chapter argues that the authorial process should be understood as a process of cooperation and collaboration between those who make contributions to knowledge growth and cultural innovation in various respects. It is therefore proposed that extensive dissemination of information and broader public access to knowledge should be promoted; moreover, the re-use of pre-existing works for producing derivatives should also be encouraged.

Chapter 3 maps out how the authors' economic rights are formulated under the main international conventions and how the international requirements are implemented under the domestic legislation of selected jurisdictions (U.S., U.K., Australia and China). It is found that the acts that are subject to the control of the authors' economic rights are overwhelmingly similar under the laws of different countries, although the differences in how the rights are delineated and categorised are apparent. Key digital challenges to the established regime of economic rights are examined in the next two chapters.

With emphasis focused on the possibilities of the Internet for disseminating information and the civic engagement in producing knowledge-based works, **chapters 4 and 5** respectively deal with the increasing conflict between the authors' right to disseminate works and the potential for public access to knowledge, and the conflict between the authors' right to control the making of derivative works and the

reality of creating and re-creating in a digital world. Thus, it is argued in chapter 4 that the acts of producing do not necessarily give rise to the right to control the dissemination of the works. Through 'decoupling' production and distribution, the public would have broader access to knowledge and at the same time creators could be fairly compensated. In chapter 5, it is concluded that the civic engagement in cultural activities has made the authors' right to control the use and re-use of expressive works less justified. In a digital world where creative works have become raw materials for creativity and communication, one should be free to base their creations on the pre-existing works in any manner they see fit. Depending on the specifications of their creative contributions, the creators of derivative works should be granted different levels of authorship.

Chapter 6 proposes that the 'author' should be reconceptualised as a relationally, socially constructed and historically contingent figure in order to recalibrate the authors' economic rights. It is hence argued that the romantic notion of authorship should be replaced by a relational notion of authorship. The relational theory of authorship acknowledges the culture as a contribution to creativity ('pre-first contribution'). It perceives a creative act as a successful effort to initiate a new cultural dialogue and starts a social communication with community members ('first contribution'). The relational notion of authorship also recognises the significance of the appropriation of the existing materials to produce new works (post-first contribution). It is further suggested that different levels of authorship should be granted to different kinds of contribution.

In **Chapter 7**, it is argued that copyright owners have certain obligations to make their contents and works accessible and available to the public at reasonable price and under fair condition. In the networked information society, the contents have become increasingly critical for citizens to engage in social and cultural activities. In addition, the works not only are of economic significance, but also support the growth of knowledge and the evolution of economy. In order to make the copyright

system updated with the technological, social and economic changes, a number of recommendations are made to harness the potential that this digital age has offered us.

Chapter 8 summarises the key findings, conclusions and recommendations of this thesis.

CHAPTER 2

Theoretical Framework

AN EVOLUTIONARY PERSPECTIVE OF COPYRIGHT

INTRODUCTION

AIM

The aim of this chapter is to articulate an analytical framework for this thesis contextualised in evolutionary economics. It highlights the importance of the free flow of information and knowledge, suggesting that copyright law should sponsor unrestricted dissemination of information and encourage the generation of novelties and variations.

SCOPE

The production of expressive works (writings, paintings, musical works, movies, etc.) is a creative process of fixing ideas and knowledge into a tangible medium of expression.[115] It is of significance not only for the preservation of civilization but also for the very growth of knowledge. For evolutionary economists, knowledge growth is the origin and locus of economic evolution. In the past decades, the link between wealth creation and the growth of knowledge has been a shared theme in

[115] The term 'fixation' here is in a sense as broad as the provisions of copyright law in many countries. For example, section 101 title 17 U.S. Code provides that a work 'is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration'.

plenty of writings of economists, evolutionary economists in particular.[116] From Marshall to Schumpeter and Hayek, extraordinary efforts have been made to explore the dynamics of economic progress, and its connection to innovation and economic adaptation to emergent novelties.[117] It is suggested by them that knowledge and information are critical economic resources in modern economy.[118] To this end, an Australian report (the *Venturous Australia Report*) affirms that information is central to the functioning of the economic system.[119]

Hayek believes that compared to governments, markets act more effectively to optimise the generation and handling of information; however other economists disagree with this assertion.[120] The best approach is likely to be produced by some appropriate hybrid of the two.[121] Modern copyright law (and other laws of

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116 See generally, Alfred Marshall, *Principles of Economics* (8th ed, 1920); Schumpeter, *Capitalism Socialism and Democracy*, above n 24; Schumpeter, *The Theory of Economic Development* (1934); Friedrich A Hayek, *Individualism and Economic Order*, above n 24.

117 '[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', Sano Shoin, Hitotsubashi University, Tokyo, 17-19th March 2007).

118 For further discourses on the importance of knowledge and information in the contemporary economy, see Daniel Bell, *The Coming of Post-Industrial Society: a Venture in Social Forecasting* (1976); Fred L Block, *Postindustrial Possibilities: A Critique of Economic Discourse* (1990); Ernest Mandel, *Late Capitalism* (1975); Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (1991).

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

120 Ibid 88.

121 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.

intellectual property), as a legal instrument (if not the only one) regulating the production and flow of knowledge and information,[122] is the key policy and legal tool to sustain such a hybrid.[123] However, the current copyright regime established three centuries ago is becoming increasingly out-dated. The rise of the participatory and read/write culture,[124] the social network market,[125] and the everyday creativity are significant reflections of the transformation of the dynamics of knowledge generation and information flow in this networked society. The role played by copyright law appears to be unclear more than ever. As a result, recent decades witness ongoing debates on whether intellectual property laws help or hurt a society in certain circumstances.[126]

This chapter evaluates principal propositions of neo-classical economics and highlights the inadequacy of the economic analysis of copyright law. It is suggested that the neo-classical economists hold an unrealistic image of the author as 'economic man' an 'autonomous individual'. They perceive the authorial process as a detached phenomenon, failing to take into sufficient account the dynamic role

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122 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.

123 For instance, the government may, on one hand, provide direct financial support for scientific research and artistic creation. On the other hand, it may also make it possible for creators to be compensated through markets and related creative and copyright industries. Moreover, it may also facilitate access to information and knowledge through making public database and information resources free and available to all people; and meanwhile it may also leave these resources to the markets.

124 Jenkins et al, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century*, above n 26; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008).

125 See generally, John Hartley, 'From the Consciousness Industry to Creative Industries: Consumer-Created Content, Social Network Markets and the Growth of Knowledge', in Alisa Perren and Jennifer Holt (eds), *The Media Industry Studies Book* (in press); Jason Potts et al, 'Social Network Markets: a New Definition of the Creative Industries' (2008) 32(3) *Journal of Cultural Economics* 167.

126 See generally, Michael A Gollin, *Driving Innovation: Intellectual Property Strategies for a Dynamic World* (2008) 36.

played by creative works in the trajectory of knowledge growth. Alternatively, this chapter recommends that copyright law and the construction of authors' rights can be contextualised in the insights of evolutionary economics. It is proposed that the authors should be regarded as *Homo sapiens Oeconomicus* rather than *Homo Oeconomicus* (Economic Man). They could be reconceptualised as relational beings situated in social dynamic relations. The romantic notion of authorship should be replaced by a relational one which is a descriptive system with emphasis focused on the relational contributors and their dynamic contributions.[127] To this end, it is argued that the primary purpose of copyright law should be established to structure and regulate the relationship of those who participate in the evolutionary and dynamic process of the trajectory of knowledge growth.[128]

2.1 NEO-CLASSICAL ECONOMICS: PROPOSITIONS AND LIMITATIONS

2.1.1 NEO-CLASSICAL ECONOMICS AND ITS APPLICATIONS

Economic analysis of intellectual property is a prominent example of the successful application of economics in social sciences. It can be traced back to many classical economists, such as Smith, Bentham, Mill and Plant. It has grown to be popular since the 1970s,[129] coming with the rise of Law and Economics as a discipline.

The Law and Economics as defined by Rowley is 'the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions'.[130] Economics, indeed, is a powerful analytical

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127 For further discussion, see ch 6 below of this thesis.

128 For further discussion, see ch 7 below of this thesis.

129 See further, William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (2003) 1-2. For historic development of economic analysis of copyright, see generally, Gillian K Hadfield, 'The Economics of Copyright: An Historical Perspective' (1992) 38 *Copyright Law Symposium*, 1.

130 Charles K Rowley, 'Public Choice and the Economic Analysis of the Law' in Nicholas Mercuro (ed), *Law and Economics* (1989) 123, 125-6.

tool to understand many issues of intellectual property but not without limitations and shortcomings; furthermore there is no single approach to the application of economics to the law. As observers have always advised, 'Law and Economics is not a homogeneous movement; it reflects several traditions, sometimes competing and sometimes complementary'. [131] Some of the limitations emanate from the imperfectness of the approach of economic analysis itself; others from the particular nature of information and knowledge as the subject matter of this analytical approach.

Economics firstly deals with the questions of how an individual behaves in certain situations and what brings about this behaviour. If answers and explanations are achieved successfully, 'the result can also be used to make (conditional) forecasts',[132] and such forecasts make policy advice possible.[133]

The explanatory efforts start with an assumption that individuals behave 'rationally' in the sense that they always 'act by making rational choices among the alternatives which are at their disposal' ('rational choice approach').[134] They always attempt to maximise their utility from monetary or non-monetary gains. However, no individual can be completely informed about everything and transactions will bear costs. Therefore, available alternatives will always be limited. Economists realise that full rationality does not exist and rationality would always be restricted in light of different 'decision situations' which are composed of two elements, namely preferences and restrictions.[135] Human behaviour as a rational action can be

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131 Nicholas Mercuro and Steven G Medema, *Economics and the Law: from Posner to Post-Modernism* (1997) ix.

132 Gebhard Kirchgassner, *Homo Oeconomicus: the Economic Model of Behaviour and its Applications in Economics and other Social Sciences* (2008) 6.

133 Ibid 7.

134 Ibid 1-2.

135 As Kirchgassner points out, '[m]odern microeconomic theory does not differ from the traditional one by deviating from the assumption of utility maximisation under restrictions, but by taking seriously the limited information as well as the restrictions'. See further, ibid 59-73.

'interpreted as a rational choice by the individual from available alternatives or – to speak in the language of economics – as 'utility maximisation under constraints with uncertainty'.[136] This view of economic man sees individuals respond to incentives, which has the following two implications. First, the behaviour of a rational individual 'can systematically be influenced by providing incentives'.[137] Second, 'if you know the structure of incentives facing an agent, then their behaviour will be predictable by reasoning through their self-interest.'[138]

The *Homo Oeconomicus* assumption describes the general model of individual behaviour which is a basis and starting point not only for economics but also for the application of economic analysis in social sciences (political science and law in particular). It is believed that human beings do not behave substantially differently when they are in similar decision situations.[139] In Western professional social thought, the idea of rational economic man 'works like a microcosm';[140] however, it 'comes out of economics'[141] and 'has to do with many other institutional settings and is much more comprehensive'.[142] The *Homo Oeconomicus* is a single person, 'a male person, sometimes a homunculus inside each of us, sometimes a giant incorporating the whole of society or the world'.[143] The economic analytical approach bases its explanation on the behaviour of the single (but not isolated) individual and this explanatory approach is called 'methodological individualism'.[144] In fact, the autonomous individual 'as the central point of philosophical and political reasoning' has been prevalent 'at least since the Enlightenment'.[145]

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136 Ibid 13.

137 See further ibid 16.

138 Kurt Dopfer and Jason Potts, *The General Theory of Economic Evolution* (2008) 29.

139 Ibid 2.

140 Mary Douglas and Steven Ney, *Missing Persons: a Critique of the Social Sciences* (1998) 22.

141 Ibid.

142 Ibid 23.

143 Ibid.

144 See further, Kirchgassner, above 132, 21-5.

145 Ibid 11.

Without exception, authors, as 'economic man' (*Homo Oeconomicus*), are also rational, self-interested, labour-averse individuals. They create expressive works (information products) such as writings, paintings, pictures, musical works and other artistic works in their pursuit of the highest possible well-being for themselves with the least possible cost. Other well-being such as reputation and artistic achievement might be their concern but obviously not the primary one. Indeed, the current copyright law has been established on the presumption that the author creates works and sells them in open markets (with the help of publishers) as an exchange for monetary gains which would cover his cost and furthermore support his life; and therefore, copyright law is to support and satisfy such needs for the author.

From the perspective of neo-classical economics, information is a commodity with its peculiar attributes. For instances, it is by its very nature inappropriable or non-excludable;[146] and the cost of creating the work ('cost of expression') is comparatively much higher than the cost of making actual copies.[147] Without the special legal protection and exclusivity afforded by copyright law, the authors cannot simply sell their creations in the open market and profit further from allowing others to make derivative works. To this end, it is argued that the author, while responding to the incentives provided by copyright law, would create more works and thus the continuing supply of intellectual and artistic works would be sustained.

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[146] For discussions on the inappropriability and non-excludability of information as commodity, see generally Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Richard R Nelson (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (1962) 609; Ejan Mackaay, 'Economic Incentives in Markets for Information and Innovation' (1990) 13(3) *Harvard Journal of Law and Public Policy* 867.

[147] As Posner and Landes pointed out, the cost of producing a book or other expressive works has two components: the cost of creating the work ('cost of expression') and the cost of producing the actual copies. See further, Landes and Posner, *The Economic Structure of Intellectual Property Law*, above n 129, 37-41.

The *Homo Oeconomicus* paradigm is 'an easy target for attack, with retaliatory complaints that he is drawn wrong'.[148] The attacks are originated on the basis of both logical arguments and empirical grounds. It is criticised that it is empirically inaccurate and unethical to perceive humans as unswervingly rational, completely selfish and amoral beings who have no family or friends and no emotion. *Homo Oeconomicus* is not a human at all. In reality, there are many situations in which people are altruistic and the gift economy does exist.[149]

Nevertheless, others tend to disagree with these critiques, arguing that *Homo Oeconomicus* and utility theory keep evolving from classical to neoclassical economics but criticisms are 'heaped upon the original one'.[150] It is argued that no economists really believe that humans exist as infinitely powerful calculating machines, but such rational capacities are sufficiently representative of attentive humankind.[151] It is also suggested that the methodological criticism of the foundations of neoclassical theory and in particular of the maximisation hypothesis are unsuccessful as the utility theory in fact can be twisted to fit any conditions[152] and thus self-interested economic man can also be altruistic by making the rational actor sensitive to the utility of others.[153] What is more, the original *Homo Oeconomicus* has been replaced by someone who is 'more human';[154] thus it even finds convergence with the sociological man (*Homo sociologicus*).[155]

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148 Douglas and Ney, above n 140, 23.

149 See generally, Marcel Mauss, *The Gift* (originally published in the *Annee Sociologique* as an article in French in 1923-1924; later republished in book form in English in 1954 and 1990); Maurice Godelier, *The Enigma of the Gift* (1999).

150 See further, Irene C L Ng and Lu-Ming Tseng, 'Learning to be Sociable: the Evolution of Homo Economicus' (2008) 67(2) *American Journal of Economics and Sociology* 265, 265-6.

151 For further discussion on both sides of arguments about rational actor models and utility theory, see John Laurent (ed), *Evolutionary Economics and Human Nature* (2003) ix-xii.

152 See further, Lawrence A Boland, 'On the Futility of Criticizing the Neoclassical Maximization Hypothesis' (1981) 71(5) *American Economic Review* 1031, 1031-6.

153 See generally, David Collard, *Altruism and Economy: a Study in Non-Selfish Economics* (1978).

154 See further, Steven D Levitt and John A List, 'Homo Economicus Evolves' (2008) 319(5865) *Science* 909, 909-10.

155 See further, Ng and Tseng, above n 150, 266.

The problem with the rational choice approach is not that it provides an overly narrow view of self-interested rational economic man. On the contrary, this theory is highly flexible and can potentially encompass all forms of behaviour. As Hodgson points out, '[t]he rational actor model is not weak because it is too narrow'; instead, '[i]t is weak because it is too broad and unspecific.'[156] Consequently, regardless how *Homo Oeconomicus* evolves, its limitations and shortcomings are particularly severe when it comes to the analysis of human creativity and associated production activities.

2.1.2 THE INADEQUACY OF ECONOMIC ANALYSIS OF COPYRIGHT

Conferring the copyright monopoly on the creators of expressive works (inventors of knowledge) lies in the rationale that the origination of knowledge and the ensuing efforts of encoding and fixing it into communicable information products would suffer inevitable costs. Unless they are compensated for such costs, the inventors and creators would be reluctant to produce more novelties and to create more works.[157] Landes and Posner assert that in the absence of legal protection for an invention, the inventor will try to keep the invention secret, thus reducing the stock of knowledge available to society as a whole.[158] In response to the market failure, copyright law is formulated to encourage the disclosure and dissemination of knowledge and

[156] See further, Laurent, above n 151, x-xi.

[157] See generally, Lloyd L Weinreb, 'Copyright for Functional Expression' (1998) 111(5) *Harvard Law Review* 1218.

[158] Landes and Posner, *The Economic Structure of Intellectual Property Law*, above n 129, 294. The assertion is made in the context of patent protection; however, such reasoning is also applicable to copyright protection.

information.[159] For the neo-classical economics, copyright is an institutional arrangement to overcome the public goods character of the creative works.[160]

Copyright, as Kenneth Arrow argued, makes information excludable and then becomes a commodity.[161] 'By establishing a marketable right to the use of one's expression,' the US Supreme Court stated in *Harper & Row Publishers, Inc v Nation Enterprise*,[162] 'copyright supplies the economic incentive to create and disseminate ideas.' 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'.[163]

However, the logic of these presumptions underpinning the current copyright system 'fails in the face of reality'.[164] Patterson and Lindberg have exemplified the reality with the fact that 'thousands of books consisting of public-domain works are published now without copyright protection', and furthermore 'both radio and television were born, prospered, and passed through their golden years without the

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159 For further literature review about the application of economic analysis in the area of copyright, see generally Ruth Towse et al, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5(1) *Review of Economic Research on Copyright Issues* 1.

160 Sam Ricketson, *The Law of Intellectual Property: Copyright, Design & Confidential Information* (2008) 1.50.

161 See generally, Arrow, 'Economic Welfare and the Allocation of Resources for Invention', above n 146.

162 471 US 539 (1985).

163 See further, Tyler T Ochoa, '*Brief Amici Curiae Of Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, The Organization Of American Historians, And H-Law: Humanities And Social Sciences Online In Support Of Petitioners'* (On Writ Of Certiorari To The United 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.

164 Patterson and Lindberg, *The Nature of Copyright: A Law of Users' Rights* (1991) 192.

benefit of copyright protection for live broadcasts'.[165] To what extent is the monopoly over the dissemination and use/re-use of creative works *desirable* and *affordable*? It is obvious that stronger and more pervasive copyright protection does not always produce stimulation to creativity;[166] neither would it always offer a wider availability of creative works.[167] The economic arguments, indeed, are hardly close to the very reality. The inadequency of the established copyright regime to accommodate the growth of knowledge is apparent in many aspects.

(a) Unrealistic Image of the Author as Economic Man and Isolated Being

In the neo-classical model, author as economic man (*Homo Oeconomicus*) is rational, self-interested, labour-averse individual. The *Homo Oeconomicus* is a single person; so is the author, detached from any social relations. In the rest of the world, what he can see are just rivals. In this view, there is no cooperative and collaborative attitude among them at all. The lack of cooperative and collaborative attitude of the romantic author has led copyright to an expanding regime of proprietary rights.[168]

The neo-classical economics contribute to a vision of the author which is just unrealistic. In no circumstances, could the author be simply regarded as an economic

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165 Ibid.

166 For example, Philip Pullman said that copyright does not necessarily incentivise creativity and creative people are going to be creative whether there are copyright laws or not. Pullman's speech was supported by witnesses in a hearing held by the House of Commons of Great Brian. See further, UK House of Commons Culture, Media and Sport Committee, *New Media and the Creative Industries: Fifth Report of Session 2006-07, Vol 2: Oral and Written Evidence* (2007) 34-6.

167 Evidence shows that old literary and musical works that are out of copyright are often more widely available than works of roughly the similar quality and age that are still copyrighted. See further, Michele Boldrin and David K Levine, *Against Intellectual Property* (2008) 102-5.

168 Generally speaking, the expansion of economic rights can be mapped out in three dimensions, that is, the subject matter covered by copyright, the term of protection and the type of activities that are subject to the copyright owner's authorisation. The arising important economic interests and the ideological change from viewing copyright as a publisher's right to viewing it as an author's right amounted to the occurrence of much of this expansion. See Stephen L Vaughn, *Encyclopedia of American Journalism* (2007) 120. Also, see generally, Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry* (2005).

man, pursuing monetary benefits. On the contrary, thes author is a relational being with the propensity to originate, adopt and retain novelties and most importantly with the needs for and capabilities of communicating. The creating of works is motivated by the desire of expressing and communicating their ideas to the world in which he or she is situated.

(b) Unrealistic Prescription of the Authorial Process as a Detached Phenomenon

Meaning-making in a given cultural environment is a process of cooperation and collaboration between the author, consumers/users and downstream authors, and others who might not be an author but also contribute many things such as values, public tastes, and artistic merits. Compared to the production activities in relation to physical goods, intellectual and artistic creations are more contextualised in a given social and cultural matrix, and are especially subject to the specific features of the human psyche and the human brain.

However, the dominant romantic notion on authorship underpinning the modern copyright regime believes that the author is an isolated genius with unique gifts given by God. This notion sees the readers and audiences, future consumers and users as copiers and predator of the author's creative efforts, and also sees the downstream authors as potential plagiarists and competitors. As Nelson suggests, in most of the model of inventive activity it is presumed that there are a large number of inventors in competition with one another; accordingly the actions chosen by rivalrous actors almost invariably will not be the social optimum.[169]

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[169] Richard R Nelson, *The Source of Economic Growth* (2000) 122. Moreover, invention in a broader sense is defined as the production of new idea and knowledge. Economists' analytical definition of 'invention' is much broader than the legal and institutional definitions employed by patent system. For instances, Arrow interpreted invention broadly as the production of knowledge. See generally Arrow, 'Economic Welfare and the Allocation of Resources for Invention', above n 146. Usher defined invention in terms of the emergence of new things which require an act of insight going beyond the normal exercise of technical or professional skill. See generally, Abbott Payson Usher, *A History of Mechanical Inventions* (Revised edition, 1988).

(c) Unrealistic Account of the Role Played by the Creative Works in the Trajectory of the Growth of Knowledge

The neo-classical approach merely treats creative works as information goods which are commercial products and commodities for exchange. In accordance to such a perception of the works, the legislative emphasis is attached to the exchange value of the information goods.

This scenario fails to take sufficient account of the importance of the role played by creative works in the trajectory of knowledge growth; the flow of information is thus not the focus of this perception. To make the dynamic process of knowledge growth possible, the invented novelty must be communicated among the economic agents and agencies. The creative works are the most dominant medium into which the novelty is fixed, and by which the knowledge can be disseminated and communicated. The works are playing a critical part in the trajectory of the growth of knowledge, enabling novel ideas to be diluted and actualised into a population of agents and agencies. By this means, potential variations can be generated and novel ideas can be originated, which will bring the growth of knowledge into the next level of the trajectory.

2.2 EVOLUTIONARY ECONOMICS: KNOWLEDGE GROWTH AND THE EVOLUTION OF ECONOMY

For evolutionary economists, the nature and causes of the wealth of nations 'lie not in social governance, nor in national or even private resources, but in the human mind's ability to originate, adopt and retain generic rules.'[170] The study of economic evolution begins with the question: what evolves? For many evolutionary economists, a general answer might be that what evolves is 'knowledge' or

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See also, Technical Change and Capital Formation, 'Technical Change and Capital Formation' in Universities-National Bureau, *Capital Formation and Economic Growth* (1955) 521.

[170] Dopfer and Potts, above n 138, 30.

'something very much like knowledge.'[171] However, this answer 'exposes a wide ontological and analytical flank' as it raises another ensuing question: what is knowledge?[172] Potts argues that in order to admit what is changing is indeed knowledge, we may need a conception of knowledge with a wider meaning. Therefore, 'knowledge', he writes, 'in the abstract, is a specific instance of association.'[173]

2.2.1 WHAT IS EVOLUTIONARY ECONOMICS?

In an article published in the inaugural volume of the *Journal of Evolutionary Economics* (JEE) in 1991, K E Boulding explained that evolutionary economics, in its widest sense, 'is simply an attempt to look at an economic system as a continuing process in space and time'.[174] H Hanusch claimed in the editorial introduction of this volume:

> Based on the deficiencies of such traditional economic concepts as neoclassicism, Keynesianism, monetarism, supply-side economics and neo-Keynesianism, an evolutionary perspective of economics suggests alternative, attractive and promising approaches.[175]

The evolutionary economists therefore take an approach different from the 'orthodox economic theory'.[176] This approach is 'characterized by dynamics and not by statics,

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[171] Esben Sloth Andersen, 'Knowledges, Specialisation and Economic Evolution: Modelling the Evolving Division of Human Time' in J Stanley Metcalfe and John Foster (eds), *Evolution and Economic Complexity* (2004) 108, 108.

[172] See further, Jason Potts, *The New Evolutionary Microeconomics: Complexity, Competence and Adaptive Behaviour* (2000) 56-60.

[173] Ibid.

[174] K E Boulding, 'What is Evolutionary Economics?' (1991) 1(1) *Journal of Evolutionary Economics* 9, 9.

[175] See further, H Hanusch, 'Editorial' (1991) 1(1) *Journal of Evolutionary Economics* 1.

[176] On further discussion on the term of 'orthodox' and 'evolutionary' economics, see Richard R Nelson and Sidney G Winter, *An Evolutionary Theory of Economic Change* (1982) 3-21.

by structures or structural changes and not by homomorphic economic entities, by disequilibrium instead of equilibrium processes'.[177]

Therefore, evolutionary economics is in sharp contrast to classical or neoclassical economic reasoning which begins with the presumption of scarcity of economic resources and rationality of economic agents.[178] The evolutionary thoughts of economics, inspired by evolutionary biology,[179] focus on the processes that transform the economy from within and their implications for many issues such as firms and institutions,[180] production,[181] competition,[182] science and technical advance,[183] and human nature.[184]

The classical and neoclassical economics are characterised as 'mechanical thinking' or 'mechanistic analysis' of human behaviour and of the economic system.[185] The specificities of human nature are ignored in this analytical manner. In contrast, evolutionary economics is 'not a mechanistic analysis of economic coordination and

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177 See further, Hanusch, above n 175, 2.

178 See generally Herbert Alexander Simon, *Models of Bounded Rationality: Empirically Grounded Economic Reason* (1997).

179 See generally Herbert A Simon, 'Darwinism, Altruism and Economics', in Kurt Dopfer (ed) *The Evolutionary Foundations of Economics* (2005) 89; Geoffrey M Hodgson, 'Decomposition and Growth: Biological Metaphors in Economics from the 1880s to the 1980s', in Kurt Dopfer (ed), *The Evolutionary Foundations of Economics* (2005) 105.

180 See for example, Nicolai Foss, 'Evolutionary Theories of the Firm: Reconstruction and Relations to Contractual Theories', in Kurt Dopfer (ed), *Evolutionary Economics: Program and Scope* (2001) 277. Ulrich Witt, 'The Evolutionary Perspective on Organizational Change and the Theory of the Firm' in Kurt Dopfer (ed), *The Evolutionary Foundations of Economics* (2005) 339. See also Richard R Nelson, 'Why Do Firms Differ, and How Does it Matter?' in Richard R Nelson (ed.) *The Source of Economic Growth* (2000) 100.

181 See generally Sidney G Winter, 'Towards an Evolutionary Theory of Production' in Kurt Dopfer (ed), *The Evolutionary Foundations of Economics* (2005) 223.

182 See for example, Nelson and Winter, above n 176, pt V (Schumpeterian Competition).

183 See for example, Nelson, *The Sources of Economic Growth*, above n 169, part III (Science and Technical Advance). See also Andersen, above n 171.

184 See Laurent, *Evolutionary Economics and Human Nature*, above n 151.

185 See further, Kurt Dopfer, 'Evolutionary Economics: a Theoretical Framework' in Kurt Dopfer (ed), *The Evolutionary Foundations of Economics* (2005) 7-12.

change';[186] evolutionary economists perceive 'human agency and its moral instincts of empathy and imagination are at the root of not just the wealth of nations, but also its continual regenerating and evolution'.[187] It is suggested, from the Darwinian and evolutionary perspective, that:

> [T]he study of human nature must be consistent with our understanding of human evolutions, as well as understanding the way in which human beings are moulded by cultural and institutional circumstances. … [A]n understanding of human nature and its evolution brings with it an appreciation that much of human evolution and individual activity centres on the acquisition and deployment of knowledge. [188]

2.2.2 DEFINING KNOWLEDGE, INFORMATION AND DATA

It is necessary to explore the differences between data, information and knowledge because the exploration of these differences would not only indicate our perception of the nature of knowledge, but also demonstrate the changing dynamic process of knowledge growth.

Since the middle of the 20th century, a number of economists, such as Hurwics, Arrow and Stiglitz, have developed an economic analysis of information.[189] As Stiglitz argues, in the field of economics, 'perhaps the most important break with the past – one that leaves open huge areas for future work – lies in the economics of

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186 Dopfer and Potts, above n 138, 1-2.

187 Ibid 1.

188 Laurent, *Evolutionary Economics and Human Nature*, above n 151, xii.

189 See generally, Joseph E Stiglitz, 'Information and Economic Analysis: A Perspective' (1985) 95 *The Economic Journal* (supplement: Conference Papers) 21; Leonid Hurwicz, 'On the Concept and Possibility of Informational Decentralization' (1969) 59(2) *The American Economic Review* (Papers and Proceedings of the 81st Annual Meeting of the American Economic Association) 513; Joseph E Stiglitz, 'The Contributions of the Economics of Information to Twentieth Century Economics' (2000) 115(4) *The Quarterly Journal of Economics* 1441; Kenneth J Arrow, *The Economics of Information* (1984).

information.'[190] The economics of information studies how information affects an economy and economic decisions, and defines the essential economic characteristics of information as an economic commodity.[191] However, the economics of information 'still has to reckon with the lack of any consensus as to what specifically it should cover.'[192] Moreover, it is argued that a unitary and all-purpose concept of information does not exist; instead, a taxonomy based on significant characteristics of information is suggested.[193] In order to pursue what characteristics will be taxonomically significant, Boisot et al initiated 'some necessary theorizing of information that takes as its focus the differences between data, information and knowledge.'[194]

Fransman criticizes that in many existing writings no necessity of distinguishing 'knowledge' from 'information' could be found as it seems that there is a 'tight coupling' between the two concepts.[195] It is noted further that there are two major problems with this tight coupling.[196] The first is that under some circumstances information and knowledge may become 'loosely coupled, or even uncoupled'. From the perspective of information economics, the economic agent is a rational information processor. However, under conditions of incomplete information, the agent may not only generate unambiguous knowledge but may also derive

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190 Stiglitz, 'The Contributions of the Economics of Information to Twentieth Century Economics', above n 189, 1441.

191 See generally, Kenneth J. Arrow,'The Economics of Information: An Exposition' (1996) 23 (2) *Empirica* 119 .

192 Max H Boisot et al, *Explorations in Information Space: Knowledge, Actors, and Firms* (2007) 16-17.

193 Ibid 16.

194 See generally ibid 15-47.

195 The tight coupling could be expressed as: information is a commodity that is capable of yielding knowledge; and knowledge is identified with information-produce (or sustained) belief. See further, Martin Fransman, 'Information, Knowledge, Vision and Theories of the Firm' in Giovanni Dosi et al (eds), *Technology, Organization, and Competitiveness: Perspectives on Industrial and Corporate Change* (1998) 149.

196 Ibid 150.

alternative, even contradictory, knowledge from the information set.[197] Furthermore, different agents may derive different even contradicting knowledge, from the same set of information.[198] The second problem is that while information is a closed set, knowledge is essentially open.[199] Knowledge is always in a process of becoming, and extends beyond itself. This process must be conceived as being open-ended.[200] Therefore, the perception that knowledge is little more than processed information is unrealistic.

The differences between data, information and knowledge are summarised by Boisot et al as 'information is an extraction from data that, by modifying the relevant probability distributions, has a capacity to perform useful work on an agent's knowledge base.'[201] To this end, data can be treated as originating in discernible differences in physical states of the world; information constitutes those regularities residing in the data that agents attempt to extract from it; knowledge is a set of expectations held by agents and modified by the arrival of information.[202] Consequentially, data, information and knowledge are viewed 'as distinct kinds of economic goods, each possessing a specific type of utility.'[203] Data can carry information about the physical world; information can modify an expectation or a state of knowledge; and knowledge allows an agent to act in adaptive ways in and upon the physical world.[204]

Evolutionary economists also see that knowledge and information are distinct concepts. But for them, knowledge and information 'stand in a process [of] relation

197 Ibid.

198 Ibid.

199 Ibid.

200 Ibid 151.

201 Boisot et al, above n 192, 20.

202 Ibid 19.

203 Ibid 20.

204 Ibid 20-1.

to each other'.[205] While examining the nature of the knowledge base of a micro unit from the evolutionary perspective, Dopfer and Potts suggest that 'information is first accessed or acquired, but when it is retained for ongoing use it becomes knowledge'.[206] For the purpose of communication, 'knowledge must be encoded as information and then decoded into knowledge by another agent, a process that naturally induces variation and differential replication.'[207] 'Knowledge and information are therefore two states of the same evolutionary process of micro units with a complex and variable knowledge base.'[208] In summary, 'knowledge is in the micros unit, information in the market (or meso) environment.'[209]

Based on different economic functions, knowledge exists in a variety of forms. For example, Mokyr sees that economically interesting ('useful') knowledge comes in two forms:

> One is the concept of technique or 'routine' pioneered by Richard Nelson and Sidney Winter. This prescriptive knowledge comes in algorithmic form – that is, a set of implicit or explicit instructions that, if followed, yields output. … The other is the underlying knowledge on which techniques are based – a catalogue of natural phenomena and the formulation of predictable and exploitable relations between them.[210]

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205 Dopfer and Potts, above n 138, 34.

206 They continue by saying: 'Not all information therefore becomes knowledge. There are two analytic levels of information and knowledge: generic and operational. … Generic information is information about a rule or the codified form of the rule. Generic knowledge is the rule as adopted and retained by the carrier for use. Generic knowledge is the core of the knowledge base of a micro unit, whether agent or agency, and is the result of a three-phase micro process. Operational information is information (i.e., signals or messages) about the economic environment, such as about resource conditions, prices, plans, etc. Operational knowledge is the use of that information in the application of generic rules.' See further, ibid 34.

207 Ibid.

208 Ibid.

209 Ibid.

210 Joel Mokyr, 'Is there a Theory of Economic History?' in Kurt Dopfer (ed), *The Evolutionary Foundations of Economics* (2005) 203-4.

To Dopfer and Potts, the knowledge base of the agent or agency is composed of two sorts of knowledge, namely *generic or 'rule' knowledge* determining what it can do, and *operational knowledge* determining how it does it. The economic agents have different knowledge because they receive different information and process it in different ways.[211]

2.2.3 THE INVENTION OF KNOWLEDGE IS ENDOGENOUS TO ECONOMIC EVOLUTION: SCHUMPETER'S THEORY REFINED

Schumpeter's theory is very pervasive in the works of evolutionary economists and he is acknowledged as the father of evolutionary economics although he himself 'might not have accepted being looked upon as an evolutionary theorist'.[212] Therefore, evolutionary economists claim 'the term "neo-Schumpeterian" would be as appropriate a designation for our entire approach as "evolutionary"'.[213] Nevertheless, in Schumpeter's writings, innovation and innovator are very distinct from invention and inventor. In economic development, the concept of innovation plays a more important and prominent role than the concept of invention. The underpinning of the Schumpeterian approach is the theory about entrepreneurship and its function which were conceptualised by Schumpeter as 'simply the doing of new things or the doing of things that are already being done in a new way (innovation)'.[214] Innovation 'is possible without anything we should identify as invention and invention does not necessarily induce innovation'.[215] Hence, innovation is not dependent on invention in any direct manner; and moreover the

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211 See further, Dopfer and Potts, above n 138, 34.

212 Lars Magnusson (ed), *Evolutionary and Neo-Schumpeterian Approach to Economics* (1994) 1.

213 Nelson and Winter, above n 176, 39.

214 Joseph A Schumpeter, 'The Creative Response in Economic History' (1947) 7(2) *The Journal of Economic History* 149, 151.

215 Joseph A Schumpeter, *Business Cycles: A Theoretical Historical and Statistical Analysis of the Capitalist Process* (1939) 84.

social process that generates innovation is '"economically and sociologically" different from the social process which produces invention'.[216]

However, it can be argued that invention can be regarded as a part of economic development and the inventor can find a place in Schumpeter's theory. Invention in a broader sense is defined as the production of new ideas and knowledge. It should be emphasised that the economists' analytical definition of 'invention' is much broader than the legal and institutional definitions employed by the patent systems.[217] Even for Schumpeter, invention is in some manner antecedent to innovation. Schumpeter wrote in 1947, '[t]he inventor produces ideas, the entrepreneur "gets things done", which may but need not embody anything that is scientifically new', and additionally, 'an idea or scientific principle is not, by itself, of any importance for economic practice'.[218] Clearly, a separation between invention and innovation can be seen in Schumpeter's writings. However, such separation unnecessarily leads to the exclusion of the analysis of invention and inventor from the Schumpeterian approach. In addition, Schumpeter's theory has been developed and refined significantly by neo-Schumpeterian or evolutionary economists.

In contrast to Schumpeter, evolutionary economics perceives that economic change and evolution can be explained by the invention of novelty (new idea and knowledge); and it further attributes wealth creation and economic development to the origination, adoption and retention of knowledge. In particular, evolutionary economists perceive economy as a process made of rules. A rule, defined as the idea that organises actions or resources into operations, is the element of knowledge in

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216 See generally, Vernon W Ruttan, 'Usher and Schumpeter on Invention, Innovation and Technological Change' (1959) 73(4) *The Quarterly Journal of Economics* 596, 597.

217 For instances, Arrow interpreted invention broadly as the production of knowledge. See further Arrow, 'Economic Welfare and the Allocation of Resources for Invention', above n 146, 609-25. Usher defined invention in terms of the emergence of new things which require an act of insight going beyond the normal exercise of technical or professional skill. See generally, Usher, above n 169; Technical Change and Capital Formation, above n 169..

218 Joseph A Schumpeter, 'The Creative Response in Economic History', above n 214, 152.

the knowledge-based economy and the locus of evolution in economic evolution.[219] As Dopfer and Potts write, 'all economic actions or resources are the product of rules, and so all economic value derives from rules and all economic wealth is composed of rules. Economic evolution is a change in generic rules, and therefore of both value and wealth. That is why it is both creative and destructive, as Schumpeter famously indicated.'[220]

These rules are generic in the sense that they are created by the human mind and evolutionary economists therefore emphasise that 'the locus of the wealth of nations is the human mind and its propensity to originate, adopt and retain new ideas.'[221] Accordingly, the growth of economy can be explained as the change of these rules, and furthermore as the growth of knowledge. Dopfer and Potts furthermore pointed out, '[e]conomies can grow because knowledge can grow, and knowledge can grow because agents can create, adopt and learn to do new things, and so can become generically different'.[222]

2.2.4 INVENTORS AND CARRIERS OF KNOWLEDGE: *HOMO SAPIENS OECONOMICUS*

In the world contemplated by the traditional economist, people are generalised as egotists or 'pleasure machines' who are pure altruists, pure ascetics, pure sensualists or mixed bundles of all theses impulses.[223] The power of this theory 'is that it entirely abstracts from *Homo sapiens* to focus on generalized rationality'.[224]

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219 Dopfer and Potts, above n 138, 6.

220 Ibid.

221 Ibid 13.

222 Ibid 44.

223 For further discussion on the nature of economic generalisations and the mythology of *Homo Oeconomicus*, see Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (2nd ed, 1945) 94-9.

224 Dopfer and Potts, above n 138, 34.

However, this approach is 'merely a convenient formal way of exhibiting certain permanent characteristics of man as he actually is'.[225]

The *Homo Oeconomicus* is 'independent of considerations of cognitive disposition, historical time or geographical space'[226] and most importantly he 'does not actually have a mind'.[227] By contrast, the defining axiom of evolutionary microeconomics in the growth of knowledge tradition 'is that the economic agent has a mind';[228] and in addition, '[a]gents have minds by definition because they construct, carry, adapt and use knowledge.'[229] Therefore, Potts proposed the concept of 'universal nomadism' which is 'a theory of evolutionary microeconomic behaviour in a complex knowledge environment.'[230]

Based on recent findings of the neuronal, cognitive and behavioural sciences, Dopfer proposes that *Homo sapiens Oeconomicus* emerges as an alternative to *Homo Oeconomicus*.[231] It is argued that *Homo sapiens* 'should be the empirical reference point for any discussion about the realism of the micro foundations of economics'.[232] *Homo sapiens* are in the first place an animal who uses and makes tools; more significantly, he can be 'viewed more generally as rule-making and rule-using animal'.[233] Thus, *Homo sapiens Oeconomicus* are 'a generic carrier of rules (ie, knowledge) and are capable of originating, adopting and retaining new knowledge, and so of becoming generically different.'[234] Evolutionary microeconomics 'begins

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225 Ibid 95.

226 Laurent, above n 151, ix.

227 Jason Potts, 'Toward an Evolutionary Theory of *Homo Oeconomicus:* the Concept of Universal Nomadism' in John Laurent (ed), *Evolutionary Economics and Human Nature* (2003) 195-9.

228 Ibid 195.

229 Ibid.

230 See further, ibid 195-216.

231 See generally, Kurt Dopfer, 'The Economic Agent as Rule Maker and Rule User: Homo sapiens Oeconomicus' (2004) 14(2) *Journal of Evolutionary Economics* 177.

232 Ibid 179.

233 Ibid 179-80.

234 Dopfer and Potts, above n 138, 31.

with the essential difference between man and other animals as being not the operational attribute of rationality, but rather in the propensity to originate, adopt and retain novel rules.'[235]

Knowledge, which is composed of rules, more frequently resides in groups or organisations rather than in individuals,[236] for instance, individual persons working for Boeing Company many not know how to build an aircraft but Boeing knows. But, knowledge in the first place is originated by individuals. As Dopfer and Potts point out, the origination and thus growth of knowledge is 'something that always begins in agents, not in an agency, although this may of course, and often does, happen to an agent working in an agency.'[237] For evolutionary economists, all rules and knowledge have carriers and meanwhile 'carriers can be distinguished between subject carriers (agents) and object carriers (agencies and artefacts)'.[238] Subject carriers are human beings with minds that function cognitively to govern social and technical behavior; the agencies, on the other hand, are object carriers who embody rule knowledge in organisational forms and patterns of social entities and organisations of material resources.[239]

The growth of knowledge is the origination of a novel idea (new knowledge and rule) in the human mind. If successfully replicated and adopted, it may generate economic development. In the following replication and selection process, the new knowledge is 'integrated into the extant rule system'.[240] In due course, the new knowledge is retained by a carrier or in the population of carriers for ongoing and continued use.[241]

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235 Ibid 30.

236 See further, Winter, above n 181, 237-41.

237 Dopfer and Potts, above n 138, 37.

238 Ibid 11.

239 See further, ibid 11, 27-36.

240 For further discussion on how the novelty is replicated, selected and thus adopted by existing knowledge system, see ibid 40-2, 48-50; see also Winter, above n 181, 242-9.

241 See further, Dopfer and Potts, above n 138, 43, 50.

It may be 'seen as the process of habituation and embedding of the new knowledge and rule into the agent's cognitive and behavioural rule complex or lifestyle'.[242]

2.3 COPYRIGHT CONTEXTUALISED IN EVOLUTIONARY ECONOMICS

2.3.1 KNOWLEDGE GROWTH AND THE IMPACTS OF COPYRIGHT

Knowledge as defined by evolutionary economists is composed of generic rules and ideas that organise actions or resources into operations.[243] The growth of knowledge (and thus the evolution of economy) can be perceived as a recurrent 'three-phase meso trajectory' which is a process of 'the origination of a rule as a discovery (invention), its adoption into a population of carriers as evolutionary dynamic, and its retention by that population as an (evolved) institution'.[244] A trajectory, as defined by evolutionary economists, is 'the process unit of change' and also 'a path from one state of order to another'.[245] The growth of knowledge is interpreted as a 'rule trajectory' that is 'the process of a novel rule becoming actualized into a carrier population'.[246] This meso trajectory is 'composed of a series of "micro trajectories" that represent the process by which the novel rule is originated, adopted and retained into each individual carrier comprising the population'.[247]

The value of the invention of novel ideas and knowledge can therefore only be achieved after the accomplishment of the process of adoption and retention. In other words, the significance of knowledge is not only about the invention itself; but more importantly about the use and reuse of the invented knowledge. Accordingly, the growth of knowledge can only originate from the adoption and retention of a novel

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242 Ibid 43.

243 Dopfer and Potts, above n 138, 6.

244 For further discussion about the meso analysis, see ibid 46-50.

245 Ibid 11-12.

246 Ibid 12.

247 Ibid.

idea into a population of individual carriers, instead of deriving from the invention of the idea alone.

The three-phase trajectory and the growth of knowledge comprise a series of 'micro trajectories' that involve tremendous amount of individual inventors and carriers who compose the general reading public.[248] In evolutionary economics, the generic micro analysis is the study of how generic rules are carried by economic agents (individuals) and agencies (organisations and firms), and the process by which a novel rule is originated, adopted and retained by such carriers.[249] It is 'a process of imagination, planning and experimental endeavour, for example, or of learning, habituation and other individual behaviours, including of course rationality'.[250]

The micro trajectory is a process by which a novel idea is originated and invented by an individual carrier, but adopted and retained by another carrier. It concerns the individual generic change in the knowledge base of the distributed carriers. Therefore, it is not the trajectory of knowledge growth because it is not a population process. The knowledge growth is a meso trajectory as a population process by which new ideas are originated and actualised into a carrier population. In other words, knowledge growth originates from the invention of novel ideas generated in individual human minds; however it eventually results from the use and reuse of the novelties by a population of people.

The development and recurrence of the trajectory of knowledge growth is supposed to be a free process until the intervention of the laws of intellectual property in the exploitation of the invented novelties or the expressive works in which the knowledge is embodied. In different circumstances, copyright law applies to the works and patent law to the novelties. The topic of patents is beyond the scope of

[248] Ibid.

[249] For further discussion on the generic micro analysis in evolutionary economics, see ibid 27-44.

[250] Ibid 27.

this thesis; therefore, this chapter only considers the impacts of the exclusive rights of copyright owners on the growth of knowledge.

To make the adoption and retention possible, the invented knowledge must be communicated among economic agents (carriers of rules and knowledge), and for the purpose of communication it must first of all be encoded as information by an agent and then decoded into knowledge by other agents.

In most cases, it is a process of *production*, *distribution* and then *interpretation* of the expressive works. Compared to the knowledge and information that fall into the territory of the laws of patent and trade secret, the knowledge that is encoded and fixed in a tangible medium of expression and thus subject to copyright law has larger potential of becoming actualised into a wider carrier population and being put into operation on social scales at large within a shorter period of time. This approach of actualisation through the medium of expression makes it an open-ended and distributed social process that the dissemination, selection, replication and employment of knowledge and information could, in theory, be potentially and freely carried on by any individual agent.

The creators of the works, as *Homo sapiens Oeconomicus*, are inventors of novel rules and knowledge. Just like other economic agents, they have the propensity to originate, adopt and retain knowledge, and have the needs and capability of extracting useful information and meanings from the world in which they are located, generating new ideas and understandings. On the other hand, they are different from other carriers and inventors of knowledge because they are communicating the novel knowledge to other agents in peculiar manners: writing, painting, and even performing. They are authors who fix knowledge into various types of medium of expression; in this way, they are producing expressive works.

In the micro analysis, origination is the only process in which the carriers appear as *authors* in a given micro trajectory. As evolutionary analysis of economics shows, the growth of knowledge in the very beginning is spawned in a generic micro trajectory. In the micro trajectory, an agent ('Agent A') invents and spreads new generic rules; other agents (users) adopt and retain the novelties. If the 'Agent A' can manage to fix their new ideas into a medium of expression, he or she would become as an *author*. Therefore, authorial creation could only be generated at the stage of knowledge origination in a given micro trajectory.

Nevertheless, in another micro trajectories, the 'Agent A' may merely function as the person who accepts and adopts novel ideas of others, and if possible puts the novelties into operation (retention). In this case, he or she is not only playing the role of author but also of readers or audiences. For example, a writer might be an author and be a reader too because he/she also reads writings of others. That is to say, an agent/carrier has multiple roles to play but in different micro trajectories which compose the entire meso trajectory of knowledge growth.

Accordingly, in the meso analysis of knowledge growth, origination is also the only phase in which the carriers could appear as authors in the meso trajectory of knowledge growth. In the stage of origination, the carriers as *Homo sapiens* are learning from experiences, keeping their knowledge base changing and evolving. In this process, novel ideas and knowledge are invented in their minds. Under desirable conditions, the carriers might be able to communicate the novelties to others by the means of expressive works.

Therefore, the authors as creative economic agents are relational beings situated in various phases of the trajectory of knowledge growth. In different historical and contextual situations, they are playing different but relational roles. The roles played by them are relational in the sense that the behaviours of creating are reliant on and thus relational with the behaviours of learning, selecting, adopting and replicating

new knowledge. Additionally, in a given micro or meso trajectory, the authors are also relational with others who are located in other trajectories.

Without the power conferred by the law, publishing their knowledge to the public is the only means by which inventors/authors can interfere or engage in the meso trajectory of knowledge growth. It is because, once novelties are disclosed to the public, the inventors/authors would no longer have the opportunity to control access to the novelties. In other words, without copyright, the disclosure of the invented knowledge is the only phase in which the meso trajectory is subject to the control of the inventors/authors. By the means of private control over free access to and free use/reuse of knowledge-based works, copyright law has imposed immediate constraints on each phase of the trajectory of knowledge growth (namely, the process of origination, adoption and retention of knowledge).

2.3.2 THE ORIGINAL PURPOSES OF COPYRIGHT

After re-examining the history of the *Statute of Anne* and its following cases and legal movements,[251] Deazley concluded that copyright law:

> was primarily defined and justified in the interests of society and not the individual … and … 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.[252]

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[251] 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 entered into force on 10 April 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* (1956) 105-6.

[252] Ronan Deazley, *On the Origin of the Right to Copy: Creating the Movement of Copyright Law in Eighteenth-Century Britain (1695 – 1775)* (2004) 226.

It has been reiterated for centuries in a number international conventions and domestic legislation of many jurisdictions that:

> [T]he primary object in conferring the rights associated with copyright lies in the general benefits derived by the public from the labors 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.[253]

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[253] John S McKeown, *Fox Canadian Law of Copyright and Industrial Design* (3rd ed, 2000) 3. For example, the contracting parties of the WIPO Copyright Treaty (WCT) explicitly declare to emphasize 'the outstanding significance of copyright protection as an incentive for literary and artistic creation'. 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.' See *Copyright Law of People's Republic of China (enacted in 1990 and revised in 2001)*. 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'. See *Copyright Act of South Korea (revised 2004)*. 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.' See *Copyright Law of Japan (revised 2006)* art 1. Article I s 8 of the US 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. See further, 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 the 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?*' (1998) <http://www.udel.edu/topics/techtak/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 how copyright law 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

In *Fox Film Corp v Doyal*,[254] Chief Justice Hughes stated: '[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 labours of authors.' In *US v Paramount Pictures, Inc*, the Court explicitly highlighted, '[the] copyright law, like the patent statutes, makes reward to the owner a secondary consideration.'[255] In *Feist Publications, Inc v Rural Telephone Service Co*, the U.S. Supreme Court stated that '[t]he primary objective of copyright is not to reward the labour of authors, but "to promote the Progress of Science and useful Arts"'.[256] The theme in the *Feist* case was reiterated by the Supreme Court three years later. 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'.[257]

Nonetheless, the scenario above, as Professor Vaver argued, has in reality been dissolved into mythology; it is full of paradoxes and myths.[258]

The progress of science and useful arts 'can be promoted in various ways, not solely through incentives for new creation'.[259] For example, authors of scholarly research and writing are usually employed by universities and institutions and they 'are

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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.

254 286 US 123 (1932).

255 334 US 131 (1948). This statement was repeated by the court years later in *Mazer v Stein*, 347 US 201 (1954).

256 499 US 340 (1991).

257 510 US 517 (1994).

258 See further, David Vaver, 'Intellectual Property Today: of Myths and Paradoxes' (1990) 69(1) *Canadian Bar Review* 98, 102.

259 Shira Perlmutter, 'Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts' (2002) 36 *Loyola of Los Angeles Law Review* 323, 324.

compensated by their salaries and rarely expect to receive significant royalties'.[260] In addition, 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 being available.[261]

The incentive maintained by the law is at many social costs, such as the cost of 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'.[262] 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'.[263]

To the very end, there is no available opinion of judges saying whose interest should prevail if rewarding the labour 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'.[264] The law tries to harmonise these

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260 Weinreb, 'Copyright for Functional Expression', above n 157, 1233.

261 See generally, Stephen Breyer, 'The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84(2) *Harvard Law Review* 281; Barry W Tyerman, '*The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*' (1971) 18(6) *University of California, Los Angeles, School of Law, Law Review* 1100, ;Stephen Breyer, 'Copyright: A Rejoinder' (1972) 20(1) *University of California, Los Angeles, School of Law Law Review* 75.

262 Tom W Bell, 'Prediction Markets for Promoting the Progress of Science and the Useful Arts' (2006) 14(1) *George Mason Law Review* 37, 42.

263 Cited in Dennis Dickinson, 'Copyright Dilemma: The Need for Local Policy' (1996) 16(4) *Library Issues* 1.

264 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', above n 261, 281.

conflicting interests,[265] carefully balancing the property rights that give authors and their publishers sufficient inducements to produce and disseminate original works.[266] At the same time, the law allows 'others to draw on these works in their own creative and educational endeavours'.[267] However, today it has been criticised 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. As Loren argued, '[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'.[268]

The court contended that creative work should be encouraged and rewarded, and it could be accomplished by means of securing 'a fair return for an author's creative labour', but how much return is 'fair' so that incentive would be sufficient? Would the copyright protection term of life plus 50 years be 'fair' enough? Obviously, US 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

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265 The conflict of interest can arise in many forms as summarised 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.

266 Paul Goldstein, *Copyright: Principles, Law and Practice (vol 1)* (1989) 4-9.

267 Ibid.

268 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* 838-9. 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* 786-7.

120 years after creation or 95 years after publication, whichever endpoint is earlier.[269] Likewise, the European Commission did not think so either. In July 2008, the Commission adopted a proposal to extend the term of protection for performers and sound recordings to 95 years.[270] It is difficult to see how these endless copyright terms 'promote the progress of science and useful arts'; however, it is 'not so difficult, especially for librarians, to see how they retard that progress'.[271]

2.3.3 THE UNDESIRABLE CONSEQUENCES OF COPYRIGHT

Copyright was meant to be an instrument for facilitating the flow and dissemination of information.[272] However, with the misplaced emphasis on the exchange value of the works, it raises many undesirable consequences which are increasingly problematic in networked information societies.

(a) Monopolised Distribution of Works is Becoming an Out-Dated Paradigm for the Dissemination of Knowledge

Since the birth of contemporary copyright regime, the law has accommodated and sustained a centralised paradigm of knowledge dissemination. Through granting copyright owners the exclusive rights to reproduce and distribute creative works, this system allows the distribution of knowledge-based works to be monopolised by one or a very limited number of agents without competition. However, since the advent of the Internet, this paradigm has become increasingly inefficient; it has continually been challenged by the rise of the networked information society with the peer to

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269 US Code Title 17 § 302; See also *Sonny Bono Copyright Term Extension Act* (1997) The Library of Congress <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:s.00505:> at 25 September 2008.

270 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* (2008) EUR-Lex <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT> at 25 September 2008.

271 John N Berry, 'The Real Purpose of Copyright' (7/1/2000) *Library Journal* <http://www.libraryjournal.com/article/CA158872.html> at 25 September 2008.

272 Atkinson and Fitzgerald, above n 122.

peer paradigm of knowledge dissemination. Accordingly, the established copyright system has become increasingly out-dated.[273]

(b) Restricted Re-/Creation is Gradually Challenged by the Democratisation of Creativity Empowered by the Application of Digital Devices for Creation

Under the established law, the re-/creation and re-/use of cultural elements are usually subject to 'the permission of the powerful, or of creators from the past'.[274] However, from a social perspective, as Boldrin and Levine suggest, 'it may well be better to improve existing works rather than to create redundant similar works'.[275]

In the cumulative systems of cultural and knowledge growth, other incoming creators often are more active or creative than the pioneer author of an existing work.[276] The exclusive nature of copyright merely allows a 'read-only' culture;[277] however, today people can 'write' their own version of culture. The advance of technologies and information infrastructure has enabled users to participate in cultural activities and play with/in creativity. They can contribute their own knowledge and thus create their own versions of culture. As Dick Hebdige argues, it is process of 'versioning'. It is a democratic principle because it implies that no one has the final say and thus everybody has a chance to make a contribution.[278]

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273 For further discussion, see ch 4 below of this thesis.

274 Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 37.

275 Boldrin and Levine, above n 167, 97.

276 This follows Nelson's observations and suggestions about how patents ought to be defined in cumulative systems technologies. See further, Nelson, *The Source of Economic Growth*, above n 169, ch 5 (On Limiting or Encouraging Rivalry in Technical Progress: the Effect of Patent-Scope Decisions) 142.

277 Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 37. See also Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, above n 124.

278 Hebdige, above n 73, xv.

The growth of public literacy and civic engagement in cultural production has also challenged established restrictions on re-/creation and re-/use of works.[279] While the law makers were constructing the modern copyright regime, what was dominantly concerned was the growing reading public. However, the public today are different because people are not just reading nowadays. They are listening to and watching (multimedia) works, and most prevalently they are playing with/in them. The traditional definition of literacy is considered to be the ability to read and write. In contrast, public literacy today has gained many facets and various dimensions in this networked information society. It extends to the ability to utilise digital technologies and multimedia to receive and interpret meanings, to express one's mind and communicate with others, and to participate in various local or virtual communities. Accordingly, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has defined 'literacy' as 'the ability to identify, understand, interpret, create, communicate, compute and use printed and written materials associated with varying contexts.' 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.'[280]

To this end, while confronting the new paradigm of knowledge growth, the 'orthodox' economics and its 'incentive-response' presumption are unable to afford adequate justification. Should rivalry in production, reproduction and distribution of creative works be limited or encouraged? The insights from evolutionary economics offer us a different perspective to explore answers which are of great normative value.[281] Knowledge growth is predominantly of cumulative and relational nature, comprising a rich mixture of variables.

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[279] For further discussion, see ch 5 below of this thesis.

[280] See the United Nations Educational, Scientific and Cultural Organisation (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.

[281] It is noted that a similar approach was taken by Richard R Nelson to examine the effect of patent-scope decisions. In cumulative systems technology cases considered by Nelson, 'broad,

2.4 TOWARDS A RELATIONAL REGIME OF COPYRIGHT

The theoretical focus of neoclassical economics, as Dopfer pointed out, is static: 'it deals with the allocation of scarce resources in an equilibrium framework.'[282] In the neoclassical model, 'endogenous variables are always rapidly changing variables.'[283] However, the growth of knowledge and the development of culture is a cumulative process based on a vast variety of distributed creative and intellectual activities of many individuals and organisations.

In contrast to classical and neoclassical economics, evolutionary economics claims to deal 'essentially with slowly changing variables';[284] and the evolutionary economists are 'concerned mainly with change, not with the principles of resource allocation in a hypothetical static world'.[285] This approach is 'characterized by dynamics and not by statics, by structures or structural changes and not by homomorphic economic entities, by disequilibrium instead of equilibrium processes'.[286] Evolutionary economics therefore is a much more realistic approach to understand why people are creative, how the human mind originates novel ideas and what the nature of knowledge growth really is.

2.4.1 INVENTORS AND AUTHORS: AN EVOLUTIONARY APPROACH

Individuals, in neo-classical economics, are '*Homo Oeconomicus*' or 'economic man' who always maximise their utility from monetary or non-monetary gains and

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prospect-claiming, pioneer patents, when their holder tried to uphold them, caused nothing but trouble'. See further, Nelson, *The Source of Economic Growth*, above n 169, ch 5 (On Limiting or Encouraging Rivalry in Technical Progress: the Effect of Patent-Scope Decisions).

282 Dopfer, 'The Economic Agent as Rule Maker and Rule User: Homo Sapiens Oeconomicus', above n 231, 179.

283 Ibid.

284 Ibid.

285 Winter, above n 181, 223-4.

286 See further, Hanusch, above n 175, 2.

therefore always respond to incentives.[287] The authors, without any exception, are also *Homo Oeconomicus* and they therefore create expressive works as a result of being stimulated by incentives afforded by copyright. These propositions and assumptions, however, might be a grave misunderstanding of why people are creative and how the knowledge grows.

The inventors, in evolutionary economics, are the producers of new ideas and knowledge. The authors are the producers of intellectual or artistic works in which the ideas and knowledge are expressed. Therefore, the concept of inventor is distinct from the concept of author; but, there are correlations. Not all inventors are authors; all authors, however, are inventors.[288] Everyone may have some novel ideas and learn something new; but not everyone can record them in material forms. There are many cases that inventors just keep their new ideas or present them in oral forms instead of fixing them into a tangible medium of expression and making them available to the public.

The proposition that all authors are inventors demands closer scrutiny in light of the very nature of the creative process of authorship. Human beings as *Homo sapiens* have the capacity of extracting useful information and meanings from the world in which they are situated. People have memory and they therefore can learn from experience, accumulating and storing knowledge in their mind.[289] The process of

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[287] See generally, Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1(2) *Economica* 167,; William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *The Journal of Legal Studies* 325; Landes and Posner, *The Economic Structure of Intellectual Property Law*, above 129.

[288] In the case of compilation of data, facts and works of extremely low originality, the creators can also be acknowledged as inventors because even the mere acts of compilation (selection and arrangement of data and facts) require minimum application of the human mind.

[289] Individuals and the organisations of individuals (firms) are perceived as living systems from evolutionary perspectives. Therefore, they 'can learn from experience, accumulating, and storing data over time in the form of knowledge that is either embodied in behaviors and physical skills or in representations – in both cases, a by-product of activity.' See further, Max H. Boisot, Ian C. MacMillan and Kyeong Seok Han, 'Codification, Abstraction, and Firm Differences: A

accepting information from the outside world is a process of having their knowledge base being modified and thus new knowledge being generated by their minds.[290] On the other hand, human beings also have the ability (and the needs) to convert their knowledge to messages, signals and symbols which are communicable to others. The human, as a social being, 'has one prime need – to communicate'.[291] 'Because', as Douglas and Ney explain further, 'it is a social being, everything in its genetic inheritance, especially its intelligence, must be equipped to read the signals and to signal back to the others of its kind'.[292] However, there is 'nothing in the description of *Homo Oeconomicus* that indicates these basic capacities and needs'.[293]

Whereas from the evolutionary perspective the author as *Homo sapiens Oeconomicus* is not an isolated rational being in pursuit of maximisation of their own utility; instead, they are always situated in firms, organisations, households, networks and other socially organised systems of agents which are called agencies by evolutionary economists.[294] They are born with the propensity to originate, adopt and retain knowledge and with the needs and capacities of communicating with other agents and agencies in the form of words, signals and symbols. They are living within an evolving knowledge ecology the evolution of which is the development of the economic system. Hence, authorial creation is a by-product of their social and economic activities which are relational with others as well as the cultural and institutional settings in which the author is located. The motivation behind human's production activities in most cases is the pursuit of material consumptive products or

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Cognitive Information-based Perspective' (ch 3) in Max H Boisot and Ian C MacMillan (eds.), *Explorations in Information Space Knowledge, Actors, and Firms* (2007) 77 , 81-2.

290 For further discussion on how the agent's knowledge base interacts with the world, see Boisot et al, above n 192, 77. See also, Fransman, above n 195, 147.

291 Douglas and Ney, above n 140, 46.

292 Ibid.

293 Ibid.

294 The micro unit of evolutionary economics is composed of both agent *Homo sapiens Oeconomicus* and the agency. The micro units are carriers of generic rules. See further, Dopfer and Potts, above n 138, 28-36.

profits from exchanging such products. However, the authors' commitments to the fixation of knowledge and thus production of expressive works are in many cases motivated by different pursuits. Instead of self-consumption or exchange for profits, the production of expressive works is primarily driven by the authors' needs of communication and their propensity to origination, adoption and retention of novelty rather than the potential of economic returns.

This has become particularly true with the prevalence of the Internet and associated information technologies. Writing and painting used to be the intellectual and creative activities that could only be done by a very small number of people in a given society; however, today, with the growth of public literacy and the democratisation of media technologies, intellectual and artistic creations become something that can be done by anyone. The rise of participatory and Read/Write culture in recent years is a great example. Meanwhile, the individuals' everyday creativity come to play a more and more prominent role in the production and dissemination of expressive works; writing and creating accordingly become something that can be done by anyone, especially with the application of digital tools. As a result, the inventors are able to fix their inventions into tangible mediums and thus become into authors in more cases.

2.4.2 TOWARDS A RELATIONAL NOTION OF AUTHORSHIP

The authors, as *Homo sapiens Oeconomicus,* are creative economic agents with the propensity to originate, adopt and retain novel rules (ie, knowledge). The origination of new ideas and knowledge is not out of air but as result of dynamic inter-actions between individuals and the internal and external environment (existing rules/knowledge).[295] The generation of novelty and knowledge growth is by its very nature relational with the extant knowledge. Likewise, the authors and their creative activities are also relational with pre-existing cultural environment; and the

[295] Ibid 37-40.

expressive works are the products of the authors' efforts of interpretation of information that is extracted from the given world.

Accordingly, the romantic notions, projected by William Wordsworth, that see the authorial persona as 'the secular prophet with privileged access to experience of the numinous and a unique ability to translate that experience for the masses of less gifted consumers' are far from being realistic. Indeed, since Roland Barthes claimed the death of the author,[296] many recent writings have committed to the articulation of an alternative conception of authorship.[297] To this end, this thesis proposes a relational theory of authorship which perceives authorial creation as a dynamic process of open-ended and communication-oriented discourse and interpretation.[298]

2.4.3 RECONSIDERING MONOPOLY IN COPYRIGHT: PRODUCTION IS A PROCESS OF COOPERATION AND COLLABORATION

The lack of cooperative and collaborative attitude of the romantic author has led copyright to a monopoly regime of property rights. After the passage of the first modern copyright statute, the *Statute of Anne*, three centuries ago, [299] this regime of proprietors has kept expanding with the endorsement and facilitation of the rise of possessive individualism since the 17th century.[300]

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296 See generally, Roland Barthes, 'The Death of the Author' in Stephen Heath (ed), *Image, Music, Text* (1968) .

297 For further discussion, see Sampsung Xiaoxiang Shi and Brian Fitzgerald, 'A Relational Theory of Authorship' in Mark Perry and Brian Fitzgerald (eds), *Knowledge Policy for the 21st Century* (2008).

298 See further, ch 6 below of this thesis.

299 It carried the full 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'. See the full text here: *The Statute of Anne 1710* (1710) The History of Copyright <http://www.copyrighthistory.com/anne.html> at 7 May 2008; see also Ransom, above n 251.

300 For further discussion on the rhetoric of possessive individualism, see Crawford B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962); See also Joseph H Carens, *Democracy and Possessive Individualism: The Intellectual Legacy of C.B. Macpherson* (1993) .

Meaning-making in a given cultural environment is a process of cooperation and collaboration between the author, the future consumers and users and downstream authors, as well as upstream authors and others who might not be an author but also contribute many things such as values, public tastes, artistic merits and other information in this process. The dominant romantic notion on authorship underpins the modern copyright regime which believes the author is an isolated genius with unique gifts given by God. This notion sees the readers, audiences, consumers and users as copiers and appropriators of the authors' creative efforts, and also sees the downstream authors as potential plagiarists and competitors. In this view, there is no cooperative and collaborative attitude among them.

The relational theory sees the process of authorial creation and meaning-making as a process of cooperation and collaboration between those who make contributions in different forms.[301] The author is first and foremost a relational generic information processor and knowledge originator. As a *Homo sapiens*, the author is a social being with the needs and capacity of communication, as well as the propensity of learning and creating.

In summary, the authorial process is a cooperative and collaborative process of receiving/extracting information from the world, selecting the useful ones and dismissing the useless ones, and thus creating new knowledge and fixing them into a variety of forms of information products. The expressive works are, by their very nature, relational. The reading of the texts is subject to the respective circumstances and situated expectations of readers and audiences. As Boisot and MacMillan pointed out, data and the regularities residing within the data are properties of events and things 'out there' in the world; information, by contrast, is relational.[302]

[301] See further, Shi and Fitzgerald, above n 297.

[302] See further, Boisot et al, above n 192, 26-8.

2.4.4 ARTICULATING A RELATIONAL APPROACH TO COPYRIGHT

The relational approach to copyright taken by this thesis is to situate the construction and implementation of the economic rights of copyright in the social relations and interactions between the creative contributors. Authors, through the application of their labour and creativity, are bringing something – works – into the world. But the production of works is not an isolated and detached phenomenon carried on by the 'autonomous individual';[303] instead, it is a relational activity contextualised in the dynamics of social interactions between the culture, the authors, the future authors, the users and the public. Hence, copyright law should aim to promote the exchange of information and the communication of novel ideas.

In order to reconcile the competing interests derived from the flow and the growth, copyright systems comprise a deliberate 'benefit-sharing' structure, allocating the benefits generated from the delivery of the knowledge-based works and associated services. The principal rule of 'benefit-sharing' is that authors are entitled to share the benefits generated from the commercial exploitation of their works. If authors can be compensated 'fairly', copyrighted works should be freely available to the users and the public.

The compensation generated through a market mechanism enabled by the exclusive rights conferred on authors is usually accepted as 'fair' and copyright law should support the functioning of this mechanism. However, in case the market mechanism fails to produce a practicable solution for the use of copyrighted works, copyright law should provide various prescribed benefit-sharing schemes as 'incentives' for the parities concerned to seek privately negotiated solutions. Under reasonable conditions, copyright owners, as content holders, have certain obligation to make their content available to the public.

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[303] The autonomous individual has been treated as the central point of philosophical and political reasoning at least since the enlightenment. See further, Kirchgassner, above n 132, 21-5.

2.5 SUMMARY

Since the British *Statue of Anne 1710*, the intention of encouraging learning and thus enhancing the growth of knowledge has found its place in the law of copyright.[304] The subsequent development of domestic legislation and case law expressly declared that the primary purpose of copyright law was to stimulate creativity by rewarding creation for the general public good. However, this is not easy. As argued in this chapter, the stated purpose and associated theory are full of paradoxes. In addition, the effects of the approaches adopted by the law to achieve the stated aim may vary in accordance with the changing of the age.

The dominant theory and legislation of copyright, with the emphasis focused on the mere exchange value of the works as information products, is not enough to accommodate the emerging challenges brought about by the rise of the networked information societies. This scenario fails to take into adequate account of the value of the access to knowledge and the role played by the works in the trajectory of knowledge growth.

Based on a relational notion of authorship, this chapter proposes that copyright monopoly over the dissemination and utilisation of the knowledge-based works should be reconsidered. The connectivity and interactions between individual economic agents are decisive to the functioning of the innovation systems. Without effective commutation of knowledge and free flow of information, the dynamics of growth and innovation would be substantially restricted.

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[304] For discussion on the birth of modern copyright law and its intension, see generally Ransom, above n 251; Benjamin Kaplan, *An Unhurried View of Copyright* (1967) ; Mark Rose, *Authors and Owners: The Invention of Copyright* (1993); Deazley, *On the Origin of the Right to Copy*, above n 252.

CHAPTER 3

ECONOMIC RIGHTS AND LIMITATIONS UNDER INTERNATIONAL AND NATIONAL LAW

INTRODUCTION

AIM

This chapter aims to highlight how exclusive rights of copyright are formulated and structured under international conventions and domestic legislation of the U.S., U.K., Australia and China, paving the way to detailed analysis of the current regime in the following two chapters.

SCOPE

Exclusive Rights: Under copyright law, the rights conferred on authors are generally classified as 'moral' and 'economic'; the latter set of rights is dealt with in this thesis.[305] Economic rights are enjoyed by authors as the rights to do and to authorise others to do certain acts in relation to their creations. Economic rights therefore are 'in general exclusive in nature, that is, the owner of the right may authorise or prohibit the doing of a particular act'.[306] In other words, the copyright owners' rights are not merely negative rights to prevent third party exploitation, but also the

[305] Author's rights under the scrutiny of this thesis are the rights with exclusivity or the exclusive rights because these rights are primarily related to the dissemination and generation of knowledge. Therefore, moral rights are not covered by this research. In addition, copyright can be enjoyed by someone else other than authors. For example, by legislation in some jurisdictions, including China, copyright can be granted to a legal person, or employers of authors. But, these are not the focus of this thesis.

[306] Sterling, above n 265, 366-7.

affirmative rights to exploit the work themselves or to enable someone else to engage in those acts.[307]

Economic rights accorded to authors must subsist in certain subject matter such as literary and artistic works which are recognised as 'traditional authored works', and performances of performers, phonograms of producers of phonograms and broadcasts of broadcasting organisations which are recognised as 'related subject matter'. Consequently, how economic rights are formulated and delineated corresponds essentially with the way in which subject matter is categorised under a given national legislation. Due to the diversities of the patterns in which copyright subject matter is categorised, there are considerable variations in the way the rights are delineated under the legislation of different countries. In this context, international conventions merely provide statements of 'minimum level of protection', leaving to member countries' discretion as how they classify and describe these rights under national legislation.

Limitations and Exceptions: Copyright does not exist unconditionally or continue indefinitely. There are a number of provisions restricting the duration, content, scope and exercise of the rights comprised in copyright. Based on consideration of public interest, the issue of restrictions has been present in the copyright system from the very beginning.[308] In this case, it is considered that 'the public interest should prevail against the private interests of authors'.[309]

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307 Robert A Gorman and Jane C Ginsburg, *Copyright: Cases and Materials* (7th ed, 2006) 503-4.

308 See further, Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (2002) 258-9. See also, Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (WIPO Document SCCR/9/7, 2003) 3.

309 Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987) 477-8.

International instruments and regional copyright law both provide for terms of protection for the economic rights. The duration of protection for authors' right is usually the life of the author plus a fixed term of years. In regard to the rights granted to performers, producers and broadcasting organisations, protection is usually based on a fixed term of years beginning at a certain point in time.

Furthermore, these exclusive rights are defined within particular scope and subsist in specific subject matter under different conditions. For instance, copyright does not protect facts or information; instead copyright protects 'the particular form of expression of the information, namely the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information'.[310] The requirement of originality for copyright protection can also be regarded as another condition on the exclusive rights.

These are naturally restrictions on and provisos to copyright,[311] but are not the topic of this thesis. The restrictions dealt with here are known as copyright 'limitations and exceptions' that apply to the exercise of the established rights. It is noted that there is no definition in international and national legislations of the difference between a 'limitation' and an 'exception'.[312] The term 'limitations' or 'limitations and exceptions' in this thesis are used to cover all restrictions on the exercise of the established rights under copyright law. Generally speaking, two types of limitations and exceptions can be identified in current copyright law, namely free uses and non-voluntary licences. The principle of free use (personal use and fair use) provides

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310 This is well-known as the 'idea-expression dichotomy' which is affirmed once more in a recent case in Australia, see *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

311 For example, in a 1994 U.S. Green Paper, limitations on the exclusive rights include fair use, first sale doctrine, library exceptions, educational use exemptions and other limitations. The Green Paper is under its full title, *Intellectual Property and the National Information Infrastructure: the Report of the Working Group on Intellectual Property Rights*; and it is available at < http://www.uspto.gov/web/offices/com/doc/ipnii/> at 28 April 2010.

312 See further, Ficsor, *The Law of Copyright and the Internet*, above n 308, 257. See also Sterling, above n 265, 434.

for 'the possibility of using protected works in particular cases without having to obtain the authorization of the owner of the copyright and without having to pay any remuneration for such use'.[313] In other certain cases, uses are also allowed, provided that payment of remuneration is ensured under 'compulsory licences' or 'statuary licences'.[314]

Thus, this chapter may be divided into three primary sections. The first section examines the entire structure of the authors' economic rights under international conventions, including the Berne Convention, the Rome Convention, the ▪WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT); the associated limitations and exceptions allowed under these conventions are considered in the following section. The last section assesses how the provisions of the authors' economic rights and limitations are delineated under the domestic legislation of selected jurisprudences, for instance, the U.S., the U.K., Australia, and the People's Republic of China.

3.1 ECONOMIC RIGHTS UNDER INTERNATIONAL CONVENTIONS

For the purpose of considering the economic rights of copyright owners, the relevant international agreements are:[315]

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313 World Intellectual Property Organisation (WIPO), *WIPO Intellectual Property Handbook: Policy, Law and Use* (2nd ed, 2004) para 5.178.

314 Ficsor, *The Law of Copyright and the Internet*, above n 308, 257.

315 Apart from the international conventions and treaties listed below, there are a number of more international agreements that are not covered by this thesis. These agreements are, for instance, the *Universal Copyright Convention* (Adopted at Geneva, 6 September 1952 and revised at Paris, 24 July 1971), *the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms* (of October 29, 1971), and the *Convention relating to the Distribution of Programme-Carrying Signals transmitted by Satellite*, Opened for Signature from 21 May 1974 to 31 march 1975.

- *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention);[316]
- *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (the Rome Convention);[317]
- *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement);[318]
- *WIPO Copyright Treaty* (the WCT);[319]
- *WIPO Performances and Phonograms Treaty* (the WPPT).[320]

The economic rights of the authors of literary and artistic works which are recognised as traditional authored works are covered in the Berne Convention and the WCT; in contrast, other subject matter that results from the distribution or exploitation of a literary or artistic work is protected under the Rome Convention and the WPPT.

3.1.1 BERNE CONVENTION

The Berne Convention has been revised on a number of occasions[321] and the list of rights guaranteed by it has been expanded with each revision.[322] The current

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316 See *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715 (entered into force 6 June 1982).

317 See *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, opened for signature 26 October 1961 <http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html> at 7 April 2009.

318 See *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995) <http://www.wto.org/english/tratop_E/TRIPS_e/trips_e.htm> at 7 April 2009.

319 See *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> at 7 April 2009.

320 See *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996) <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> at 7 April 2009.

321 The original text of the Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979. See, WIPO, *Summary of the*

provisions (adopted under the Paris Act of 24 July 1971) set forth minimum standards of protection in regard to 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'.[323]

Due to the way in which the text of the Convention has developed over years and has resulted from particular contemporary needs and pressures, the economic rights are not set out with logical and systematic organisation, but are found in separate provisions.[324]

The following are among the rights which must be recognised as economic rights under the Berne Convention:

- **Right of translation** in literary and artistic works;[325]
- **Right of reproduction** in literary and artistic works:[326] The Convention indicates particularly that any sound or visual recording shall be considered as a

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Berne Convention for the Protection of Literary and Artistic Works (1886) <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html> at 5 February 2010.

322 Sterling, above n 265, 602.

323 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 2(1) (entered into force 6 June 1982) states: 'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science'.

324 Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*: *1886-1986* above n 309, 367. See also Sterling, above n 265, 617.

325 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 8 (entered into force 6 June 1982) states: 'Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.'

reproductio.[327] Meanwhile, appropriate limitations on the reproduction right under national legislation are allowed provided that the limitations only relate to special cases, the limitations do not conflict with a normal exploitation of the work, and the limitations do not unreasonably prejudice the legitimate interests of the author.[328] These provisions constitute the well-known 'three step' test;

- **Right of adaptation, arrangement and other alteration** in literary and artistic works:[329] The translation right is incorporated in the adaptation right in some national laws such as the UK *Copyright, Designs and Patents Act 1988*;[330]
- **Right of cinematographic adaptation** in literary or artistic works;[331]
- **Right of distribution, of public performance and of communication to the public** in the cinematographic adaptation and reproduction of literary or artistic

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326 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 9(1) (entered into force 6 June 1982) states: 'Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.'

327 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 9(3) (entered into force 6 June 1982) states: 'Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention'.

328 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 9(2) (entered into force 6 June 1982) states: 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

329 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 12 (entered into force 6 June 1982) states: 'Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.'

330 See U.K. CDPA 1988, Article 21(3): '(a) in relation to a literary or dramatic work, means— (i) a translation of the work; (ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work; (iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical; (b) in relation to a musical work, means an arrangement or transcription of the work.'

331 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 14(1)(i) (entered into force 6 June 1982) states: 'Authors of literary or artistic works shall have the exclusive right of authorizing: (i) the cinematographic adaptation and reproduction of these works'.

works:[332] However, there is no general right of distribution provided for authors under the Convention;

- **Right of public performance and of communication to the public of a performance** in dramatic, dramatico-musical and musical works;[333]
- **Right of public recitation and of communication to the public of a recitation** in literary works;[334]
- **Right of broadcasting and other communications through wireless broadcasting, cable retransmission or rebroadcasting** in literary and artistic works (art. 11*bis* (1));[335]
- **Right of recording of musical works** in musical work.[336]

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[332] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 14(1) (entered into force 6 June 1982) states: 'Authors of literary or artistic works shall have the exclusive right of authorizing: (i) … the distribution of the works thus adapted or reproduced; (ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.'

[333] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11 (entered into force 6 June 1982) states: 'Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works.'

[334] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*ter* (entered into force 6 June 1982) states: 'Authors of literary works shall enjoy the exclusive right of authorizing: (i) the public recitation of their works, including such public recitation by any means or process; (ii) any communication to the public of the recitation of their works.'

[335] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*bis*(1) (entered into force 6 June 1982) states: 'Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

[336] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 13(1) (entered into force 6 June 1982) states: 'Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall

Reproduction right: The current provision for a comprehensive reproduction right was eventually accomplished after decades of development of the Berne Convention. It was not until in July 1967 that a specific article was introduced to the Convention in the Stockholm Act, which recognised a general right of reproduction.[337] The original text for the Convention did not supply any statement that expressly protected the reproduction right because no consensus was reached as to the scope and content of this right.[338] Notwithstanding this accomplishment, the wording and delimitation of the reproduction right is ambivalent and problematic, especially in the digital environment. For instance, the Convention fails to provide a practical definition of 'reproduction'; the use of the phrase – 'in any manner or form' – adds additional confusion.[339] Even though 'reproduction' could be interpreted as 'copying',[340] whether reproduction 'in any manner or form' would cover temporary copies remains unanswered.

3.1.2 ROME CONVENTION

In terms of the neighbouring rights, the minimum protection granted to performers, producers of phonograms (sound recordings) and broadcasting organisations is provided primarily under the Rome Convention, and then substantially strengthened and extended under the TRIPS Agreement and the WPPT. The subject matter of the related rights are performances of performers,[341] phonograms of producers of

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apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.'

337 WIPO, *Record of the Intellectual Property Conference of Stockholm (11 June - 14 July, 1967)* (1971) 1143.

338 Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 370.

339 See generally, Haochen Sun, 'Reconstructing Reproduction Right Protection in China' (2006) 53 *Journal of the Copyright Society of the USA* 223.

340 Sterling, above n 265, 617-18.

341 The term 'performers' is defined as 'actors, singers, musicians, dancers and other persons who perform literary or artistic works'. See *Rome Convention*, art 3(a).

phonograms[342] and broadcasts of broadcasting organisations.[343] In addition, arts 4,[344] 5[345] and 6[346] of the Rome Convention set forth respectively the requirement for each category of the subject matter to be protectable.

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[342] The term 'phonogram' is defined as 'any exclusively aural fixation of sounds of a performance or of other sounds'; therefore, it does not extend to visual or audiovisual recording. See *Rome Convention*, art 3(b). The term 'producer of phonograms' is defined as 'the person who, or the legal entity which, first fixes the sounds of a performance or other sounds'. See *Rome Convention*, art 3(c).

[343] The term 'broadcasting' is defined as 'the transmission by wireless means for public reception of sounds or of images and sounds'; and 'rebroadcasting' means 'the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation'. See *Rome Convention*, arts 3(f), 3(g).

[344] *Rome Convention*, art 4 (**Performances Protected. Points of Attachment for Performers**):
Each Contracting State shall grant national treatment to performers if any of the following conditions is met:
- the performance takes place in another Contracting State;
- the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;
- the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

[345] *Rome Convention*, art 5 (**Protected Phonograms: 1. Points of Attachment for Producers of Phonograms; 2. Simultaneous Publication; 3. Power to exclude certain Criteria**):
Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:
- the producer of the phonogram is a national of another Contracting State (criterion of nationality);
- the first fixation of the sound was made in another Contracting State (criterion of fixation);
- the phonogram was first published in another Contracting State (criterion of publication).

If a phonogram was first published in a non–contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State. By means of a notification deposited with the Secretary–General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

[346] *Rome Convention*, art 6 (**Protected Broadcasts: 1. Points of Attachment for Broadcasting Organizations; 2. Power to Reserve**):
Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:
- the headquarters of the broadcasting organisation is situated in another Contracting State;
- the broadcast was transmitted from a transmitter situated in another Contracting State.

Protection for Performers against Certain Acts they have not Consented to: The Rome Convention contains a minimum protection without guaranteeing specific exclusive rights for performers:

(i) protection against certain acts they have not consented to;[347]

(ii) phonogram performance remuneration right;[348] and

By means of a notification deposited with the Secretary–General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

[347] *Rome Convention*, art 7 (**Minimum Protection for Performers: 1. Particular Rights; 2. Relations between Performers and Broadcasting Organizations**):

The protection provided for performers by this Convention shall include the possibility of preventing:

- the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
- the fixation, without their consent, of their unfixed performance;
- the reproduction, without their consent, of a fixation of their performance;
- if the original fixation itself was made without their consent;
- if the reproduction is made for purposes different from those for which the performers gave their consent;
- if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

However, the domestic law referred to in sub–paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

[348] *Rome Convention*, art 12 **(Secondary Uses of Phonograms)**: If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the

(iii) other protection and limitation.[349]

The reason is that at the Diplomatic Conference for the preparation of the draft Convention, there 'was considerable apprehension among some delegates and representatives that the granting of exclusive rights of authorisation [to performers] would have undesirable consequences'.[350]

Phonograms Producers' 'Right to Authorize or Prohibit': The Rome Convention grants the right of reproduction and a phonogram performance remuneration right to the producers of phonograms under art 10[351] and art 12.[352] It is required further under art 12 that the remuneration shall be paid to the performers, *or* to the producers of the phonograms, *or* to both. According to Ficsor, the expression 'right to authorize or prohibit' used under art 12 has the same meaning as the expression 'exclusive right of authorizing' used in art 11 of the WPPT.[353] It is argued that:

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absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

349 *Rome Convention*, art 9 **(Variety and Circus Artists)**: Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

Rome Convention, art 19 **(Performers' Rights in Films)**: Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.

350 Sterling, above n 265, 662.

351 *Rome Convention*, art 10 **(Right of Reproduction for Phonogram Producers)**: Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

352 *Rome Convention*, art 12 **(Secondary Uses of Phonograms)**: If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

353 For further discussion on the exclusive right granted to the producers of phonograms, see Ficsor, *The Law of Copyright and the Internet*, above n 308, 631.

> [a]n owner of a right who may either authorize or prohibit the act covered by the right in fact has an exclusive right of authorization; and the exclusive right of authorization – exactly on the basis of its exclusive nature – also involves the possibility of not authorizing and, thus, prohibiting the act.[354]

Broadcasting Organisations' 'Right to Authorize or Prohibit': The minimum rights contained in art 13 of the Rome Convention for the broadcasting organisations are the right "to authorize or prohibit":

> (a) the rebroadcasting of their broadcasts;
>
> (b) the fixation of their broadcasts;
>
> (c) the reproduction:
>
> (i) of fixations, made without their consent, of their broadcasts;
>
> (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
>
> (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

3.1.3 TRIPS AGREEMENT

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.[355] Under the provisions of the TRIPS Agreement, economic rights arise for authors by virtue of (i)

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354 Ibid.

355 WTO, *Overview: the TRIPS Agreement* <http://www.wto.org/english/tratop_E/TRIPS_e/intel2_e.htm> at 12 April 2009.

compliance with the Berne Convention as required by art 9(1) of the Agreement, and (ii) specified rights provided by the Agreement.[356]

Authors' Rights: The specified economic rights granted to authors under the Agreement fall into two categories. The first one is the protection of computer programs and compilations of data:

- **Computer programs**, whether in source or object code, shall be protected as literary works under art 19(1) of the Berne Convention; and
- **Compilations of data or other material**, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.[357]

The second one is the protection with regard to rental rights. Article 11 of the TRIPS Agreement provides that in respect of at least computer programs and cinematographic works, a member shall provide authors and their successors in title the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works.

Performers' Rights: Under art 14(1) of the TRIPS Agreement,[358] it is required that the performers 'shall have the possibility of preventing the following acts when undertaken without their authorization':

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356 Sterling, above n 265, 692.

357 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 10(2) .

358 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 14(1) states as follows:
'In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also

- the fixation of their unfixed performance; and
- the reproduction of such fixation; and
- the broadcasting by wireless means and the communication to the public of their live performance.

Producers of Phonograms: Economic rights granted to producers of phonograms (sound recordings) under the TRIPS Agreement include the following rights to 'authorize or to prohibit':

- the right to authorize or prohibit the direct or indirect **reproduction** of their phonograms;[359]
- the right to authorize or to prohibit the **commercial rental** to the public of originals or copies of their copyright works.[360]

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorisation:[361]

- the fixation of broadcasts;
- the reproduction of fixations of broadcasts;
- the rebroadcasting by wireless means of broadcasts;
- the communication to the public of television broadcasts of the same.

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have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.'

359 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 14(2) .

360 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 11 .

361 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 14(3) . However, the provision of such rights is not obligatory as art 14(3) continues to say: Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

3.1.4 WCT

Since the passage of the Paris Act of the Berne Convention, a number of problems were caused by new means of electronic dissemination of works and other subject matters in the 1980s and early 1990s. In response to the technological challenge brought about by the Internet in particular, the WCT was adopted on 20 December 1996 and came into force on 6 March 2002.

The WCT incorporates and extends the list of rights provided under the Berne Convention. Accordingly, *in addition to* the economic rights provided for authors under the Berne Convention, the WCT deals with three exclusive rights which are:

- **Right of distribution** in literary and artistic works:[362] It is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership. The Agreed statement concerning Articles 6 provides that the expression 'original and copies' refers exclusively to fixed copies that can be put into circulation as tangible objects;
- **Right of rental** in computer programs, cinematographic works, works embodied in phonograms;[363]
- **Right of communication to the public** in literary and artistic works.[364] It is the right to authorize any communication to the public, by wire or wireless means,

[362] *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 6(1): 'Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.'

[363] *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 7: 'Authors of (i) computer programs; (ii) cinematographic works; and (iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.' However, the following paragraph art 7(2) provides that art 7(1) shall not apply (i) in the case of computer programs, where the program itself is not the essential object of the rental; and (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

including right of making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them.

Reproduction Right: The Committees of Experts was to clarify the scope of the reproduction right by proposing a specific article in its Basic Proposal[365] which suggested that the reproduction right under art 9(1) of the Berne Convention 'shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form'.[366]

The proposed provision was deleted ultimately; instead, the 'Agreed Statements Concerning Article 1(4)' was attached to the final text of the WCT, indicating that the provisions and limitations of the reproduction right as set out in art 9 of the Berne Convention shall fully apply in the digital environment, and the storage of a protected work in digital form in an electronic medium constitutes a reproduction.[367]

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364 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 8: 'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'

365 WIPO, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference* (WIPO Doc CRNR/DC/4, 30 August 1996) <http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_4.pdf> at 14 April 2009.

366 Ibid 29.

367 Agreed statements concerning art 1(4) of the *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996). The reproduction right, as set out in art 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of art 9 of the Berne Convention.

This statement, however, did not even handle the temporary copying question which was the most controversial issue that surrounded the reproduction argument.[368] Whether the making of temporary copies falls necessarily within the ambit of the meanings of 'reproduction' and 'storage' remains ambiguous and obscure under the WCT (and the WPPT).[369] The appropriate application of the reproduction right in the case of temporary copies continues to be a subject of debate at both the national and international levels.[370] As WIPO pointed out, the key question is whether such copies always require the consent of the rights-holders in order to avoid infringement.[371] Nonetheless, remarkable development has been achieved in regional or national legislation. For instance, exceptions for temporary reproduction that is of a transient or incidental nature have been carefully tailored in many countries.[372]

Distribution Right: Under the Berne Convention, the distribution right merely subsists in 'cinematographic adaptation and reproduction of literary or artistic works'.[373] By contrast, the WCT notably extends the scope of the distribution right to cover all literary and artistic works, and general right of distribution thus is granted to the author. This provision is of considerable significance as it 'represents

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368 See further, Makeen Fouad Makeen, *Copyright in a Global Information Society: the Scope of Copyright Protection Under International, US, U.K. and French Law* (1st ed, 2000) 287.

369 Some commentators suggest that the term 'storage' imply permanence. See generally Jane C Ginsburg, 'Achieving Balancing in International Copyright Law (Book Review)' (2003) 26(2) *Columbia Journal of Law & the Arts* 201; David Nimmer, 'A Tale of Two Treaties' (1997) 22(1) *Columbia-VLA Journal of Law & the Arts* 1.

370 See further, WIPO, *Intellectual Property on the Internet: A Survey of Issues* (2002) 33.

371 Ibid.

372 Such exceptions can be seen in, for example, art 5(1) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the *Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*; *Copyright Act 1968* (Cth) s 43(A); and *Digital Millennium Copyright Act 1988* (DMCA) U.S.. In August 2001, the U.S. Copyright Office issued a special report which includes a comprehensive discussion of the issue of protection for RAM copies and other temporary copies made in the context of network transmissions. See US Copyright Office, *DMCA Section 101 Report* (2001).

373 See *Berne Convention for the Protection of Literary and Artistic Works,* opened for signature 9 September 1886, 1 BDIEL 715, art 14(1) (entered into force 6 June 1982).

the specific recognition in an international instrument, after many years of debate, of the author's right to authorise the distribution of copies of his work, as distinct from and in addition to the right to authorise the reproduction (copying) of works'.[374]

In contrast to the reproduction right that fully applies in the digital environment under the Agreed statements concerning art 1(4),[375] the Agreed statement concerning art 6 indicates that the distribution right is applicable only to 'tangle objects'. Therefore, it appears that the distribution right is limited to physical copies of works and has no application to electronic copies of works. One of the subsequent implications is that since the doctrine of first sale is a limitation on the distribution right, this doctrine is applicable only to physical copies but not to electronic copies.[376]

The Right of Communication to the Public: The WCT's extension and clarification of the right of communication to the public is particularly extraordinary. Under the Berne Convention, the communication right exists only in specific cases;[377] however, the WCT remarkably moves ahead on the base of the provisions of the Berne Convention and thus makes two essential advances: (i) the

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374 Sterling, above n 265, 714-15.

375 Agreed statements concerning art 1(4) of the *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996): The reproduction right, as set out in art 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of art 9 of the Berne Convention.

376 See further discussion in s 4.1.3 below of this thesis.

377 For example, art 11(1)(ii) of the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, (entered into force 6 June 1982) provides that authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising any communication to the public of the performance of their works; art 11ter(1)(ii) provides that authors of literary works shall have the exclusive right of authorising any communication to the public of the recitation of their works; art 11bis(1)(i) and (ii) provide that authors of literary and artistic works shall enjoy the right of communication to the public by wireless broadcasting, cable retransmission or rebroadcasting of broadcasts.

communication right is to be enjoyed by all authors of literary and artistic works; and (ii) it is to include the right of making available to the public in 'on-demand' services.

Under the Berne Convention, the communication right was limited merely to the non-material form of dissemination such as wireless broadcasting, cable retransmission or rebroadcasting. The growing impacts of the ICTs were not covered. The wireless broadcasting and the cable retransmission or rebroadcasting is point-to-multipoint communication by which an active sender can transmit works to many recipients. By contrast, the Internet presents the world a point-to-point way in which transmitting works is on interactive basis and of on-demand nature. It empowers individual users to choose the place and the time they want to access and use works in digital form. It is ambiguous under the Berne Convention as to whether the traditional communication right is applicable to the interactive, on-demand transmission of works over the information networks such as the Internet. Given the extremely dynamic nature of the Internet-type of networks, the extension of the existing rights alone did not seem to be sufficient.[378]

It was therefore proposed that the WCT should adopt a 'neutral way'. It should not be technology-specific, but it should indicate the interactive nature of digital transmissions.[379] Furthermore, it should be free from specific legal characterisation, leaving how the right(s) could be implemented to national legislation. It was also suggested that the gap in the coverage of the communication right and the

[378] See further, Mihály Ficsor, 'Protection Of Copyright And Related Rights in The Digital Context: The Wipo Internet Treaties' (Paper presented at the Wipo-Escwa Arab Regional Conference on Recent Developments in the Field of Intellectual Property, Beirut, 5-6 May 2003) <http://www.wipo.int/arab/en/meetings/2003/ip_bey/pdf/wipo-escwa_ip_bey_03_6.pdf> at 11 June 2009.

[379] See further ibid.

distribution right should be eliminated.[380] This solution which is referred to as the 'umbrella solution' has been adopted in the WCT.

It, therefore, appears that the WCT excludes the applicability of the distribution right in the digital environment. In addition, it extends and clarifies that the communication right also covers interactive transmissions as to the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[381] This 'on-demand' availability right is 'a major accomplishment of the WIPO Treaty: for the first time in international law, authors are given specific rights concerning use of their works in Internet and similar services'.[382]

3.1.5 WPPT

Compared to the Rome Convention, the WPPT has significantly extended the level of protection for the rights of performers and of producers.

Performers' 'exclusive right of authorizing': The WPPT explicitly stated that the performers shall have the 'exclusive right of authorizing'. It clearly extended the right of 'minimum protection against certain acts' as delineated in the Rome Convention. The exclusive rights and remuneration right subsisting in both their unfixed performances and fixed performances are:

- **Right of (i) broadcasting and communication to the public** of their unfixed performances except where the performance is already a broadcast performance; and **(ii) of fixation** of their unfixed performances;[383]

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380 Ibid 10.

381 See, *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996), art 8.

382 Sterling, above n 265, 717.

383 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 6 **(Economic Rights of Performers in their Unfixed Performances)**: Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and

- **Right of reproduction** in performances fixed in phonograms:[384] The Agreed statement concerning art 7 indicates that the reproduction right and the exceptions permitted fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. The storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction. There are two notable variations between the provisions of the Rome Convention and the WPPT: (i) the reproduction right is limited to phonograms under the WPPT. However the minimum protection under the Rome Convention covers performances fixed in both phonograms and audiovisual fixations; and (ii) the minimum protection against certain acts under the Rome Convention is replaced by an exclusive right to authorise reproduction under the WPPT.
- **Right of distribution** in performances fixed in phonograms:[385] Similarly to the reproduction right, the distribution right is also limited to performances fixed in phonograms. The Agreed statement concerning art 8 declares that the expressions 'original and copies' refers exclusively to fixed copies that can be put into circulation as tangible objects.
- **Right of rental** in performances fixed in phonograms;[386]

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communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances.

384 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 7 **(Right of Reproduction)**: Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

385 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 8 **(Right of Distribution)**: (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership. (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

386 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 9 **(Right of Rental)**: (1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer. (2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of

- **Right of making available of fixed performances (on-demand availability right)** in performances fixed in phonograms:[387] Compared to the exclusive right granted to authors concerning communication to the pubic of their works by wire or wireless means including 'on-demand availability' access under the WCT, the exclusive right accorded to performers is notably limited to on-demand availability services under the WPPT. However, under art 15, performers are granted a right to equitable remuneration for broadcasting or for any communication to the public instead of a right of authorisation.
- **Right to remuneration for broadcasting and communication to the public of performances fixed in phonograms**:[388] Under the Rome Convention, the right to remuneration shall be paid to the performers, *or* to the producers of the phonograms, *or* to both where the phonograms are used *directly* for broadcasting or for any communication to the public. In contrast, *both* performers and producers

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equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

387 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 10 **(Right of Making Available of Fixed Performances)**: Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

388 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 15 **(Right to Remuneration for Broadcasting and Communication to the Public)**: (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

of phonograms shall enjoy the equitable remuneration right, and the remuneration results from *both direct and indirect* use of the phonograms.

Phonogram Producers' 'exclusive right of authorizing': The rights accorded to producers of phonograms are essentially parallel to that granted to performers. These rights are the 'exclusive right of authorizing':

- reproduction;[389]
- distribution;[390]
- rental;[391]
- making available of phonograms;[392] and
- a right to remuneration for broadcasting and communication to the public.[393]

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389 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 11 **(Right of Reproduction)**: Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

390 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 12 **(Right of Distribution)**: (1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership. (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.

391 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 13 **(Right of Rental)**: (1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them, by or pursuant to, authorization by the producer. (2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

392 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996), art 14 **(Right of Making Available of Phonograms)**: Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

393 *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996) art 15 **(Right to Remuneration for Broadcasting and Communication to the Public)**: (1) Performers

It is notable that the international conventions merely provide statements of a minimum level of protection. The provisions such as communication right are tailored deliberately to be free from specific legal characterisation, and contracting parties are free to implement the international obligations in their own ways.[394] It is an age-old practice followed by the member countries of the Berne Union in the application of the various rights granted by the Convention.[395] The legal characterisation of a right therefore is frequently different under national laws as under the Convention.[396]

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and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

394 In the case of the communication right under the WCT, contracting parties are clearly 'free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right (with appropriate exceptions). By the "other" right, of course, first of all, the right of distribution was meant, but a general right of making available to the public, might also be such an "other" right.' Ficsor, 'Copyright and Related Rights in the Context of the Internet', above n 378.

395 Ibid.

396 Examples are given by Dr Ficsor further that 'in certain countries the right of public performance covers not only those acts which are referred to in the provisions of the Berne Convention as public performances of works but also the right of broadcasting and the right of communication to the public which, under the Berne Convention, are separate rights. In other countries, the right of communication to the public is such a general right covering all the three categories of rights mentioned. Still in other countries, it is the right of broadcasting which also covers communication to the public by wire.' See, ibid 10-11.

Given those considerable and allowable variations, it is necessary to examine how the rights provided by international conventions are implemented in a specific member country. This chapter will review the domestic legislation in the US, the UK, Australia and China. A comparative assessment of the different approached taken by these jurisdictions respectively can be found in s 4.1.1 below of this thesis.

3.2 LIMITATIONS AND EXCEPTIONS ALLOWED UNDER THE INTERNATIONAL CONVENTIONS

Prior to the Berne Convention, there was 'no general rule covering all cases as to the way in which countries could institute permitted limitations and exceptions' under international instruments.[397] In the Stockholm Act of the Berne Convention (1967), a general rule which is known as 'three-step test' was formulated under art 9(2) for introducing limitations on the established reproduction right.[398] This rule has been adopted in the following international instruments including the TRIPS Agreement,[399] the WCT[400] and the WPPT,[401] and regional legislation.[402]

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397 Sterling, above n 265, 435, 439.

398 *Berne Convention for the Protection of Literary and Artistic Works,* opened for signature 9 September 1886, 1 BDIEL 715, art 9(2) (entered into force 6 June 1982): 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

399 *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on 1 January 1995), art 13 **(Limitations and Exceptions)**: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

400 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 10 **(Limitations and Exceptions)**: '(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

Consequently, the 'three-step test' later 'made a great "carrier" with its application being extended not only to other economic rights, but also to related rights, and even to certain categories of industrial property rights'.[403]

3.2.1 BERNE CONVENTION

A. Three-step Test: General Limitation Concerning Reproduction Right

The Berne Convention has 'contained provisions relating to limitations and exceptions since its inception'.[404] Before the Stockholm Act, various specific provisions had been introduced allowing member countries to provide for limitations on and exceptions to the rights established under the Convention.[405]

While a general provision for the exclusive right of authorising reproduction of works was being constituted in the Stockholm revision, it was considered that, 'both because of limitations which countries had already introduced, and because of the need for flexibility in the exercise of the reproduction right, countries should be

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401 *WIPO Performances and Phonograms Treaty* art 16 (adopted in Geneva on 20 December 1996) **(Limitations and Exceptions)**: '(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram'.

402 For instance, the 'three-step' test can also be found in art 6(3) of *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases* and art 5(5) of *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*.

403 Ficsor, *The Law of Copyright and the Internet*, above n 308, 280.

404 Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 10.

405 Such provisions provided for limitations and exceptions in regard to quotation, illustration for teaching purposes, reporting of current event, and so on. See Sterling, above n 265, 439.

allowed to introduce restrictions on the way in which the right was to be exercised'.[406] It was recognised as equally important that countries should not be allowed to permit exceptions that are 'so wide as to undermine the reproduction right'.[407]

Accordingly, the 'three-step test' was introduced in art 9(2) of the Convention as a comprehensive rule under which countries may provide for limitations on or exceptions to the established exclusive right of reproduction.[408] As a counterpart of art 9(1) which introduce the general right of reproduction, art 9(2) is also of a general nature.[409] This formulation opens 'the way to other exceptions of lesser importance that would be too cumbersome to include in the Convention itself'.[410]

The 'three-step test' contains three conditions that must be satisfied in the introduction of any limitations on or exceptions to the reproduction right. The three conditions are:

- the limitations only relate to special cases;
- the limitations do not conflict with a normal exploitation of the work; and
- the limitations do not unreasonably prejudice the legitimate interests of the author.

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406 Ibid.

407 Roger Knights, *Limitations and Exceptions under the "Three-Step-Test" and in National Legislation - Differences between the Analog and Digital Environments* (2001) World Intellectual Property Organization <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=12728> at 27 April 2009.

408 For further discussion on the formulation of the 'three-step test', see Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 479–81. See also, Ficsor, *The Law of Copyright and the Internet*, above n 308, 284-8.

409 Ficsor, *The Law of Copyright and the Internet*, above n 308, 257. See also Sterling, above n 265, 280.

410 Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 480.

These conditions are cumulative and must all be satisfied; however, each raises problems of interpretation.[411] The wording '**special cases**', as commentators explain, includes two aspects: 'First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Second, there must be something 'special' about this purpose, 'special' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstances'.[412]

The meaning of **'normal exploitation'** is given no guidance in the Convention; however, the records of the Stockholm revision conference may provide useful assistance. The adjective 'normal' is 'not of a mere descriptive, empirical nature here, but rather of a normative one'.[413] According to the relevant records, permitted limitations and exceptions on the exclusive right of reproduction should only be allowed for specified purposes and on the condition that these purposes should not enter into economic competition with the exercise of the right and should not undermine the exploitation of the work in the market.[414]

No clear guidance as to the meaning of **'unreasonably prejudice the legitimate interests of the author'** can be found either in the text of the Convention or in the records of relating conferences. It is a matter of logic that any limitation on the reproduction right, even if it can pass the previous two steps, would inevitably prejudice the authors' interests. The drafting authority for the Stockholm revision conference attempted to limit this prejudice by introducing the term 'unreasonable'.[415] As Ricketson suggests:

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411 For further interpretation of the art 9(2), see ibid 482-9.

412 Ibid 482.

413 Ficsor, *The Law of Copyright and the Internet*, above n 308, 285.

414 See further, ibid 284-6.

415 See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308; see also Ficsor, *The Law of Copyright and the Internet*, above n 308, 286-8.

> the words 'not unreasonably prejudice' therefore allow the making of exceptions that may cause prejudice of a significant or substantial kind to the authors' legitimate interests, provided that (a) the exception otherwise satisfies the first and second conditions stipulated in Article 9(2), and (b) it is proportionate or within the limits of reason, ie, if it is not unreasonable.[416]

The limitations and exceptions under the three-step test in art 9(2) may take the form of either free uses or compulsory licenses, depending essentially on the number of reproductions made.[417] Under the first two conditions of the three-steep test, an 'unreasonable prejudice' can further be avoided based on non-voluntary licence by introducing a right to equitable remuneration instead of an exclusive right.[418]

The instances of uses covered by art 9(2) may include judicial and administrative use, private use, research and scientific purposes, copying for teaching purposes, and other permissible purposes.[419]

B. Other Free Uses Allowed under the Berne Convention

There are certain other limitations and exceptions permitted in provisions other than the art 9(2) under the Berne Convention. Such provisions providing for certain free uses of works may be listed as follow:

- Official texts of a legislative, administrative and legal nature, and to official translations of such texts;[420]

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416 Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 27.

417 Ibid.

418 See further, Ficsor, *The Law of Copyright and the Internet*, above n 308, 288.

419 See further, Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 485-8.

420 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 2(4) (entered into force 6 June 1982): It shall be a matter for

- News of the day press information;[421]
- Political speeches and speeches delivered in the course of legal proceedings;[422]
- Certain uses of lectures and addresses;[423]
- Quotations: It is a mandatory requirement that making quotations from works must be allowed;[424]
- Illustrations for teaching;[425]
- Use of articles in newspapers or periodicals;[426]

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legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

421 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 2(8) (entered into force 6 June 1982): The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

422 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 2*bis*(1) (entered into force 6 June 1982): It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

423 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 2*bis*(2) (entered into force 6 June 1982): It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose.

424 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 10(1) (entered into force 6 June 1982): It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

425 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 10(2) (entered into force 6 June 1982): It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

426 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 10*bis*(1) (entered into force 6 June 1982): It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the

- Use of works in reporting of current events.[427]

C. Compulsory Licences Allowed under the Berne Convention

A number of exceptions that allow to impose compulsory licences in certain circumstances can be found under several provisions in the Convention:

- Compulsory licences for broadcasting of works;[428]
- Ephemeral recordings of broadcast works;[429]
- Compulsory licences for recoding of musical works;[430]

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broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

427 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 10*bis*(2) (entered into force 6 June 1982): It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

428 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*bis*(2) (entered into force 6 June 1982): It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

429 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*bis*(3) (entered into force 6 June 1982): In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

- Limitation of certain rights of certain contributors Concerning Cinematographic Works;[431][432]

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[430] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 13 (entered into force 6 June 1982): (Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto): (1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

[431] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 14*bis*(2) (entered into force 6 June 1982): (a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed. (b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work. (c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union. (d) By 'contrary or special stipulation' is meant any restrictive condition which is relevant to the aforesaid undertaking.

[432] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 14*bis*(3) (entered into force 6 June 1982): Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

- Compulsory licences in relation to developing countries: The Appendix to the Paris Act contains a series of compulsory licenses with respect to the translation and reproduction of works.

3.2.2 ROME CONVENTION

The limitations and exceptions permitted under the Rome Convention are of two types. The first category contains specific limitations provided for under the Article 15(1) of the Convention, including:

- Private use;[433]
- Use of short excerpts in connection with the reporting of current events;[434]
- Ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;[435]
- Use solely for the purposes of teaching or scientific research.[436]

Another type of limitation, contained in art 15(2) of the Convention,[437] includes the compulsory licences that is limited to the following cases:[438]

- Broadcasting of performances;[439]
- Secondary uses of phonograms;[440]

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433 *Rome Convention*, art 15(1)(a).

434 *Rome Convention*, art 15(1)(b).

435 *Rome Convention*, art 15(1)(c).

436 *Rome Convention*, art 15(1)(d).

437 *Rome Convention*, art 15(2): Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

438 See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 45.

439 *Rome Convention*, art 7(2)(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

- Communication to the public of certain television broadcasts.[441]

In addition, a specific limitation on the exclusive right of performers is provided for under art 19 of the Convention. As a result, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application.[442]

3.2.3 TRIPS AGREEMENT

The fundamental cornerstone of the TRIPS Agreement in relation to limitations of and exceptions to copyright is contained in art 13 which reads as follows:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

This provision adopts the language of the three-step test in art 9(2) of the Berne Convention and purports to apply a general formula or template for the introduction of limitations and exceptions under member countries' domestic law. Consequently, it extends the application of the three-step test beyond the reproduction right to all

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[440] *Rome Convention*, art 12 (Secondary Uses of Phonograms): If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

[441] *Rome Convention*, art 13(d): Broadcasting organisations shall enjoy the right to authorize or prohibit … the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

[442] *Rome Convention*, art 19: Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.

exclusive rights that are listed in the Berne Convention and the non-Berne exclusive right required to be protected under the TRIPS Agreement (that is, the rental right in computer programs and cinematographic works).[443] As confirmed by WIPO, 'generally and normally, there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned'.[444]

However, art 13 is limited to copyright and does not apply to related rights (neighbouring rights).[445] Instead, the matter of exceptions to related rights is dealt with in art 3(1) and art 14(6). Accordingly, the TRIPS' provisions of limitations on and exceptions to related rights add nothing to the Rome Convention.

3.2.4 WCT

As Ricketson points out, limitations and exceptions under the WCT are provided for in two ways, both of which carry the three-step test.[446]

The first is contained in art 1(4)[447] and the Agreed Statements Concerning art 1(4).[448] Article 1(4) and its relevant Agreed Statement are a clear attempt to extend

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443 See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 46–55. See also Ficsor, *The Law of Copyright and the Internet*, above n 308, 300-3. See also Christophe Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society* (2007) UNESCO e-Copyright Bulletin <http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf> at 28 April 2009.

444 WIPO, *Implications of the TRIPS Agreement on Treaties Administered by WIPO* (1996) 22-3.

445 Ficsor, *The Law of Copyright and the Internet*, above n 308, 301-2.

446 Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 56.

447 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 1 (Relation to the Berne Convention): (4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

448 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) agreed statements concerning art 1(4): The reproduction right, as set out in Article 9 of the Berne Convention, and

the exclusive right of reproduction as set out in art 9(1) of the Berne Convention and the limitations permitted under art 9(2) of the Convention to the digital environment. However, the extension brings about more confusions as to the temporary reproduction that is of a transient or incidental nature.[449]

The second provision dealing with limitations and exceptions appears in art 10 of the WCT. In particular, the first paragraph of this article provides for limitations of and exceptions to the exclusive rights to be granted under the WCT,[450] namely the distribution right in art 6, the rental right in art 7 and the right of communication to the public in art 8. The second paragraph has a 'different sphere of operation';[451] it adopts a language of the three-step test similar to art 13 of the TRIPs Agreement and purports to apply to all the exclusive rights accorded under the Berne Convention.[452]

Furthermore, it is stated that the limitations and exceptions under art 10 extend into the digital environment; notwithstanding, member countries are allowed to devise

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the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

449 See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 56-60.

450 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 10 (Limitations and Exceptions): (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

451 *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 10 (Limitations and Exceptions): (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

452 See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 60-3.

new exceptions and limitations that are appropriate in the digital network environment.[453]

3.2.5 WPPT

Similar to the WCT, the WPPT deals with limitations and exceptions with specific provisions.[454] Article 16(1) of the WPPT acknowledges that limitations and exceptions with regard to the protection of performers and producers of phonograms under national legislation is to be equivalent to those applying under such national law to literary and artistic works.[455] Thus art 16(1) refers only to the rights accorded to performers and phonogram producers under national laws.

Article 16(2) provides specifically for limitations of and exceptions to the rights granted under the WPPT.[456] It requires that any limitations of and exceptions to the rights provided for under the WPPT must be confined to the three-step test.[457]

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[453] *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) agreed statement concerning art 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

[454] On detailed introduction of limitation and exceptions allowed under the WPPT, see Ficsor, *The Law of Copyright and the Internet*, above n 308, 640-3.

[455] *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 16(1): Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

[456] *WIPO Copyright Treaty* (adopted in Geneva on 20 December 1996) art 16(2): Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

[457] See further, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, above n 308, 64-5.

3.3 DOMESTIC LAW: ECONOMIC RIGHTS AND LIMITATIONS IN THE US, UK, AUSTRALIA, CHINA

The economic rights prescribed under the above international conventions fall into two general heads, namely (i) *the right of public dissemination of works in both material and non-material forms* and (ii) *the right of making derivative works*.

The rights set forth in the conventions are implemented in various ways under the copyright laws of different nations. For illustrative purpose, the laws of the U.S., U.K., Australia and China are selected to exemplify how these rights are formulated under domestic legislation. The right of public dissemination can further be broken into two subheads: the right of public dissemination in material forms and the right of public dissemination in non-material forms.

The table below is an outline of the different approaches in which economic rights (neighbouring rights not entirely included) are structured under the copyright law of selected nations.

The Right of Public Dissemination							
Dissemination in Material Forms			Dissemination in Non-Material Forms				
Reproduction Right	Distribution Right	Rental Right	Communication Right: Broadcasting right	Communication Right: On-demand availability	Performance Right	Rights not listed under treaties	Treaties
The right to reproduce … in copies or phonorecords	The right to distribute copies or phonorecords by sale or other transfer of ownership, or by rental, lease, or lending; the right to perform publicly, the right to perform sound recordings by means of a digital audio transmission					The right to display publicly	US
The right to copy the work	The right to issue copies to the public		The right to communicate the work to the public		The right to perform in public	The right to show or play in public The right of authorisation	UK
The right to reproduce or to make a copy	The right to publish the work	Rental right	The right to communicate		The right to perform in public; the right to cause recordings to be seen or heard in public	The right of authorisation	Australia
Reproduction right	Distribution right	Rental right	Broadcasting right	Network communication right	Performance right	The right to exhibit/display, to present/show	China

The right of making derivative works is highly interrelated with the reproduction right,[458] and varies significantly under the copyright law of different nations.

The Right of Making Derivative Works	Treaties	U.S.	U.K.	Australia	China
	Translation right	The right to prepare derivative works	The right to make an adaptation	The right to make an adaptation	Translation right
	Right of cinematographic adaptation				Right of Cinematographic adaptation
	Right of adaptation, arrangement and other alteration				Right of adaptation, right of compilation

3.3.1 *COPYRIGHT ACT 1976* OF THE U.S.

The *Copyright Act 1976* (U.S.) declares that copyright protection subsists in original works of authorship fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device;[459] nonetheless it containss a 'non-exclusive list', stating that copyright generally subsists in the following 'original works of authorship':

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

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458 For further discussion, see ch 5 below of this thesis.

459 See [US] *Copyright Act 1976,* §102.

The rights subsisting in the works mentioned above under the Act are the exclusive rights to do and to authorise any of the following:[460]

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

The House Report explains further that the formulation of the exclusive rights accorded to a copyright owner under the §106 are 'to do and to authorize' any of the activities specified in the five numbered clauses.[461]

> The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights

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460 See [US] *Copyright Act 1976*, §106.

461 The §106(6) in the [US] *Copyright Act 1976*, was added by the Digital Performance Right in the *Sound Recordings Act 1995*. See *Public Law 104-39* (1995) United States Copyright Office <http://www.copyright.gov/legislation/pl104-39.html> at 4 September 2009.

at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1).

…

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106 (4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

…

Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."[462]

Neighbouring Rights: As mentioned above, *sound recordings* or phonograms are protected as 'works of authorship'; accordingly, the producers are protected as

[462] US HR Rep No 94-1476, 94th Cong, 2d Sess 61-62 (1976) <http://straylight.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106----000-notes.html > at 3 September 2009.

'authors' of the sound recordings.[463] In the US, copyright protection for *broadcasters* may be 'gained through recording the broadcast work, and under the Communication Act'.[464] Performers, under §1011 of the Act,[465] are granted protection against unauthorised fixation and transporting in sound recordings and music videos.[466]

Limitations and Exceptions: The doctrine of fair use as limitations on exclusive rights is set out under §107 of the current 1976 Act. Further limitations include reproduction by libraries and archives,[467] effect of transfer of particular copy or phonorecords,[468] exemption of certain performances and displays,[469] secondary transmissions,[470] ephemeral recordings,[471] computer programs,[472] secondary

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[463] See [US] *Copyright Act 1976*, §102(a)(7).

[464] Sterling, above n 265, 211.

[465] In 1994, the *Uruguay Round Agreements Act* added ch 11, entitled 'Sound Recordings and Music Videos,' to title 17 Pub L No 103-465, 108 Stat 4809, 4974.

[466] [US] *Copyright Act 1976*, §1011 states as follow:

Unauthorized Acts - Anyone who, without the consent of the performer or performers involved —

fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

Definition. — As used in this section, the term "traffic in" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer, or dispose of.

Applicability. — This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

State Law Not Preempted. — Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

[467] [US] *Copyright Act 1976*, §108.

[468] [US] *Copyright Act 1976*, §109.

[469] [US] *Copyright Act 1976*, §110.

[470] [US] *Copyright Act 1976*, §111.

transmissions of superstations and network stations for private home viewing,[473] reproduction for blind or other people with disabilities,[474] and secondary transmissions by satellite carriers within local markets.[475] In addition, compulsory license for making and distributing phonorecords is set forth under §115.[476] Negotiated licenses for public performances by means of coin-operated phonorecord players are provided for under §116.

3.3.2 *COPYRIGHT, DESIGNS AND PATENTS ACT 1998* OF THE U.K.

In order to implement the requirements of the EU Copyright Directive,[477] the U.K. enacted the *Copyright and Related Rights Regulations 2003* in 2003.[478] The Regulations considerably amended the *Copyright, Designs and Patents Act 1988*

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471 [US] *Copyright Act 1976*, §112.

472 [US] *Copyright Act 1976*, §117.

473 [US] *Copyright Act 1976*, §119.

474 [US] *Copyright Act 1976*, §121.

475 [US] *Copyright Act 1976*, §122.

476 In 2004, Marybeth Peters, the Register of Copyrights, was required to testify on s 115 compulsory license before the subcommittee on Courts, the Internet and Intellectual Property of the House Committe on the Judiciary. See, *Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committe on the Judiciary* (2004) United States House of Representatives, <http://www.copyright.gov/docs/regstat031104.html> at 8 February 2010.

477 Under the official title *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, it is also known as the Information Society Directive. This Directive serves to implement a number of international obligations raised by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The full text of the Directive is available at Official Journal of the European Communities <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> at 17 April 2010.

478 The Regulations come into force on 31st October 2003 and the full text is available at: Office of Public Sector Information <http://www.opsi.gov.UK/si/si2003/20032498.htm> at 17 April 2010.

(CDPA).[479] Under the amended s 16(1) of the CDPA, the owner of the copyright in a work has the exclusive right to do the following acts:[480]

> (a) to copy the work, under section 17;
>
> (b) to issue copies of the work to the public, under section 18;
>
> (ba) to rent or lend the work to the public, under section 18A;
>
> (c) to perform, show or play the work in public, under section 19;
>
> (d) to communicate the work to the public, under section 20;
>
> (e) to make an adaptation of the work or do any of the above in relation to an adaptation, under section 21;
>
> and those acts are referred to in this Part as the 'acts restricted by the copyright'.

The term 'copyright work' is defined under s 1 CDPA as: (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films or broadcasts, and (c) the typographical arrangement of published editions.

Neighbouring Rights: Under the CDPA, sound recordings and broadcasts are defined as 'copyright work'; accordingly, producers and broadcasters are also protected as 'copyright owners'. The rights in performances granted to the performers are set forth under pt II of the CDPA.[481] It is a set of *sui generis* rights.[482] Significant additions are also provided in the *Duration of Copyright and*

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479 The updated text of the Act in relation to copyright is available at: the Intellectual Property Office <http://www.ipo.gov.U.K./cdpact1988.pdf> at 17 April 2010.

480 See generally, Kevin Garnett, Jonathan Rayner James and Gillian Davies, *Copinger and Skone James on Copyright* (14th ed, 1999) 389.

481 Under s 180(2) of the *Copyright, Designs and Patents Act 1988* (UK), 'performance' is defined as 'a live performance given by one or more individuals' which includes: (a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation.

482 Sterling, above n 265, 205. Chapter II of pt II of the *Copyright, Designs and Patents Act 1988* (UK) under the title 'Economic Rights' contains statutory protection for performers against certain acts they have not consented to, for instance, consent required for recording and of live performance (s 182); consent required for copying of recording (s 182A); consent required for

Rights in Performances Regulations 1995 and the *Copyright and Related Rights Regulations 1996*.[483]

Exceptions and Limitations: The acts permitted in relation to copyright works notwithstanding the subsistence of copyright are set forth under ch III of pt I of the CDPA. These acts include, for instance, making of temporary copies in s 28A; or the acts done for the purpose of research and private study in s 29, criticism, review and news reporting in s 30; incidental inclusion of copyright material in s 31; making a single accessible copy for personal use in s 31A; multiple copies for visually impaired persons in s 31B; intermediate copies and records in s 31C; acts done in relation to education in ss 32-36A, copying by librarians and archivists in ss 37-44A, acts done for public administration in ss 45-50C, and other acts permitted in relation to databases in s 50D etc. The CDPA also contains a number of compulsory licensing provisions, including, for example, ss 73, 93B, 93C, 118-120, 142, and the Copyright Tribunal has the statutory role of setting prices for access to copyright works under all compulsory licensing provisions.[484] In addition, sch 2 of the CDPA contains a set of permitted acts in relation to rights in performances.

3.3.3 *COPYRIGHT ACT 1968* (CTH) OF AUSTRALIA

In Australia, the economic rights conferred on copyright owners are set forth in the *Copyright Act 1968* (Cth) s 31 (for literary, dramatic or musical works) and ss 85-88 (for subject-matter other than works).

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issue of copies to public (s 182B); consent required for rental or lending of copies to public (s 182C); consent required for making available to the public (s 182CA); and a right to equitable remuneration for exploitation of sound recording (s 182D). Moreover, infringement of performer's rights by use of recording made without consent and infringement of performer's rights by importing, possessing or dealing with illicit recording are dealt with under ss 183 and 184 of the *Copyright, Designs and Patents Act 1988* (UK).

483 See further, Garnett, James and Davies, above n 480, 655-98.

484 For further discussion on compulsory licensing system in the UK and US, see T Gallagher, *Copyright, Compulsory Licensing and Incentives* (2001) Oxford Intellectual Property Research Centre Working Paper Series <http://www.oiprc.ox.ac.UK/EJWP0201.pdf> at 2 February 2010.

The formulation of economic rights is set out in accordance with the categorisation of subject matter protected under the *Act*. The categories of subject matter described in the *Act* are an exhaustive statement of the material protectable. A list of specific economic rights is provided for authors or producers of the material of each category.

The economic rights subsisting in *literary, dramatic or musical work*s are defined as the exclusive right to do all or any of the following acts:

- **to reproduce** the work in a material form – s 31(1)(a)(i);
- **to publish** the work – s 31(1)(a)(ii);
- **to perform** the work in public – s 31(1)(a)(iii);
- **to communicate** the work to the public – s 31(1)(a)(iv);
- **to make an adaptation** of the work – s 31(1)(a)(vi);
- in the case of a work other than a computer program, **to enter into a commercial rental arrangement** in respect of the work reproduced in a sound recording – s 31(1)(c); and
- in the case of a computer program, **to enter into a commercial rental** arrangement in respect of the program – s 31(1)(d) and ss (31)(3), (5), (7).

In the case of an *artistic work*, the economic rights include the right to do all or any of the following acts:

- **to reproduce** the work in a material form – s 31(b)(i);
- **to publish** the work – s 31(b)(ii);
- **to communicate** the work to the public – s 31(b)(iii).

Neighbouring Rights: The economic rights subsist in subject matter other than works are defined under pt IV of the *Copyright Act 1968* (Cth).

In the case of a *sound recording*, copyright is the exclusive right to do all or any of the following acts:

- **to make a copy** of the sound recording – s 85(a);
- **to cause the recording to be heard in public** – s 85(b);
- **to communicate** the recording to the public – s 85(c);
- **to enter into a commercial rental arrangement** in respect of the recording – s 85(d).

In the case of a *cinematograph film*, copyright is the exclusive right to do all or any of the following acts:

- **to make a copy** of the film – s 86(a);
- **to cause the film**, in so far as it consists of visual images, **to be seen in public**, or, in so far as it consists of sounds, **to be heard in public** – s 86(b);
- **to communicate** the film to the public – s 86(c).

Economic rights subsist in *television broadcasts* and *sound broadcasts* are defined under s 87 as the exclusive right:

- in the case of a television broadcast in so far as it consists of visual images – **to make a cinematograph film of the broadcast, or a copy of such a film** - s 87(a);
- in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds – **to make a sound recording of the broadcast, or a copy of such a sound recording** - s 87(b); and
- in the case of a television broadcast or of a sound broadcast – **to re-broadcast it or communicate it to the public otherwise than by broadcasting it** - s 87(c).

The *Published editions of works* are described as a separate subject matter in which copyright subsists as the exclusive right to make a facsimile copy of the edition.[485]

Exceptions and Limitations: In Australia, the balancing of interests is:

> not expressly stated as a principle in the *Copyright Act 1968*, but it is apparent from the Act's structure which establishes limits to the scope of copyright as well as numerous exceptions to the copyright owner's exclusive rights and provides for certain uses of copyright material that cannot be forbidden by the copyright owner as long as the users pays compensation for such use.[486]

The limitations and exceptions can generally be categorised as fair dealing, specific royalty-free exceptions and statutory licences.[487]

The fair dealing provision under Australian law applies to all subject matter but are confined to the doing of acts for several specific purposes, including research or study in ss 40 and 103C, criticism or review in ss 41 and 103A, parody or satire in s 41A, reporting news in ss 42 and 103B, judicial proceedings or the giving of professional advice in ss 43 and 104. Therefore, the fair dealing defences under the Australian law comprise a narrowly-drafted range compared to the fair use doctrine under US law. Other conditionally permitted acts include temporary reproductions in ss 43A, 43B, 111A and 111B, performing, broadcasting, etc.[488]

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485 *Copyright Act 1968* (Cth) s 88.

486 Fitzgerald and Fitzgerald, above n 11, 166.

487 Ibid 167. For a comprehensive summary of the existing limitations and statutory licences in the Australian copyright law, see, *Fair Use and Other Copyright Exceptions: An Examination of Fair use, Fair Dealing and other Exceptions in the Digital Age*, Australian Attorney-General Issues Paper (2005).

488 See further, *Copyright Act 1968* (Cth) pt III: div 3 (Acts not constituting infringements of copyright in works); div 4 (Acts not constituting infringements of copyright in literary, dramatic and musical works); div 4A (Acts not constituting infringements of copyright in computer programs); div 4B (Acts not constituting infringements of copyright in artistic works); div 5 (Copying of works in libraries or archives); div 6 (Recording of musical works); div 7 (Acts not

In particular, compulsory licences available under the Australian copyright law include sound recording or film of a work or sound recording for the purpose of making a broadcast in ss 47(3), 70(3) and 107(3), making of records of musical works previously recorded in ss 54-64, performing published sound recordings in public in s 108, broadcasting published sound recordings in s 109, retransmission of free-to-air broadcast in pt VC, etc.[489] It is notable that the compulsory licensing scheme under the Australian law is much more extensive than is found in some other countries as it applies to educational purposes.[490]

3.4 *COPYRIGHT LAW (1990)* OF CHINA

The growth of modern copyright regime in the People's Republic of China (China) has resulted from embracing the belief of the market economy and the pursuit of foreign investment. Historically speaking, modern Chinese copyright law was transplanted from western jurisprudence and relevant international copyright treaties that effectively encourage and protect both domestic and international investments in the information industry.

Accordingly, economic rights are the core of copyright in China and the utilitarian rationale of copyright protection is also deeply rooted in Chinese copyright law. This is especially evidenced by the amendment to the *Copyright Law 1990* on 27 October 2001 (the 2001 Amendment). The 2001 Amendment leads to significant expansion of economic rights, bringing China in line with the TRIPS Agreement.

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constituting infringements of copyright in artistic works); and pt IV: div 6 (Infringement of copyright in subject-matter other than works).

489 See further, Fitzgerald and Fitzgerald, above n 11, 189-95. See also, S Ricketson and M Richardson, *Intellectual Property: Cases, Materials and Commentary* (2005) 447-62.

490 Graham Greenleaf, 'National and International Dimensions of Copyright's Public Domain (An Australian Case Study)', (2009) 6(2) *SCRIPTed*, 259, 278.

3.4.1 BRIEF HISTORY OF MODERN CHINESE COPYRIGHT LAW

The modern and systematic copyright protection for copyright in China was established after the *Copyright Law 1990 of the People's Republic of China*[491] and the following *Regulations for the Implementation of Copyright Law of the People's Republic of China* (1991)[492] (hereinafter '*Copyright Law 1990*' and '*Copyright Implementation Regulations 1991*').[493] Given the historical context, the *Copyright Law 1990* was a significant progress;[494] however, it was not in compliance with the Berne Convention in many cases.[495]

On 15 October 1992, China became a party to the Berne Convention and applied to the version of Paris 1971.[496] The State Council issued the *Provisions on the Implementation of the International Copyright Treaties* on 30 September 1992,[497] providing for detailed rules for implementing the Berne Convention and other bilateral agreements on copyright which China has concluded with foreign countries. In order to comply with WTO rules and the TRIPS Agreement, China amended the *Copyright Law 1990* on 27 October 2001 (hereinafter '2001 Amendment').[498] Accordingly, the *Copyright Implementation Regulations 1991* was replaced with the

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491 It was adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990. This law set out the modern legal framework for copyright protection in China.

492 The *Copyright Implementation Regulations 1991* was approved by the State Council on 24 May 1991, and promulgated by Decree No 1 of the National Copyright Administration on 30 May 1991. It was to specify the detailed requirements and procedures governing comprehensive issues arising from copyright protection.

493 For further introduction to the *Copyright Law 1990* and its *Implementation Regulations 1991*, see Robert Haibin Hu, *Guide to China Copyright Law Studies* (2000).

494 For further discussion on the historical development of the modern Chinese copyright legal system, see Sanqiang Qu, *Copyright in China* (2002).

495 See further, ibid 344-9.

496 See WIPO, *Treaties Database (Contracting Parties)* <http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=931C> at 14 June 2009.

497 It was promulgated on 25 September 1992 by decree no 105 of the State Council of China, and effective as of 30 September 1992.

498 The 2001 Amendment was adopted at the 24th session of the Standing Committee of the Ninth National People's Congress on 27 October 2001.

Regulation for the Implementation of the Copyright Law of the People's Republic of China 2002 (hereinafter '*Copyright Implementation Regulations 2002*').[499] The 2001 Amendment and its Implementation Regulations have significantly followed the provisions of the TRIPTs Agreement, the WCT and the WPPT, bringing Chinese copyright law in line with these international conventions.[500]

Many years before the 2001 Amendment, the Chinese courts had already handled a series of lawsuits involving unauthorised transmission of copyright works on the Internet.[501] In response to the growing challenges to judicial practices of copyright protection, the Supreme Court of China issued the *Judicial Interpretations Regarding Various Issues on the Application of Laws while Adjudicating Disputes Relating to Computer Network Copyright* in November 2000 (hereinafter 'Network Copyright Interpretations').[502] The Networks Copyright Interpretation was revised later in December 2003 and November 2006 respectively.[503]

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499 It was promulgated by decree no 359 of the State Council of China on 2 August 2002, and effective as of 15 September 2002.

500 For further discussion on the 2001 Amendment, see generally Xiaoqing Feng and Yanliang Wei, 'Internationalization of the Copyright System and the 2001 Amendment of the Copyright Law of the People's Republic of China' (2002) 5(5) *Journal of World Intellectual Property* 743; Haochen Sun, 'Re-thinking the Chinese Copyright Law in the Digital Age' (2003) 6(6) *Journal of World Intellectual Property* 895.

501 For further discussion on the lawsuits which brought dramatic challenges to Chinese copyright legal system before 2001, see generally Chiang Ling Li, 'Network Copyright Rules in the People's Republic of China' (2002) 5(2) *Journal of World Intellectual Property* 181.

502 It was adopted at the 1144th meeting of the Sentencing Committee of the Supreme People's Court on 22 November 2000, and revised on 23 December 2003, for the first time in accordance with the decision of the *Supreme People's Court Concerning the Amendment of the Interpretations of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Cases Related to Copyright Disputes over Computer Network* passed at the 1302nd session of the Sentencing Committee of the Supreme People's Court, and revised on 20 November 2006, for the second time in accordance with the decision of the *Supreme People's Court Concerning the Amendment of the Interpretations of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Cases Related to Copyright Disputes over Computer Network* (II).

503 For further discussion about this judicial interpretation and its two amendments, see generally Zhipei Jiang CJ, 'The Judicial Protection of Copyright on the Internet in the People's Republic of

However, the 2001 Amendment and its Implementation Regulations merely provide very broad provisions on the 'Communication Right', and issues such as ISPs liability, Technology Protection Measures (TPMs), Digital Rights Management (DRM) and left the enforcement of the right unresolved.[504] Meanwhile, various new information technologies and business models were appearing in the information industry sector, creating new legal challenges. In response, on the 18 May 2006, the State Council issued the *Regulations for the Protection of the Right of Communication via the Information Network* (hereinafter 'Communication Right Regulations').[505] This Regulation introduces a 'safe harbour' provision and a 'notice and take down procedure' for ISPs who provide information storage space and searches or link services,[506] and addresses the protection for DRMs, while prohibiting the circumvention of TPMs.[507] The regulation also establishes the fair use exceptions for libraries, archives, memorial museums, art galleries and nine-year compulsory education providers.[508]

China' in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 15.

504 For further discussion on the Communication Right Regulations, see generally Qian Wang, 'The New Right of Communication Through the Information Network in the People's Republic of China', in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 187; Yong Wan, 'China's Regulations on the Right of Communication Through the Information Network' (2007) 54(2-3) *Journal of the Copyright Society of the USA* 525.

505 It was made by the State Council as decree no 468, and came into effect on 1 July 2006.

506 See *Regulations on the Protection of the Right of Communication via Information Network of PRC 2006* arts 14-17.

507 See *Regulations on the Protection of the Right of Communication via Information Network of PRC 2006* arts 4-5. For further discussion on TPM protection, see generally Huijia Xie, 'The Regulation of Anti-circumvention in China', (2007) 54(2-3) *Journal of the Copyright Society of the USA* 545.

508 See *Regulations on the Protection of the Right of Communication via Information Network of PRC 2006* arts 6-8.

On 29 December 2006, China formally joined the *WIPO Copyright Treaty* (*WCT*)[509] and the *WIPO Performances and Phonograms Treaty* (*WPPT*).[510] China has now joined all the mainstream international treaties involving copyright protection and has established comprehensive digital copyright protection laws, while leaving additional issues such as the enforcement of law to central and local government.[511]

3.4.2 ECONOMIC RIGHTS

Before the 2001 Amendment, the *Copyright Law 1990* only contained one vague and general provision on economic rights granted to authors, namely rights of exploitation and remuneration.[512] By contrast, the 2001 Amendment enumerates and defines 12 economic rights in art 10(5)-(16) following a general provision which states that copyright shall include any other rights that should be enjoyed by copyright owner.[513] These provisions are strengthened and detailed under the *Regulation on the Implementation of the Copyright Law of the People's Republic of China (2002)* (Copyright Regulation 2002).

In particular, the economic rights granted to authors under the *Copyright Law 1990* of China (Amended 2001) include:

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509 See *Decision of the Standing Committee of the National People's Congress on Acceding to the WIPO Copyright Treaty* issued by the Standing Committee of the National People's Congress on 29 December 2006.

510 See ibid.

511 Enforcement of law is a problematic and critical issue due to various reasons such as local protectionism, lack of professionals, constrained budget and insufficient coordination and transparency. See generally Danny Friedmann, *Paper Tiger or Roaring Dragon* (LLM Thesis, University of Amsterdam, 2007).

512 See *Copyright Law 1990* art 10: The term 'copyright' shall include the following personality rights and economic rights: … (5) the right of exploitation and the right to remuneration, that is, the right of exploiting one's work by means of reproduction, performance, broadcasting, exhibition, distribution, making cinematographic, television or video production, adaptation, translation, annotation, compilation and the like, and the right of authorising others to exploit one's work by the abovementioned means, and of receiving remuneration therefore.

513 *Copyright Law 1990* art 10(17).

- **Right of reproduction**: It is the exclusive right to make one or more copies of a work by printing, photocopying, lithographing, making a sound recording or visual/audiovisual recording, duplicating a recording, or duplicating a photographic work or by any other means - art 10(5);
- **Right of distribution**: It is the exclusive right to make available to the public of the original or reproductions of a work though sale or other transfer of ownership - art 10(6);
- **Right of rental**: It is the exclusive right to authorise, with payment, others to temporarily use cinematographic works, works created by virtue of an analogous method of film production, and computer software, except any computer software that is not the main subject matter of rental - art 10(7);
- **Right of exhibition**: It is the exclusive right to publicly display the original or reproduction of a work of fine art and photography - art 10(8);
- **Right of performance**: It is the exclusive right to publicly perform a work and publicly broadcast the performance of a work by various means - art 10(9);
- **Right of presenting**: It is the right to show to the public a work, of fine art, photography, cinematography and any work created by analogous methods of film production through film projectors, over-head projectors or any other technical devices - art 10(10);
- **Right of broadcasting**: It is exclusive the right to publicly broadcast or communicate to the public a work by wireless means, to communicate to the public a broadcast work by wire or relay means, and to communicate to the public a broadcast work by a loudspeaker or by any other analogous tool used to transmit symbols, sounds or pictures - art 10(11);
- **Right of communication to the public via information networks (on-demand availability right)**: It is the exclusive right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them - art 10(12);

- **Right of making cinematographic work**: It is the exclusive right to fix a work on a medium through film production or by virtue of an analogous method of film production - art 10(13);
- **Right of adaptation**: It is the exclusive right to change a work to create a new work of originality - art 10(14);
- **Right of translation**: It is the exclusive right to translate a work in one language into one in another language - art 10(15);
- **Right of compilation**: It is the exclusive right to compile works or parts of works into a new work by reason of the selection or arrangement - art 10(16).

3.4.3 NEIGHBOURING RIGHTS

In China, the establishment of the legal system for neighbouring rights (or copyright-related rights) granted to performers, producers of sound or visual/audiovisual recordings, broadcasting organisations and publishing organisations is on a par with the provision of copyright protection for authors under the *Copyright Law 1990* and related implementation regulations. It is noted that art 26 of the *Copyright Regulation 2002* provides that the term 'copyright-related rights' refers to the right enjoyed by publishers as to the format design of the books and magazines published thereby, the right enjoyed by performers as to their performances, the right enjoyed by producers of sound or visual/audiovisual recordings as to their products of sound or visual/audiovisual recordings, and the rights enjoyed by radio and television stations as to the programs in their broadcasts.

Under the *Copyright Law 1990* (Amended 2001) and the *Copyright Regulation 2002*, the neighbouring rights (economic rights) accorded to performers, producers of sound or visual/audiovisual recordings, broadcasting organisations and publishing organisations include the following exclusive rights and rights to remuneration.

As the subject matter in which the neighbouring rights subsist are derived from the process of distributing, performing or exploiting a pre-existing literary, dramatic, musical or artistic work, the exercise of neighbouring rights is extensively relational with the underlying copyright in the work. Accordingly, it is required that the performers, producers, broadcasting and publishing organisations shall exercise their rights without prejudicing the legitimate rights of copyright owners.[514]

The Publishers' Rights: *The economic rights and responsibilities of publishers* provided for under *Copyright Law* arts 29-35; *Copyright Regulation* arts 26-30 include primarily the following rights:

- **Exclusive Publishing Right**: A book publisher shall have the exclusive right to publish the work delivered to him by the copyright owner for publication. The exclusive right to publish a work enjoyed by the book publisher specified in the contract shall be protected by law, and the work may not be published by others.[515]
- **Exclusive Right in typographical arrangement**: A publisher has the right to license or prohibit any other person to use the typographical arrangement of books or periodicals he has published.[516]

The Performers' Rights: *The legal rights and responsibilities of performers* are provided for under *Copyright Law* arts 36-38. It is notable that the term 'performer' refers to actors or acting entities or other persons who perform literary and artistic works under art 5(6) of the *Copyright Regulation*. The economic rights granted to performers are the exclusive rights:

- to authorize others **to make live broadcasts and public transmission** of its or his performance and to receive remuneration;[517]

[514] *Copyright Regulation 2002* art 27.

[515] *Copyright Law 1990* art 30.

[516] *Copyright Law 1990* art 35.

- to authorize others **to make sound recordings and visual recordings**, and to receive remuneration;[518]
- to authorize others **to reproduce or distribute sound recordings and visual recordings** incorporating his performance, and to receive remuneration;[519] and
- to authorize others **to communicate** his performance to the public through information network, and to receive remuneration.[520]

The Rights of Producers of Sound or Visual/Audiovisual Recordings: *The economic rights of producers of sound or visual/audiovisual recordings* are the exclusive rights to reproduce, distribute, rent and communicate to the public on through information networks such sound or visual/audiovisual recordings.[521] The term 'sound recordings' is defined as the recordings of any sounds performed or other sounds,[522] and 'visual/audiovisual recordings' is defined as recordings of a series of related images or pictures, with or without accompanying sounds, other than cinematographic works and works that are created by ways similar to making movies.[523]

The Rights of Broadcasters: *The economic rights granted to a radio station or television station* are the exclusive right to rebroadcast its broadcast radio or television program;[524] and the exclusive right to fix its broadcast radio or television program into aural or visual medium and to reproduce the fixations.[525]

3.4.4 LIMITATIONS AND EXCEPTIONS

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517 *Copyright Law 1990* art 37(3).
518 *Copyright Law 1990* art 37(4).
519 *Copyright Law 1990* art 37(5).
520 *Copyright Law 1990* art 37(6).
521 *Copyright Law 1990* art 41.
522 *Copyright Regulation 2002* art 5(2).
523 *Copyright Regulation 2002* art 5(3).
524 *Copyright Law 1990* art 44(1).
525 *Copyright Law 1990* art 44(2).

No such term as ‘fair use’, ‘fair dealing’ or ‘compulsory licence’ can be found in the text of the copyright law of China. By contrast, it is formulated as ‘limitations on rights’ under the s 4 of ch 2 of the *Copyright Law of China* (revised 2001), and is set forth in detail with the wording such as ‘the use is permitted without consent from and without compensation paid to copyright owners’ or ‘the use is permitted without consent from but with compensation paid to copyright owners’.[526] Additionally, the ‘three-step test’ is not explicitly specified under Chinese copyright law; however, a similar provision can be seen in art 21 of the *Copyright Implementation Regulations 2002*.[527]

Fair Use: The use permitted without having to obtain copyright owners’ authorisation and without having to pay remuneration is referred to by scholars as ‘fair use’ or ‘reasonable use’.[528] Chinese copyright law does not provide a general rule governing such permitted free use; alternatively, 12 conditions that may amount to such use are enumerated under the law, and another 8 conditions are listed under the *Communication Right Regulations 2006*.

Under art 22 of the *Copyright Law of China* (revised 2001), it is stated as below:

> In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced:
>
> (l) use of a published work for the purposes of the user's own private study, research or self-entertainment;

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526 See, for example, *Copyright Law 1990* arts 22, 23, 32, 39, 42.

527 It states as follow: ‘The exploitation of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the Copyright Law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.’

528 See, for example, Wang Qian, *Copyright Law* (2009) 197 [trans of: Zhuzuoquan Fa Xue].

(2) appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point;

(3) reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;

(4) reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted;

(5) publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;

(6) translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;

(7) use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;

(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work;

(9) free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;

(10) copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;

(11) translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country; and

(12) transliteration of a published work into Braille and publication of the work so transliterated.

The above limitations on rights shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

Article 6 of the *Communication Right Regulations 2006* provides:

Under any of the following circumstances, works may be provided through the information network, and the provider may be exempted from obtaining the owner's permission as well as paying the relevant remunerations thereto:

(1) Where an appropriate portion of any published work is quoted in the works one provides to the general public for the purpose of introducing or commenting on any work or elaborating any issue;

(2) Where it is inevitable to reproduce or quote any published work in the works he provides to the general public for the purpose of making any new release;

(3) Where, in order to support the teaching research or scientific research, a small quantity of published works are provided to some people who engage in teaching or scientific research;

(4) Where any state organ provides to the general public any published work within a reasonable range for the purpose of exercising its functions and duties;

(5) Where the works as already published by any Chinese citizen, legal person or any other organization in Chinese are translated into any language of any minority ethnic group and are provided to such people within the territory of China;

(6) Where any already published work is provided to the blind in a way as particularly perceptible to the blind and not for the purpose of making profits;

(7) Where any Article on current affairs such as political and economic issues that has been published is provided through the information network; or

(8) Where a speech as delivered in a public gathering is provided to the general public.

Compulsory (Statutory) Licences: Likewise, the use permitted without consent from but with compensation paid to copyright owners is referred to as 'statutory licensing' by scholars.[529]

The use without having to obtain authorisation but with payment of compensation to copyright owners is set forth under the following provisions of the Chinese copyright law.

> **Article 23**
>
> In compiling and publishing textbooks for implementing the nine-year compulsory education and the national educational program, parts of published works, short written works, music works or single copies of works of painting or photographic works may be compiled into textbooks without the authorization from the authors, except where the authors have declared in advance the use thereof is not permitted, with remuneration paid according to the regulations, the name of the author and the title of the work indicated and without prejudice to other rights enjoyed by the copyright owners according to this Law.
>
> **Article 32**
>
> …
>
> Except where the copyright owner has declared that reprinting or excerpting is not permitted, other newspaper or periodical publishers may, after the publication of the work by a newspaper or periodical, reprint the work or print an abstract of it or print it as reference material, but such other publishers shall pay remuneration to the copyright owner as prescribed in regulations.
>
> **Article 39**
>
> …
>
> A producer of sound recordings who exploits a music work another person has duly made into a sound recording to produce sound recordings, may not obtain permission

[529] See, for example, ibid 223.

from, but shall pay remuneration to the copyright owner as prescribed by regulat1ons, such Work shall not be exploited where the copyright owner has declared that such exploitation is not permitted.

Article 42

…

A radio station or television station that broadcasts a published work created by another person does not need a permission from, but shall pay remuneration to, the copyright owner.

Article 43

…

A radio station or television station that broadcasts a published sound recording, does not need a permission from, but shall pay remuneration to, the copyright owner, except that the interested parties have agreed otherwise. The specific procedures for treating the matter shall be established by the State Council.

Two additional statutory licences are set out under the *Communication Right Regulations 2006*:

Article 8

Where the nine-year compulsory education or state education planning is implemented through the information network, the owner's permission may be absent in using fragments of works, short written works or musical works, a single work of fine art, or photographic works to produce courseware; the long-distance education institutions that have produced the courseware or acquired courseware according to law may provide such courseware to the registered students through information networks but shall pay relevant remuneration to the copyright owner.

Article 9

In order to alleviate poverty, where any work on planting and breeding, disease prevention and cure, disaster prevention and relief as well as the works that meet the basic cultural demands is published by Chinese citizens, legal persons or other

organizations to the general public in the rural areas, a network service provider shall announce in advance the upload of such works to the network as well as the authors and remunerations thereof before they are actually uploaded. Within 30 days as of announcement, where a copyright holder refuses to provide his works, a network service provider shall not provide his works. Where 30 days elapse as of announcement and if the copyright holder has no different opinion, the network service provider may provide his works and pay the corresponding remunerations to the copyright holder in light of the announced rates. After a network service provider provides any work and if the relevant copyright holder disagrees to the upload, the network service provider shall immediately delete the copyright holder's works and pay the relevant remunerations corresponding to the display period of the copyright holder's works in light of the relevant announced rates.

As for the works as provided according to the provisions of the preceding paragraph, no economic benefit may be directly or indirectly obtained.

3.5 SUMMARY

This chapter has outlined the regime of the authors' exclusive rights under the international conventions and domestic legislation of the U.S., the U.K., Australia and China. It has found that the minimum levels of protection required by the international treaties are implemented in diverse ways under the domestic law of different jurisdictions. Although the differences of the formulation of the economic rights in domestic legislation are apparent, the challenges that a specific country has experienced might exist in other jurisdictions.

The past decades have witnessed increasing tension between the existing legal framework and the rise of the civic engagement in cultural creation. The tension has showed us that copyright law needs to be updated and the reality needs to be recognised. Scholars have been aware of that and academic responses have been

made by professors such as Lawrence Lessig,[530] Jessica Littman,[531] and William Fisher.[532] Law makers, only recently, respond to the appeals from users and academics, and have endeavoured to produce some legislative move.[533] In the next two chapters, this thesis will examine the major problems that are brought about by the tension.

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530 See generally, Lawrence Lessig, *Free Culture: the Nature and Future of Creativity* (2005); Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, above n 124.

531 See generally, Litman, above n 103.

532 See generally, Fisher, above n 104.

533 For instance, the German and European factions of the Green Party commissioned a legal feasibility study about file-sharing and have promised to make the 'culture flat-rate'. See further, Volker Grassmuck, *The World Is Going Flat(-Rate)* (2009) Intellectual Property Watch <http://www.ip-watch.org/weblog/2009/05/11/the-world-is-going-flat-rate/> at 9 June 2009.

CHAPTER 4

THE RIGHT OF DISSEMINATION *VS* ACCESS TO KNOWLEDGE

INTRODUCTION

AIM

This chapter aims to draw attention to the expansion of copyright in the digital age and its increasing tensions with the potential of the new infrastructure for public access to knowledge. The copyright war against online piracy is worldwide; however this chapter argues that it is a losing battle for all. This chapter proposes to reconsider the exclusivity of authors' economic rights in relation to the public dissemination of works, particularly in the online digital environment.

SCOPE

Copyright originated from the right to authorise or stop others making copies of written works.[534] Under the 1709 *Statute of Anne*, what was granted to authors and purchasers of printed books was the right to the printing and reprinting of the books.[535] At that time printing and reprinting were the most significant acts upon which the business of the publishers and book dealers relied, and normal use by readers had nothing to do with making copies. For instance, it was unnecessary to make copies in order to read a book, to borrow a book from a library, or to share a

[534] Paul Goldstein, *Copyright's Highway: from Gutenberg to the Celestial jU.K.ebox* (revised ed, 2003) 1-2.

[535] See generally L Ray Patterson, *Copyright in Historical Perspective* (1968); Deazley, *On the Origin of the Right to Copy*, above n 252.

book with families, neighbours and friends. However, things have changed. In the digital environment, each use would inevitably result in making permanent or temporary copies.[536] Most notably, sharing has always been desirable; but, sharing in the digital environment would lead to making copies as well, and even amount to distribution or communication to the public.

This chapter examines the significant expansion of copyright in the Internet-based media age, through the establishment of a broader communication right at both international and national levels. The worldwide copyright war against online piracy and P2P file-sharing is illustrative of the increasing tensions between the expansive copyright and the needs of the users. The copyright war makes no one a winner; however, the potential of this digital age is unprecedented and could have afforded a win-win world if the law had responded properly. This chapter traces the emerging practices and initiatives that address the increasing conflicts between the law and the expectations of the users. As sharing of ideas is always desired and access to knowledge is always justified, the market has developed a few solutions; meanwhile academics have also made many proposals.

The importance of information flow and access to knowledge underlined by evolutionary economics has great significance for the construction of the rights of copyright. Encouraging learning and facilitating the wide spread of knowledge should be the ultimate purpose of copyright law. To this end, this chapter concludes that the decentralised information distribution model empowered by the participative web infrastructure should be accommodated and supported by the law. It is thus argued that the increasing exclusivity of copyright should be recalibrated in order to

[536] For further discussion on the making of copies and its impacts on reproduction right, see generally Jaap H Spoor, 'The Copyright Approach to Copying on the Internet: (Over) Stretching the Reproduction Right?' in P Bernt Hugenholtz (ed), *The Future Of Copyright In A Digital Environment* (1996) 67.

maintain a more sensible balance between incentivising creativity and facilitating public access to knowledge.

4.1 EXPANSIVE RIGHTS OF PUBLIC DISSEMINATION

Since the advent of the digital age, the exclusive rights to disseminate works to the public have expanded significantly. Looking at the subsequent copyright wars, people may wonder whether the expansion is appropriate.

4.1.1 ECONOMIC RIGHTS IN THE DIGITAL ENVIRONMENT

In response to the challenges raised by the new means of transmission of works in the digital age, the provisions of exclusive rights have undertaken significant reform particularly under international conventions. Following the 1967 Stockholm Act that established a comprehensive exclusive right of reproduction in the Berne Convention,[537] the WCT clarified further that the reproduction right should 'fully apply in the digital environment, in particular to the use of works in digital form'.[538] By contrast, the right of distribution merely subsists in 'fixed copies that can be put into circulation as tangible objects';[539] therefore, it appears that the distribution right is not applicable in the digital environment in the language of the Convention. Instead, to deal with the transmission of works on the Internet and in similar networks, the WCT has articulated a broad communication right.[540] In correspondence with the WCT, the WPPT also recalibrated the reproduction right, distribution right and communication right in relation to performers and phonogram producers.

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[537] See *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 9 (entered into force 6 June 1982).

[538] See WCT, Agreed statements concerning Article 1(4).

[539] See WCT, Agreed statements concerning Articles 6 and 7.

[540] See WCT, art. 8.

This 'umbrella solution' articulated under the abovementioned international conventions is implemented in various ways under the domestic copyright law of different countries. Accordingly, national laws differ substantially in their approaches to categorise and formulate these exclusive rights. For instance, as raised in an IViR report:

> under some laws the distribution of tangible copies is part of a wider right of 'communication to the public', whereas in other countries it is included in the reproduction right, or dealt with separately. Similarly, 'making available' may be part of the right of 'communication to the public' (or public performance right), whereas in other countries 'making available' is the overarching term.[541]

A. The U.S. Approach

In early 1990s, the US studies on the issue of the adaptation of the copyright system to the digital networked environment were the most advanced and their impacts on the preparation of the World Intellectual Property Organization (WIPO) 'Internet Treaties' were particularly significant.[542]

The Working Group on Intellectual Property Rights of the Information Infrastructure Task Force officially released its report on intellectual property rights in September 1995. The report was widely known as the 'White Paper', under the title 'Intellectual

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[541] IViR, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (2006) 41-3, <http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf> at 2 February 2010.

[542] For further discussion on the US's impact on the establishment of the international copyright system in the digital age, see generally Mihály Ficsor, 'The WIPO "Internet Treaties" the United States as the Driver: the United States as the Main Source of Obstruction — As Seen by an Anti-Revolutionary Central European' (2006) 6(1) *John Marshall Review of Intellectual Property Law* 17.

Property and the National Information Infrastructure'.[543] The Working Group admitted that the right to distribute copies or phonorecords of a work had traditionally covered the right to convey a possessory interest in a tangible copy of the work,[544] and it was not clear that a transmission in digital environment could constitute a distribution.[545] The Working Group suggested that the existing US copyright regime could handle the new condition without creating any new right. It argued in the 'White Paper' that 'as a result of technological developments, the distribution right can be exercised by means of transmission'.[546] Nevertheless, the Working Group was aware that 'these transmissions will clearly constitute exercise of the public performance right'.[547] The Working Group also examined the potential interplay between the distribution right and the publication right. It proposed that '[j]ust as not all distributions of copies by transmission will constitute distributions to the public (and fall within the distribution right), not all transmissions of copies will constitute publication.'[548]

In August 2001, the U.S. Copyright Office issued a 'DMCA Section 104 Report'. The office acknowledged in the report that '[w]e are not aware of any country other than the United States that has implemented the making available right through application of a combination of the distribution, reproduction, public performance and public display rights.'[549]

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543 US Information Infrastructure Task Force Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995) <http://www.uspto.gov/web/offices/com/doc/ipnii/> at 2 February 2010.

544 Ibid 68-9.

545 Ibid 213.

546 Ibid 213-14.

547 Ibid 222.

548 Ibid 220.

549 US Copyright Office, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act* (2001) 94-5, <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf > at 2 February 2010.

B. The U.K. Approach

As mentioned in s 3.3.3 of this thesis, the international obligations under the WCT and WPPT are implemented into the U.K. CDPA through the *Copyright and Related Rights Regulations 2003* ('Regulations') in 2003.[550]

Reproduction Right: The reproduction right under s 17 of the CDPA was left unaffected by the Regulations. The s 17 contains detailed clarification on the meaning of 'copying'.[551]

Making of temporary copies is not an infringement on the reproduction right if it is transient or incidental and is an integral and essential part of a technological process and the sole purpose of which is to enable – (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work.; additionally, it has no independent economic significance.[552]

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[550] For a comprehensive study on the implementation of the WCT and WPPT through the Directive 2001/29/EC in EU member states, see Guido Westkamp, *Implementation of Directive 2001/29/EC in the Member States', Part 2 of IViR Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (1991) European Commission, the EU Single Market <http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm> at 2 February 2010.

[551] Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form, which includes storing the work in any medium by electronic means (*Copyright, Designs and Patents Act 1988* (UK) s 17(2)); In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work (*Copyright, Designs and Patents Act 1988* (UK) s 17(3)); Copying in relation to a film or broadcast includes making a photograph of the whole or any substantial part of any image forming part of the film or broadcast (*Copyright, Designs and Patents Act 1988* (UK) s 17(4)); Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement (*Copyright, Designs and Patents Act 1988* (UK) s 17(5)). In addition, copying in relation to any work includes the making of copies which are transient or are incidental to some other use of the work (*Copyright, Designs and Patents Act 1988* (UK) s 17 (6)).

[552] *Copyright, Designs and Patents Act 1988* (UK) s 28A.

Additionally, a parallel provision on the making of temporary copies of a recording of a performance can be found in s 1A of sch 2 of the CDPA.

The Right to Issue Copies to the Public: The distribution right is formulated as the right to issue copies to the public under s 18 CDPA. This provision also contains the 'exhaustion principle' or 'first sale doctrine' for the subsequent distribution of the work.[553] The Regulations also left this provision unaffected because the traditional interpretation of the right to issue copies to the public always concerned the distribution of tangible copies merely.[554]

Communication Right: The Regulations introduced into the CDPA, a public communication right by electronic transmission. The communication right, under the new s 20(1),[555] subsists in: (a) a literary, dramatic, musical or artistic work, (b) a sound recording or film, or (c) a broadcast. Section 20(2) clarifies further that the general heading of a public communication right by electronic transmission is composed of two rights: (i) broadcasting right, and (ii) making available right.

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553 *Copyright, Designs and Patents Act 1988* (UK) s 18(3) sates as follow:
References in this Part to the issue to the public of copies of a work do not include-
any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 18A: infringement by rental or lending), or
any subsequent importation of such copies into the United Kingdom or another EEA state,
except so far as paragraph (a) of subsection (2) applies to putting into circulation in the EEA copies previously put into circulation outside the EEA.

554 Westkamp, above n 550.

555 *Copyright, Designs and Patents Act 1988* (UK) s 20 (Infringement by communication to the public) states as follow:
(1) The communication to the public of the work is an act restricted by the copyright in -
(a) a literary, dramatic, musical or artistic work,
(b) a sound recording or film, or
(c) a broadcast.
(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include -
(a) the broadcasting of the work;
(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

The scope of the 'broadcasting right' is essentially subject to the definition of 'broadcast'. The Regulations substantially modified the meaning of 'broadcast' and the modification can be found in s 6 of the CDPA.[556] It is argued that '[t]he interplay

[556] *Copyright, Designs and Patents Act 1988* (UK) s 6 (Broadcasts) states:

In this Part a "broadcast" means an electronic transmission of visual images, sounds or other information which –

is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or

is transmitted at a time determined solely by the person making the transmission for presentation to members of the public, and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly.

(1A) Excepted from the definition of "broadcast" is any internet transmission unless it is –

a transmission taking place simultaneously on the internet and by other means,

a concurrent transmission of a live event, or

a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

An encrypted transmission shall be regarded as capable of being lawfully received by members of the public only if decoding equipment has been made available to members of the public by or with the authority of the person making the transmission or the person providing the contents of the transmission.

References in this Part to the person making a broadcast or a transmission which is a broadcast are

to the person transmitting the programme, if he has responsibility to any extent for its contents, and

to any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission;

and references in this Part to a programme, in the context of broadcasting, are to any item included in a broadcast.

For the purposes of this Part, the place from which a wireless broadcast is made is the place where, under the control and responsibility of the person making the broadcast, the programme-carrying signals are introduced into an uninterrupted chain of communication (including, in the case of a satellite transmission, the chain leading to the satellite and down towards the earth).

(4A) Subsections (3) and (4) have effect subject to section 6A (safeguards in case of certain satellite broadcasts).

References in this Part to the reception of a broadcast include reception of a broadcast relayed by means of a telecommunications system.

(5A) The relaying of a broadcast by reception and immediate re-transmission shall be regarded for the purposes of this Part as a separate act of broadcasting from the making of the broadcast which is so re-transmitted.

between s 6 and 20, as regards the status of broadcasters as right owners, results essentially in the grant of an extensive web-casting right vested in broadcasting organisations', and '[t]his will cause conflicts in relation to the envisaged WIPO Broadcasting Treaties where web casting has now been struck off'.[557]

In addition, performers are conferred the right to authorise or prohibit the making available to the public of a recording of their performance under s 182CA.[558]

C. The Australian Approach

In order to update Australia's copyright regime to meet the challenges raised by the rapid development of new information technologies, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (the CADA)[559] implemented major reforms to the *Copyright Act 1968* (Cth). The CADA created a new broadly-based, technology-neutral right of communication to the public which is an exclusive right in literary, musical, artistic and dramatic works, sound recordings, films and broadcasts.[560] The new right replaced the former rights of broadcasting (wireless transmissions) and transmission to subscribers to a diffusion service (wired transmissions).[561]

Copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast.

557 Westkamp, above n 550, 442.

558 *Copyright, Designs and Patents Act 1988* (UK) s 182CA states as follow:

Consent required for making available to the public

A performer's rights are infringed by a person who, without his consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them.

The right of a performer under this section to authorise or prohibit the making available to the public of a recording is referred to in this Chapter as "making available right."

559 See, *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

560 See *Copyright Act 1968* (Cth) ss 10(1), 22(6), 22(6), 25.

561 See further, Ricketson and Richardson, above n 489, 371-8.

It is similar with the UK approach in the sense that the communication right under Australian law also comprises two exclusive rights: (i) a technology-neutral right of electronic transmission; and (ii) the right of making available online. Under s 10(1) of the current Australian law, the term 'communicate' is widely defined as 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.'[562] But the new right 'does not, however, cover the physical distribution of copyright material in a tangible form (such as the distribution of hard copies of books)'.[563]

The right to communicate to the public subsists in broad subject matters, including literary, dramatic or musical works,[564] artistic work,[565] sound recordings,[566] cinematograph films,[567] and television and sound broadcasts.[568]

In terms of the distribution right, copyright owners are not granted a general right to control the distribution of their works or other subject matter under Australian copyright law. The notion of this distribution right, as Ricketson pointed out, is 'generally alien to the Anglo-Australian copyright tradition, where care has usually been taken to distinguish between copyright as an incorporeal right and rights in the actual copyright article itself.'[569] In order to exert control over the distribution of their copyrighted works, copyright owners have to rely on their exclusive rights to

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562 See *Copyright Act 1968* (Cth) s 10(1).

563 Australia Attorney-General's Department, *Copyright Amendment (Digital Agenda) Act 2000 Fact Sheet* (2006) <http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_CopyrightAmendment(DigitalAgenda)Act2000factsheet-2001> at 3 February 2010.

564 *Copyright Act 1968* (Cth) s 31(1)(a)(iv).

565 *Copyright Act 1968* (Cth) s 31(1)(b)(iii).

566 *Copyright Act 1968* (Cth) s 85(1)(c).

567 *Copyright Act 1968* (Cth) s 86(c).

568 *Copyright Act 1968* (Cth) s 87(c).

569 See further, S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Design and Confidential Information* (updated 2009) 9.450.

reproduce, first publish, broadcast or communicate to the public. Nevertheless, they are given the right to prevent the distribution of infringing copies of their copyrighted works or other subject matter.[570]

D. The Chinese Approach

Copyright Law 1990 of China (amended 2001) contains a general communication right in works, performances, and audio or audio-visual productions. The right was clarified further by the *Regulations for the Protection of the Right of Communication via the Information Network* ('Communication Right Regulations').[571]

Distribution Right: Under art 10(5) of the Chinese copyright law, the reproduction right is defined as the right to produce one or more copies of a work by such means as printing, photocopying, lithographing, making a sound recording or visual/audiovisual recording, duplicating a recording, or duplicating a photographic work, and so forth.[572] The enumeration of the acts of reproducing is merely illustrative and is not exhaustive. Performers are also conferred the exclusive right to reproduce their performances fixed in sound recordings and video recordings.[573] Likewise, producers of sound or visual/audiovisual recordings and broadcasting organisations are granted a reproduction right under specific conditions.[574]

Since the acts of reproducing are enumerated in an illustrative and non-exhaustive manner, this provision should cover all new forms of reproduction.[575] Therefore, transforming a work into a digitised product constitutes a production, and making copies in the digital environment should also fall within the ambit of the

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570 See further, B Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law and Policy* (2007) 166-7.

571 It was made by the State Council as decree no 468, and came into effect on 1 July 2006.

572 *Copyright Law 1990 of China* (amended 2001) art 10(5).

573 *Copyright Law 1990 of China* (amended 2001) art 37(5).

574 *Copyright Law 1990 of China* (amended 2001) art 41, 44(2).

575 See further, Yang Li, *Intellectual Property Law in the Cyberspace* (Wangluo Zhishi Chanquan Fa, 2002 ed) 62 [trans of: Wangluo Zhishi Chanquan Fa].

reproduction right.[576] Due to the fact that temporary reproduction remains controversial at the international level, the 2001 amendment remains silent on this issue. Given that the Chinese delegation stood on the opposition side of a broader reproduction right,[577] temporary reproduction is very unlikely to find any space in the scope of the right of reproduction under Chinese law.

Distribution Right: Under the *Copyright Law 2001* of China, distribution right is defined as the right to make available to the public the original or reproductions of a work through sale or bestowal.[578] 'Sale or bestowal' means the transfer of ownership of the copy of a work. The law does not explicitly state that the distribution right is limited to tangible objects (physical copies of works). However, given the context in which this provision is situated, the distribution right should merely apply to physical copies of works and it is not applicable in the digital environment.[579] This definition is therefore in compliance with international conventions.

It is notable that the meaning of 'distribution' in copyright law differs essentially from that used in publishing industries and from the understanding of many Chinese people. The word 'distributing' is frequently combined with 'publishing', and therefore is understood as a general act of making available to the public, including transmitting works in the digital environment. As a result, confusion and inconsistency between copyright law and other laws can be found,[580] which result in particular difficulties for enforcing the provisions on the communication right.[581]

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[576] See further, Sun, 'Re-thinking the Chinese Copyright Law in the Digital Age', above n 500, 901-2.

[577] See further, WIPO, *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Geneva, 1996* (1999) 628.

[578] *Copyright Law 1990 of China* (amended 2001) art 10(6).

[579] Qian Wang, 'On the Concept of "Distribution" in the Meaning of China Copyright Law' (trans of: Lun Zhuzuoquan Yiyi Shang De "Faxing", 2008 ed) 65 [trans of: *Zhishi Chanquan*].

[580] For example, variations can be seen in: the *Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling*

Communication Right: The communication right is set out in art 8 of the WCT, plus arts 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention. (It is a very broad set of exclusive rights, governing any act of communication to the public of a given work, including making available to the public by wire or wireless means which can be interactive or non-interactive.

This provision is implemented under the Chinese copyright law through: (a) extending the existing right, and (b) creating a new exclusive right, namely the right of communication through an information networks (on-demand availability right). The 2001 Amendment sets forth the following rights in regard to disseminating works to the public by means of point-to-multipoint communication (non-interactive): the right of exhibition,[582] the right of performance,[583] the right of presentation,[584] and the right of broadcasting.[585] The dissemination of works by means of point-to-point communication (interactive) is covered by a new provision under the 2001 Amendment. Article 10(12) defines the right of communication through information networks as the right to make a work available to the public in such a way that members of the public may access the work from a place and at a

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Criminal Cases of Infringing Intellectual Property (adopted at the 1331st Session of the Judicial Committee of the Supreme People's Court on 2 November 2004 and the 28th Session of the 10th Procuratorial Committee of the Supreme People's Procuratorate on 11 November 2004 and to be effective as of 22 December 2004), and the *Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II)* (adopted on 4 April 2007, at the 1422nd Session of the Judicial Committee of the Supreme People's Court and the 75th Session of the 10th Procuratorial Committee of the Supreme People's Procuratorate, and to be effective on 5 April 2007).

581 See Wang, 'On the Concept of "Distribution" in the Meaning of China Copyright Law', above n 579, 65.

582 *Copyright Law of China 1990* (amended 2001) art 10(8). However, neither Berne Convention nor the WCT sets forth the exhibition right.

583 *Copyright Law of China 1990* (amended 2001) art 10(9).

584 *Copyright Law of China 1990* (amended 2001) art 10(10).

585 *Copyright Law of China 1990* (amended 2001) art 10(11).

time individually chosen by them. It is obvious that this provision essentially implements the second half the art 8 of the WCT.

The approach adopted by the Chinese law, unlike the WCT art 8, is not technology-neutral. While revising the *Copyright Law 1990*, the Chinese law makers did not sufficiently take into account the convergence of the Internet, the broadcasting networks and the telecommunication networks. Consequently, the law might fail to accommodate the application of the Internet for non-interactive broadcasting. Whether the transmission of works by means of live media stream on the Internet fall within the ambit of the 'network communication right' or the 'broadcasting right' is arguable.

For instance, the opinions of the courts in *Ningbo Chenggong Multimedia Communication Ltd v Beijing Shiyue Network Technology Ltd* (hereinafter 'Shiyue case') [586] are particularly controversial. The defendant offered unauthorised streaming of a copyrighted work (TV drama) in a live manner on its website (www.uusee.com), and thus was sued for infringing the network communication right. The defendant argued that the TV drama was streamed live but not on-demand. Live streaming which is not interactive does not constitute 'communication to the public through information network'. This argument was supported neither by the court at first instance nor by the court of appeal. Both courts held that making a work available to the public online without authorisation amounted to infringement of the right of communication through information network, even though the work was played in a live manner.

[586] See Beijing Haidian District People's Court Civil Judgment [(2008) Hai Min Chu Zi No 4015], issued on 10 January 2008, and Beijing No 1 Intermediary People's Court Civil Judgment [(2008) Yi Zhong Min Zhong Zi No 5314], issued on 5 June 2008.

The judgments were criticised by many copyright scholars who supported the defendant's argument.[587] It is argued that the communication right under Chinese law merely governs interactive communication and on-demand services.[588] Live streaming of a work is not on-demand in nature so it does not fall within the ambit of the communication right under Chinese copyright law.

Live streaming cannot fall within the scope of the broadcasting right either. This is because the broadcasting right is confined to: (i) traditional wireless broadcasting of a work, and (ii) cable retransmission of the broadcast of the work.[589] Such definition was essentially transplanted from art 11*bis*(1) of the Berne Convention without taking into account of the advance of communication technology after the Convention.[590]

Two possible solutions are available. It is suggested that the provision of the broadcasting right of the 2001 Amendment should be revised to define the broadcasting right as the exclusive right 'to authorize any communication to the public by wire or wireless broadcasting and transmitting, or other means'.[591] Alternatively, the provisions on the right of exhibition, the right of performance, the right of presentation, and the right of broadcasting, and the right of communication via information network can be revised into a general provision covering any

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587 See Yanlai Hu, '*Improving the Legal System to Solve the Problem of Network Communication Right*' [trans of: *Wanshan Fazhi Pojie Xinxi Wangluo Chuanboquan Nanti*], Intellectual Property News of China (Beijing), 27 October 2006, (trans of: Zhongguo Zhishi Chanquan Bao, 27 October 2006), <http://www.cipnews.com.cn/showArticle.asp?Articleid=9662> at 15 June 2009.

588 Qian Wang, 'On the Meaning of the Right to Network Dissemination of Information: Also Comments on the Decision of "Chenggong Multimedia V Shiyue Company" (2008) 12 *The Application of Law* (trans of: Falv Shiyong) 64 [trans of: *Lun 'Wangluo Chuanbo Quan' De Hanyi: Jianping 'Chenggong Duomeiti Su Shiyue Gongsi An' Yishen Panjue*].

589 See *Copyright Law of China 1990* (amended 2001) art 10(11).

590 Wang, 'On the Meaning of the Right to Network Dissemination of Information: Also Comments on the Decision of "Chenggong Multimedia V Shiyue Company"', above n 588, 64.

591 Ibid.

'communicating to the public by wire or wireless means' following art 8 of the WCT.

In conclusion, with the worldwide establishment of a broader reproduction right and communication right governing the transmission of works on the Internet, the right of public dissemination of works has been dramatically extended, and correspondingly the right-owners' power to control the production and dissemination of the copies of works in the digital age has unprecedentedly been strengthened. Indeed, it has successfully brought the resilience of copyright law to this digital age (at least in theory), but it has gone too far. Together with the enforceable mass-market licenses and technological protection measures (TPMs),[592] copyright owners even can 'impose access and use restriction far exceeding those that content providers could otherwise obtain under copyright law'.[593]

The expansion of the legitimate power of copyright owners may be measured from the following three dimensions.

4.1.2 SIGNIFICANT EXPANSION (I): BROADER SUBSISTENCE OF THE COMMUNICATION RIGHT

The communication right (including broadcasting right) is far more pervasive in the Internet age than that in the mass media age.[594] Accordingly, the business of new intermediaries' (particularly Internet-based media) is more reliant on copyright

[592] For a broad study on copyright, contract and TPMs in Australia, see Copyright Law Review Committee, *Copyright and Contract* (2002).

[593] Neil Weinstock Netanel, *Copyright's Paradox* (2008) 70.

[594] In the digital networked environment, the reproduction right, as discussed above and in ch 3, has also been expanded considerably. However, the expansion of the communication right (including broadcasting right) is even more significant to media and entertainment industries.

owners' authorisation compared to that of old intermediaries (mass media such as TV and radio broadcasters).[595]

The WCT not only extended the communication right to the Internet environment, but even more significantly broadened the range of the subject matter of the right. Under the Berne Convention, the communication right traditionally deals with dissemination of specific works in specific non-material form under specific conditions. For instance, it was limited merely to cinematographic adaptation and reproduction of works,[596] performance of dramatic, dramatic-musical and musical works,[597] and recitation of literary works.[598] The Convention left works including graphic works, photographic works, works of pictorial art and computer programs without such protection. It also did not extend to literary works, except in the case of recitation thereof. [599] By contrast, the WCT remarkably broadened the communication right to (including on-demand availability right) such a striking level that this right was conferred on authors of all literary and artistic works.[600]

Likewise, the communication right contained in the Rome Convention was also broadened under the WPPT. The Rome Convention merely, for instance, granted phonogram producers and performers a remuneration right for broadcasting the

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595 For a EU study on the impact of the digital copyright on online business models, see IViR, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/Ec on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Part I: The Impact of Directive 2001/29/EC on Online Business Models* (2007).

596 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 14(1) (entered into force 6 June 1982).

597 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11 (entered into force 6 June 1982).

598 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*ter* (entered into force 6 June 1982).

599 WIPO, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference* (1996) <http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_4.pdf> at 14 April 2009.

600 See *WIPO Copyright Treaty* art 8.

phonograms to the public, and conferred a right of rebroadcasting on broadcasters.[601] In contrast, the WPPT not only extended those rights contained in the Rome Convention,[602] but also accorded a distinct making available right or on-demand availability right to both performers and producers of phonograms.[603]

The parallel extension can be found in the US, UK, Australian and Chinese copyright law as mentioned above in s 4.1.1 of this thesis. For example, under the Chinese law, the communication right, which is confined to the on-demand availability right, not only subsists in works, performances, but in sound recordings or audio-visual productions.[604]

To the disseminators (broadcasters and website operators), the consequences have far-reaching implications for their business. For instance, in order to disseminate a song through broadcasting, the disseminator (broadcaster) needs to be licensed by the authors of the musical works (composition and lyric), but does not need licences from the phonogram producer and performer under the international conventions and for example the Chinese law. It is because the producer does not have the right to authorise the broadcasting of the sound recording to the public, and the performer does not have the right to authorise the broadcasting of his or her performances fixed in phonograms. Nonetheless, the performer and producer are granted a right to remuneration for broadcasting to the public of the sound recording.[605]

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601 See *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, arts 7, 12, 13.

602 Under the *WIPO Performances and Phonograms Treaty* (adopted in Geneva on 20 December 1996) performers are granted the right of broadcasting of their unfixed performances (live performance) (art 6), the right to remuneration for broadcasting their performances fixed in phonograms excluding audiovisual products (art 15). However, high-level negotiations on an international treaty on the protection of audiovisual performances have been carried on by the WIPO. See William New, *'Positive Noises' On Resuming Talks On WIPO Audiovisual Performances Treaty* (2009) Intellectual Property Watch <http://www.ip-watch.org/weblog/2009/09/09/%E2%80%98positive-noises%E2%80%99-on-resuming-talks-on-audiovisual-performances-treaty/> at 20 January 2010.

603 See *WIPO Performances and Phonograms Treaty*, arts 10, 14.

604 See *Copyright Law 1990 of China* (amended 2001) arts 10(12), 37(6), 41.

605 See *WIPO Performances and Phonograms Treaty*, art 15.

However, in order disseminate a song through making it available online, the disseminator (website operator) needs to be authorised not only by the authors of the musical works, but also by the performer and the producer of the sound recording. It is because, under the abovementioned international treaties and national laws, the exclusive right to make available online is accorded not only to the authors of works, but also to the producers of phonogram and the performers of the performance fixed in the phonogram. Under the UK CDPA, the communication right (including the making available right) is even granted to the broadcasters as 'broadcast' is protected as 'copyright work'.[606]

4.1.3 SIGNIFICANT EXPANSION (II): FEWER EXCEPTIONS AND LIMITATIONS AVAILABLE TO EMERGENT INDUSTRIES

Apart from the expansive application of the exclusive rights, there are fewer limitations on these rights in the digital networked environment. For instance, the 'first-sale doctrine' as an important limitation on copyright can hardly find a place in the digital world.[607] Even more seriously, unlike the compulsory licensing scheme accommodating the competing interests of copyright owners and the broadcasting industries, there is no such system available to the Internet-based media yet.[608]

4.1.4 SIGNIFICANT EXPANSION (III): STRONGER PROTECTION FACILITATED BY INDIRECT LIABILITY RULES

Individual Internet users have been blamed and even sued for the rampant online piracy all over the world;[609] however, it is obviously unrealistic to chase those

606 See *Copyright, Designs and Patents Act 1988* (UK) ss 1, 16, 20.

607 See further, s. 7.3.2 of ch 7 below of this thesis.

608 See further, s. 7.3.3 of ch 7 below of this thesis.

609 Until now, no individual user in Mainland China has been sued for P2P file sharing or sharing copyright works online by other means. However, individuals who operated commercial website have been sued for copyright infringement; and even punished by criminal penalties. For

geographically distributed individuals. Copyright owners became aware of the Internet Service Providers (ISPs) who are much easier and more realistic targets with deeper pockets. This tactic is reliant very much on statutory provisions for indirect or secondary liability for copyright infringement. The widely established rules of indirect liability can also be seen as significant strengthening of copyright protection in the digital networked environment.

A. Indirect Liability in US, UK and Australia

Indirect or secondary liability for copyright infringement is imposed on a third party who does not himself commit infringing acts, but instead makes it possible for another to infringe. The third party is held liable on the ground that he might be in the best position to stop the infringement, or he knowingly induces, assists, or otherwise materially contributes to the infringing conduct of another. Notwithstanding its indirect or secondary nature, the liability for enabling or facilitating infringement falls under a variety of set of heads in different countries, and there are also some differences in emphasis.[610]

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example, the operator of the personal website 'Yun Xiao Ge' (www.yunxiaoge.com) was sentenced to one year in prison and fined for 100 000 Yuan. The website reproduced and made available to the public of copyright works in very large scale for profit. See Yan Xiaohong, *Yan Xiaohong, Deputy Commissioner of National Copyright Administration of China, Briefed the Press on Recent Action of Government to the Internet Piracy* (2006) Embassy of the People's Republic of China in Switzerland <http://www.fmprc.gov.cn/ce/cech/ger/4/t235846.htm> at 24 June 2009. Nevertheless, given individuals are sued in the rest of the world such as the US (Amy Harmon, *261 Lawsuits Filed on Internet Music Sharing* (2003) The New York Times <http://www.nytimes.com/2003/09/09/technology/09MUSI.html> at 18 June 2009); Singapore (Chua Hian Hou, *Singapore: 33 Internet Users Probed in Piracy Crackdown* (2005) Straits Times <http://www.asiamedia.ucla.edu/article.asp?parentid=33611> at 18 June 2009); and Hong Kong SAR (*Chan Nai Ming V Hksar* [2007] HKCFA 35; FACC No 3 of 2007, <http://www.hklii.hk/hk/jud/eng/hkcfa/2007/FACC000003_2007-57111.html> at 18 June 2009); it would probably happen in Mainland China as well.

610 See generally Jane C Ginsburg and Sam Ricketson, 'Inducers and Authorisers: A Comparison of the US Supreme Court's *Grokster* Decision and the Australian Federal Court's *KaZaa* Ruling' (2006) (11)1 *Media & Arts Law Review* 1.

Although US copyright law sets forth author's exclusive as the right 'to do or to authorise',[611] US courts have not given independent content to the right 'to authorise'. Those who authorise infringement may be exposed to indirect liability[612] which is referred to as vicarious liability,[613] contributory liability[614] and the liability of inducement in the US.[615]

In sharp contrast, under the UK CDPA, similar liability may arise from the statutory provisions for authorisation of infringement[616] and secondary infringement[617] concerning dealings with infringing copies, providing the means of making infringing copies and permitting or enabling public performance.[618] Australia substantially follows the UK paradigm. Under the *Copyright Act 1968* (Cth), an independent right of authorisation is provided for under separate provisions.[619] As a

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611 17 US Code §106 provides:
Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
to reproduce the copyrighted work in copies or phonorecords;
to prepare derivative works based upon the copyrighted work;
to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

612 See generally Robert A Gorman, *Copyright: Cases and Materials* (17th ed, 2006), 848.

613 *Shapiro, Bernstein & Co v H L Green Co*, 316 F 2d 304 (2d Cir 1963).

614 *Sony Corp of America v Universal City Studios, Inc*, 464 US 417 (1984).

615 *MGM Studios, Inc v Grokster, Ltd*, 545 US 913 (2005).

616 *Copyright, Designs and Patents Act 1988* (UK) s 16(2) provides: Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

617 See *Copyright, Designs and Patents Act 1988* (UK) ss 22-6.

618 For further discussion on secondary infringement under UK law, see Garnett, James and Davies, above n 480, 469-75; 477-89.

619 *Australia Copyright Act 1968* (Cth) s 13(2) provides: For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject matter

result, authorisation of infringement is 'a separate act of infringement from the act which is itself authorised' and 'does not apply to indirect acts of infringement';[620] the violation of the 'authorisation right' amounts to direct infringement of copyright.[621] Thus, under the Australian law, direct infringements occur where a person, without the licence of the copyright owner, does or authorises the doing of any acts comprised in copyright; indirect infringements, by contrast, 'occur once an act of direct infringement has taken place, and involve a further dealing with the result of that infringing act'.[622]

The meaning of authorisation of copyright infringement is clarified in a rich body of case law. In *University of New South Wales v Moorhouse*,[623] the High Court of Australia held that a person authorised an infringing act if the person sanctioned,

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includes the exclusive right to authorize a person to do that act in relation to that work, adaptation or other subject matter.

620 Ginsburg and Ricketson, above n 610, 10-5.

621 *Australia Copyright Act 1968* (Cth) s 36 provides for infringement by doing acts comprised in the copyright:

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:

the extent (if any) of the person's power to prevent the doing of the act concerned;

the nature of any relationship existing between the person and the person who did the act concerned;

whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

The next three succeeding sections do not affect the generality of this section.

622 Ricketson and Richardson, above n 489, 259-60. Under the Australian copyright law, indirect infringements include, for instance, the importation and sale of infringing copies (*Copyright Act 1968* (Cth) ss 37, 102), the sale of, or other commercial dealings with, infringing articles (*Copyright Act 1968* (Cth) ss 38 and 103), and the act of permitting a place of public entertainment to be uses for infringing performances of literary, dramatic or musical works (*Copyright Act 1968* (Cth) s 39).

623 [1975] HCA 26.

approved or countenanced the infringing act. The court was also of the opinion that the ability of the alleged authoriser to control or prevent the infringing act should be considered. Some degree of knowledge of the infringing acts should also be necessary for the purpose of establishing authorisation of such acts. In *Australasian Performing Right Association Ltd v Jain*,[624] the Full Federal Court articulated that the word 'authorise' connotes a mental element. Therefore, unlike the acts of direct infringement, the construction of liability for an act of indirect infringement must meet a requirement of knowledge (actual or constructive).[625]

To codify the rules established in case law, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) adopted ss 36(1A) and 101(1A) of the *Copyright Act 1968* (Cth). In determining authorisation of infringing acts, the matters that must be taken into account include the following:

> (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
>
> (b) the nature of any relationship existing between the person and the person who did the act concerned;
>
> (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

In addition, the establishment of the liability for authorisation of copyright infringement does not necessarily lead to the joint tortfeasor liability. In the Australian law, the joint tortfeasor liability is quite distinct from the liability for authorisation. A person may be exposed to joint tortfeasor liability merely where by 'common design' he participates in, induces, or procures another person to commit an act of infringement. In *Universal Music Australia Pty Ltd v Cooper*, (hereinafter

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624 (1990) 18 IPR 663.

625 For further discussion, see Ricketson and Richardson, above n 489, 260-75.

'*Universal Music v Cooper*')[626] the Federal Court of Australia confirmed once again:

> the circumstance that two or more persons assisted or concurred in or contributed to an act causing damage is not of itself sufficient to found joint liability and there must also be some common design. In other words, there must be something in the nature of concerted action or agreed common action. It is not necessary that there must be an explicitly mapped out plan with the primary offenders.[627]

Therefore, joint tortfeasor liability is a very limited concept under Australian law. The factual background of the *Universal Music v Cooper* case is essentially similar to that of the *Push v Baidu* case in China;[628] however, the courts based their decisions on completely different grounds. In *Push v Baidu*, the defendant was held liable without clear legal grounds given by the court.[629] By sharp contrast, in *Universal Music v Cooper*, the defendant was found liable for authorisation, but joint tortfeasor liability was not established because a 'common design' between the defendant and his users was not present.

In conclusion, acts of copyright infringement, notwithstanding the legislative variations naturally occur in one of two ways: directly, through the hands of the infringer, or indirectly, through making it possible or easier for another party to commit the infringing act.[630] National laws of different countries differ significantly in their ways to regulate these acts so that under some laws the act in question may amount to indirect infringement whereas in others it may be included in direct infringement.

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626 [2005] FCA 972.

627 Ibid.

628 Wang, 'The New Right of Communication through the Information Network in the PRC', above n 504, 212.

629 Ibid 208.

630 Ginsburg and Ricketson, above n 610.

B. Indirect Liability under Chinese Copyright Law

The art 10 of *Copyright Law 1990 of China* (Amended 2001) gives a non-exhaustive list of exclusive rights, and it states further that copyright owners could also authorise others to exercise the enumerated rights. Chinese courts, akin to the US approach, have not given independent meaning to 'the right to authorise'; instead, the concepts of direct and indirect liability, primary and secondary infringement have been accepted in the theory of torts and even copyright infringement.[631]

Generally speaking, direct liability arises from the illegal doing of the acts comprised in art 10 of the *Copyright Law 1990 of China*, and indirect liability is imposed on the one who makes it possible for a third party to do those acts. Thus, the liability of authorisation of infringement conceptualised in Australian and UK copyright law falls within the ambit of indirect liability in the legal theory of copyright in China.[632]

Nonetheless, Chinese copyright law has not set forth any specific rules for indirect liability yet. The courts have to base their rulings on general theory of torts (joint liability in particular). Under the current law, indirect liability is generally covered by joint liability. Provisions in regard to indirect liability in Chinese law can be seen in the following laws, regulations and judicial interpretations. The *General Principles of the Civil Law of China* (1987)[633] provides:

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631 See further, Liu Jiarui, *On the Establishment of the System of Indirect Liability for Copyright Infringement in China* (2004) 11 *Electronic Intellectual Property Right* (trans of: Dianzi Zhishi Chanquan) 23-9 [trans of: *Lun Zhongguo Banquan Jianjie Zeren Zhidu de Jianli*].

632 See further, Qian Wang, *On the Indirect Liability under Copyright Law* (2005) 2 *Science-Technology and Law* (trans of: Keji Yu Falv) 50-9 [trans of: Lun Banquanfa Zhong De Jianjie Zeren]. See also, Qian Wang, *On Indirect Copyright Infringement and the Codification of Associated Rules* (2005) 12 *Jurisprudence* (trans of: Fa Xue) 66-74 [trans of: *Lun Banquan "Jianjie Qinquan" Jiqi Guize De Fadinghua*].

633 It was adopted at the fourth session of the sixth National People's Congress, promulgated by Order No 37 of the President of the People's Republic of China on 12 April 1986, and effective as of 1 January 1987.

- **Article 43:** An enterprise as legal person shall bear civil liability for the operational activities of its legal representatives and other personnel.
- **Article 130:** If two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability.

In the language of US copyright law, the liability defined in the art 43 is vicarious liability; however, art 130 (joint liability) is not easy to fit in without further clarification. The art 148 of the *Opinions of the Supreme People's Court on Some Issues Concerning the Implementation of the General Principles of the Civil (trial implementation)* (1988)[634] provides: 'those who abet and assist another to infringe upon other legal rights are joint tortfeasors and shall bear joint liability'.

The acts of abetting, inducing, aiding and assisting infringement would give birth to what is referred to in US law as 'contributory liability'. According to the *Opinions*, contributory liability is covered by joint liability; but vicarious liability is not. As a result, joint liability (contributory) together with vicarious liability constitutes indirect liability under Chinese law.

The provisions on joint liability (contributory) are further refined to be applicable in the Internet age by the Supreme People's Court. The art 4 of the *Judicial Interpretations Regarding Various Issues on the Application of Laws while Adjudicating Disputes Relating to Computer Network Copyright* in November 2000 ('Networks Copyright Interpretations')[635] provides:

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634 It was adopted at the Judicial Committee of the Supreme People's Court on 26 January 1988.

635 It was adopted at the 1144th meeting of the Sentencing Committee of the Supreme People's Court on 22 November 2000, and revised on 23 December 2003, for the first time in accordance with the *Decision of the Supreme People's Court Concerning the Amendment of the Interpretations of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Cases Related to Copyright Disputes over Computer Network* passed at the 1302nd Session of the Sentencing Committee of the Supreme People's Court, and revised on 20 November 2006, for the second time in accordance with the *Decision of the Supreme People's Court Concerning the Amendment of the Interpretations of the Supreme People's Court on Some Matters Concerning*

- **Article 3:** If an Internet Service Provider attaches itself to any other person's act of infringing copyright through the network, or abets or assists any other person to commit an act of copyright infringement, the people's court shall, in accordance with the provisions of Article 130 of the *General Principles of the Civil Law*, subject the Internet Service Provider and other doers or persons who directly commit the infringing act to the joint liabilities.
- **Article 4:** If an Internet Content Service Provider is aware that internet users infringe any other people's copyright through the network, or has been warned by the copyright owner with strong evidence, but fails to remove the infringing contents or take other measures so as to eliminate the infringement consequences, the people's court shall impose joint liabilities on the Internet Content Service Provider and the internet users in accordance with the provisions of Article 130 of the *General Principles of the Civil Law*.

Accordingly, direct liability is imposed on an Internet Service Provider (ISP) jointly with another if it attaches itself to the infringement. Otherwise it would be imposed with contributory liability, ultimately and jointly liable for the infringement in the case of any abetting or assisting of it.

An Internet Content Service Provider (ICSP) is imposed with contributory liability for failure to remove infringing content if: (i) it is aware of the infringement, ***or*** (ii) it has been noticed by the copyright owner. The corresponding provisions can also be found in arts 22 and 23 of the *Communication Right Regulations*.[636]

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the Application of Law in the Trial of Cases Related to Copyright Disputes over Computer Network (II).

636 *Regulations on the Protection of the Right of Communication via Information Network* (2006/China):
Article 22: Network service providers that provide information storage space to service recipients for them to provide works, performance recordings, sound recordings or video recordings to the public via information networks shall not assume liability for compensation where the following conditions apply:

However, it is notable that none of the provisions mentioned above explicitly recognise 'joint liability' as 'contributory' or 'vicarious'. Since both direct and indirect infringement may amount to joint infringement, the term 'joint liability' is too ambiguous and is unable to differentiate indirect liability from direct liability.

The differentiation of direct and indirect liability has significant implications for the court to make right decisions. Compared to direct liability, indirect liability would require more extensive elements, including the power and ability to prevent or control another one's infringing acts, the relationship between the direct infringer and the third party, and the mental element.

Differentiate Direct and Indirect Infringement: The distinction between direct and indirect infringement has been essential in a number of cases. Judicial practices gradually recognised that service providers of search engines and hyperlinks to

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they have clearly indicated that the information storage space is provided to the service recipient, and published the name, contact person and network address of the network service provider;

they have not altered the works, performance recordings, sound recordings or video recordings provided by the service recipient;

they did not know, or could not reasonably have been expected to know, that the works, performance recordings, sound recordings or video recordings provided by the service recipient have infringed other people's rights;

they have not directly gained any financial interest from the service recipient's provision of works, performance recordings, sound recordings or video recordings; and

upon receiving written notice from the rights holder, they have removed the alleged infringing works, performance recordings, sound recordings or video recordings in accordance with the provisions of these Regulations.

Article 23: Where a network service provider provides search or link services for a service recipient and, upon receiving written notice from the rights holder, disconnects the links to infringing works, performance recordings, sound recordings or video recordings, such network service provider shall not assume liability for compensation. However, if the network service provider knew, or could reasonably have been expected to have known, that the works, performance recordings, sound recordings or video recordings to which links were provided infringed other people's rights, the network service provider shall assume joint liability for infringement.

unlicensed work were not doing the acts comprised in copyright under Chinese copyright law; instead, they were just assisting, aiding, facilitating or inducing their users for infringement. As a result, contributory liability was imposed on the network service providers following the principles of joint liability.

The first copyright case of the digital age before the 2001 Amendment in China[637] is *Wang Meng v Beijing Cenpok Intercom Technology Co, Ltd* (hereinafter 'Six Writers case').[638] The plaintiff, together with five other prominent Chinese writers, filed a lawsuit for copyright infringement. The defendant was sued for re-publishing the writers' novels on its website (www.bol.com.cn) without authorisation. The defendant argued that no provisions could be found in the law governing the transmission of works on the Internet. Such argument was not accepted by the court. Both the court of first trial and the court of appeal held that the rights of authors were enumerated in a non-exhaustive way under the *Copyright Law 1990*. It was held further that the advance of technology gave rise to a new manner in which works could be transmitted and made available to the public. Disseminating works through the Internet fell within the scope of author's exclusive rights.

The following years witnessed profound development of judicial protection for copyright in the digital age. A large amount of litigation against online service providers for copyright infringement has occured; meanwhile, extensive liability rules for copyright infringement have been established. Generally speaking, the awareness and knowledge of the infringing acts has been essentially taken into account for addressing the liability of Internet Service Providers (ISPs). It is also a touchstone by which the applicability of the safe harbor principle is tested in many

637 See generally Qian Wang, 'The New Right of Communication through the Information Network in the People's Republic of China' in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 189. See also, Li, above n 501, 186-8.

638 See Beijing Haidian District People's Court, Civil Judgment (1990) Hai Zhi Chu Zi No 57, issued on 18 Septermber 1999; and Beijing No 1 Intermediary People's Court, Civil Judgment (1999) Yi Zhong Zhi Zhong Zi No 185, issued on 17 December 1999.

cases.[639] *Li Xuebing v Sohu Internet Information Service Co Ltd* (hereinafter 'Sohu case')[640] is the first case after the *Communication Right Regulations* which came into force on 1 July 2006. The plaintiff claimed that the defendant (NASDAQ: SOHU) re-published his novel on the website (www.sohu.com) without authorisation, and infringed his 'communication right' and other exclusive rights. It was argued that in this case the novel was uploaded to the website by users through the Bulletin Board Service (BBS) provided by the defendant. The court agreed that BBS providers should not be liable for copyright infringement for the content published by users; however, the service provided by the defendant in this case was not BBS service. The defendant accepted submissions from users, and then edited and published the works on its website with deliberate arrangement. Therefore, the defendant in this case was an Internet content provider being unable to act with reasonable diligence, and copyright infringement by the defendant was established.

Contributory Liability: In determining contributory liability, the court has taken the following factors into account: (i) the acts of the third party – assisting, aiding, facilitating, abetting, inducing or substantially contributing to the infringing acts by the infringer; (ii) mental element – the third party knew, or ought reasonably to have known, that the acts of another are infringing (knowledge test).

To determine the third party's actual knowledge of the infringing acts, the court has attempted to apply some objective parameters in specific cases. The knowledge test might be satisfied if: (i) the third party has received notice for taking down from copyright owner (for instance, the *eleven labels v Yahoo! China* case),[641] or; (ii) in

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639 For provisions on the safe harbor principle, see *Communication Right Regulations 2006* arts 20, 21, 22, 23.

640 See Shanghai No 2 Intermediary People's Court, Civil Judgment [(2006) Hu Er Zhong Min Wu (Zhi) Chu Zi No 226], issued on 25 April 2007; Shanghai High People's Court, Civil Mediation Order (2007) Hu Gao Min San (Zhi) Zhong Zi No 74, issued on 17 July 2007.

641 See *Warner International Inc v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02630, issued on 24 April 2007; *EMI Group Hong Kong Ltd v Beijing Alibaba Information Technology Ltd*,

absence of the notice by copyright owner, the third party fails to act to stop evident infringing activities. Such activities are so apparent that any reasonable person operating under the same or similar circumstances would know the infringing nature. This is very similar to the so-called 'red flag' test (applicable knowledge standard) in US copyright law.[642]

The 'red flag' test has been applied by the court in many recent cases. In *NuCom Online (Beijing) Information Technology Co, Ltd v Shanghai TuDou Network Technology Co, Ltd* (hereinafter '*NuCom v TuDou*'),[643] the defendant's actual knowledge of infringing acts by users was found. The court based its decision on the common sense that copyright owner of a newly released film would be very unlikely to authorise online communication of the work concerned. In *Guangdong Zhongkai Culture Development Co Ltd v Guangzhou Shulian Software Technology Co Ltd and Shanghai CAV Advertisement Co Ltd* (hereinafter 'Shanghai POCO case'),[644] the defendant operated P2P software (POCO) and associated services. The court also

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Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02621, issued on 24 April 2007; *EMI Records Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02631, issued on 24 April 2007; *Warner Music Hong Kong Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02625, issued on 24 April 2007; *Universal Music Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02622, issued on 24 April 2007; *Universal International Music B V v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02626, issued on 24 April 2007.

642 Wang, 'The New Right of Communication through the Information Network in the PRC', above n 504, 213-15.

643 See Shanghai No 1 Intermediary People's Court, Civil Judgment (2007) Hu Yi Zhong Min Wu (Zhi) Chu Zi No 129, issued on 10 March 2008; Shanghai High People's Court, Civil Judgment (2008) Hu Gao Min San (Zhi) Zhong Zi No 62, issued on 30 July 2008.

644 See *Guangdong Zhongkai Culture Development Co Ltd v Guangzhou Shulian Software Technology Co Ltd and Shanghai CAV Advertisement Co Ltd*, Shanghai No 1 Intermediary People's Court, Civil Judgment (2006) Hu Yi Zhong Min Wu (Zhi) Chu Zi No 384, and Shanghai High People's Court Judgment (2008) Hu Gao Min San (Zhi) Zhong No 7.

held the defendant liable partially on the ground of common knowledge that the movies available online were extremely likely to be infringing copies.

Vicarious Liability: Whether there is vicarious liability for copyright infringement under Chinese law is even more controversial. Unlike the US law that has extended vicarious liability beyond an employer/employee relationship to cases in which a defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities',[645] vicarious liability is only provided for between employers and employees under Chinese law.[646]

However, it is arguable that the court based its decision on the theory of vicarious liability in *NuCom v TuDou*. The defendant, the operator of a video sharing website (www.tudou.com, known as the YouTube of China), was sued for providing the online playing of a movie and thus infringing the plaintiff's exclusive right to communicate the work to the public through information networks. The courts found that the defendant had actual knowledge of the infringing nature of the movie uploaded by users and failed to take down the infringing work in due course. The infringing work was a newly released movie. Given the high cost of producing cinematographic works, it is common sense that copyright owners would be very unlikely to authorise free online playing or downloading for such works. The courts also found that since the defendant undertook routine maintenance and management for the website, examining, approving and highlighting the content uploaded by users, it had the ability and opportunity to keep the infringing activities of its users under control. Therefore, the defendant had actual knowledge of the infringement on its website.

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645 *See Gershwin Publishing Corp v Columbia Artists Management, Inc*, 443 F 2d 1159, 1162 (2d Cir 1971).

646 See *General Principles of the Civil Law of China* (1987), art 43.

Given the actual knowledge of infringement, the courts were of the opinion that no 'notice and take down' procedure would be required for the establishment of joint liability. Therefore, the defendant was found liable for copyright infringement, and damages were awarded to the plaintiff.

In summary, the decision made by the Chinese courts in *NuCom v TuDou* was based on the following grounds: (i) the infringing nature of users' activities were extremely apparent and the defendant failed to act to stop those infringing acts; (ii) the defendant had the ability to supervise and control the sharing of the film concerned (and actually the defendant did control users' uploading activities); (iii) the defendant facilitated the infringing acts through its website.[647]

4.2 COPYRIGHT WAR: A LOSING BATTLE FOR ALL

4.2.1 OVERVIEW OF THE COPYRIGHT WAR

The Internet is 'characterised as a giant copying machine that facilitates widespread and undetectable copyright infringement'.[648] To deal with the new situation, a broad communication right has been created, marking the resilience of copyright law on the Internet. However, in response, substantial disobedience of the law has arisen in the digital world. In certain cases, the disobedience is tolerated by copyright owners;[649] but in most other cases, it is not. For example, entertainment industries have launched full-fledged battles against individual users for P2P file sharing.

Since the very beginning, copyright-related industries did not see such advances in media technology as emerging opportunities; on the contrary, they focused on the

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647 See Shanghai No 1 Intermediary People's Court, Civil Judgment (2007) Hu Yi Zhong Min Wu (Zhi) Chu Zi No 129, issued on 10 March 2008; Shanghai High People's Court, Civil Judgment (2008) Hu Gao Min San (Zhi) Zhong Zi No 62, issued on 30 July 2008.

648 Litman, above n 103, 25.

649 Tim Wu, *Tolerated Use* (2008) Social Science Research Network <http://ssrn.com/abstract=1132247> at 10 June 2009.

'destructive' power of the Internet. The war against P2P file sharing and online piracy has continued for many years since the Napster case.[650] Looking at the battleground today, Professor Lawrence Lessig claims that it is a 'total failure'.[651] On the World Copyright Summit[652] which was organised by the International Confederation of Societies of Authors and Composers (CISAC) in June 2009, the industries have acknowledged that they are losing the battle.[653]

The copyright war against online piracy is illustrative of the increasing tension between the existing legal framework and the new paradigm for knowledge dissemination. On one hand, access to knowledge and sharing of ideas are overwhelmingly desirable and affordable; on the other hand, copyright owners, particularly the giant media firms, are treating the great potential to the public as a great threat to their established business. However, as Fritz Attaway from the Motion Picture Association of America (MPAA) admitted on the World Copyright Summit 2009, 'we live in an age where we cannot block access to our content. People are going to get it one way or the other. We would like them to pay for it and we need to seek out ways where they can pay for it. But just saying "no" isn't the answer.'[654]

4.2.2 LITIGATION TARGETING DIGITAL LIBRARIES

A. Digital Libraries Sued in China

In China, digital libraries have been targeted by numerous lawsuits, and they have lost most cases. After investigating the nature of traditional library and digital library,

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650 *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001).

651 James Eyers, 'Call for Copyright Overhaul', *The Australian Financial Review* (Melbourne), 5 June 2009.

652 See the official website: <http://www.copyrightsummit.com> at 18 April 2010.

653 See Liza Porteus Viana, *Copyright Holders Acknowledge Losing Battle For Public Consciousness At World Copyright Summit* (2009) Intellectual Property Watch <http://www.ip-watch.org/weblog/2009/06/11/copyright-holders-acknowledge-losing-battlefor-public-consciousness-at-world-copyright-summit/> at 16 June 2009.

654 Ibid.

the courts have held that different rules should be applied. In *Chen Xingliang v China Digital Library Co, Ltd* (hereinafter 'China Digital Library case'),[655] the court, for the first time, made a judgment applying the new provision of a communication right in the 2001 Amendment. The defendant scanned three books written by the plaintiff and provided on-line reading and downloading services for registered readers on its website (www.d-library.com.cn). The court made a favourable judgment for the plaintiff and awarded damages. The court held that the digital library was different from a traditional paper-based library. Uploading the books written by the plaintiff to the Internet made the works available to such a large number of people that it was expected and foreseen by the plaintiff. Furthermore, the court affirmed that the communication of works to the public through networks was a new way of exploiting copyrighted works and that such a right should belong to the copyright owners.

Following the China Digital Library case, a large number of cases against digital libraries have appeared. The leading ones include *Zheng Chengsi v Beijing Sursen Digital Technology Co, Ltd*;[656] *Du Changwei v Beijing Founder Electronics Co, Ltd*;[657] *Wu Rui v Beijing Superstar Shenzhou Kechuang Technology Ltd. and Beijing Superstar Information Technology Development Ltd* (Superstar Digital Library);[658] and *Jiang Xingyu v Tsinghua Tongfang Optical Disc Co, Ltd, et al*.[659] In the most

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655 See Beijing Haidian District People's Court, Civil Judgment (2002) Hai Min Chu Zi No 5702, issued on 27 June 2002.

656 See Beijing Haidian District People's Court, Civil Judgment (2004) Hai Min Chu Zi No 12509, issued on 20 December 2004; Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Zhong Zi No 3463, issued on 10 June 2005.

657 See Beijing Haidian District People's Court, Civil Mediation Order (2006) Hai Min Chu Zi No 11270, issued on 18 May 2006.

658 See Beijing Haidian District People's Court, Civil Judgment (2007) Hai Min Chu Zi No 7610, issued on 11 December 2007; Beijing No 1 Intermediary People's Court, Civil Judgment (2008) Yi Zhong Min Zhong Zi No 5282, issued on 2 June 2008.

659 See Shanghai No 2 Intermediary People's Court, Civil Judgment (2005) Hu Er Min Wu (Zhi) Chu Zi No 326, issued on 25 March 2006; Shanghai High People's Court, Civil Judgment (2006) Hu Gao Min San (Zhi) Zhong Zi No 55, issued on 18 August 2006.

remarkable series of lawsuits, the defendant Beijing Wanfang Data Co, Ltd was sued by nearly 500 authors of masters or doctorate dissertations in 2007 and 2008.[660] The courts held that making the dissertations available to the public without authorisation constitutes copyright infringement and the defendant was ordered to pay compensation to the defendants respectively.[661]

Wu Rui v Beijing Century Duxiu Technology Ltd (hereinafter 'Duxiu case')[662] is one of the rare cases in which the digital library won on the ground of fair use. The defendant operated a website (www.duxiu.com)[663] in connection with the Superstar Digital Library.[664] The plaintiff sued the defendant for the unauthorised making available to the public of partial content of his books on the website. The parts available to the public were covers, preface, table of contents, preamble, foreword, and pages of the text of the books. Both the first trial and appellate courts were of the opinion that making such a limited part of the books available to the public is allowed by fair use. The purpose of making available in this case was to provide brief information about the books, giving readers ideas of the main content but mere

660 The courts made hundreds of separate judgments. See for example, Beijing Chaoyang District People's Court, Civil Judgment (2008) Chao Min Chu Zi No 23622; Beijing No 2 Intermediary People's Court, Civil Judgment (2008) Er Zhong Min Zhong Zi No 18639, issued on 13 December 2008.

661 China Tech News, *Wanfang Data Ordered To Compensate For Copyright Infringement* (2008) <http://www.chinatechnews.com/2008/10/20/7773-wanfang-data-ordered-to-compensate-for-copyright-infringement/> at 19 June 2009. See also, China Daily, *Beijing Company Loses Copyright Lawsuit* (2008) <http://www.chinadaily.com.cn/bizchina/2008-10/17/content_7116455.htm> at 19 June 2009.

662 See Beijing Haidian District People's Court, Civil Judgment (2007) Hai Min Chu Zi No 8079, issued on 11 December 2007; Beijing No 1 Intermediary People's Court, Civil Judgment (2008) Yi Zhong Min Zhong Zi No 6512, issued on 5 June 2008.

663 It is a scholar search engine working with the Superstar Digital Library. Both are operated by the SuperStar Digital Library Group Ltd. For further discussion about the DuXiu scholar search engine and its services, see Li Aiguo, 'Digitizing Chinese Books: A Case Study of the SuperStar DuXiu Scholar Search Engine' (2009) 35(3) *The Journal of Academic Librarianship* 277.

664 'In China, there are 3 major commercial e-book providers that have libraries as customers: The SuperStar Digital Library, the Apabi Digital Library and the Sursen Digital Library. The SuperStar Digital Library, a product of the SuperStar Digital Library Group Ltd., is the largest Chinese digitized book collection in the world.' See ibid 277.

making very limited amount of text accessible. Such use did not undermine authors' moral rights and potential economic interests. Copyright law encourages and protects creations; meanwhile, in order to promote the progress and prosperity of social and cultural development. Copyright law also encourages the dissemination of works without threatening the authors' legitimate interests. After publishing the works to the public, authors cannot stop the public from using, presenting and disseminating them. The courts therefore held that the use of the works by the defendant did not go beyond fair use, did not cause unfavourable consequences to the plaintiff, and thus no infringement was found in this case.

B. Industrial Reponses Raised by Chinese Digital Libraries

It seems that the lawsuits mentioned above have not slowed down the development of digital libraries in China. On the contrary, due to many favourable circumstances, digital libraries and digital publishing have achieved tremendous success and significantly transformed the traditional publishing industry in China.[665] Apart from the substantial supports from the government, advance of technology,[666] and lower

[665] According to the General Administration of Press and Publication of China (GAPP), the market size of digital publishing industry has been, for the first time, in excess of that of traditional paper-based publishing industry and is expected to exceed 75 billion yuan (10.98 billion US dollars) in 2009. See Xinhua News, *China's Digital Publishing Sector to Maintain High Growth Rate* (2009) China Daily <http://www.chinadaily.com.cn/bizchina/2009-07/08/content_8395895.htm> at 22 August 2009. See also, Tiffany Wong, *China: The Next Big Market for Digital Publishing? 810,000 Titles, 79 Million Readers of Digibooks in 2008* (2009) TeleRead: Bring the E-Books Home <http://www.teleread.org/2009/08/13/china-the-next-big-market-for-digital-publishing-810000-titles-79-million-readers-of-digibooks-in-2008/> at 22 August 2009. For an extensive examination of the publishing industry and digital impacts in China, see Bill Cope and Christopher Ziguras, *The International Publishing Services Market* (2002) ch 4.

[666] See generally Guohui Li and Michael Bailou Huang, 'New Era New Development: An Overview of Digital Libraries in China' 2008 (5362) *Lecture Notes in Computer Science* 304; Leye Yao and Ping Zhao, 'Digital Libraries in China: Progress and Prospects' (2009) 27(2) *The Electronic Library* 308.

costs to scanning and publishing,[667] innovative copyright practices are also advantageous to the development of digital libraries.[668]

As has happened in other countries with a modern copyright system, the development of e-book industries and digital libraries has also increasingly created an intellectual property dilemma in China. On one hand, the industries are reliant on copyright protection to survive the fierce competition; on the other hand, copyright is also a barrier to the abilities to digitise books and to create new business models. Wei Liu, a researcher from Shanghai Library, has concluded that 'digital copyright will always be a heavy burden for digital library practitioners until a reasonable intellectual property framework for digital assets can be consolidated'.[669]

The *Regulation on the Protection of the Right of Communication via Information Networks of China* provides under art 7 that:

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667 Kevin Kelly, *Scan This Book!* (2006) The New York *Times* <http://www.nytimes.com/2006/05/14/magazine/14publishing.html?_r=1> at 22 August 2002. See also, Open Content Alliance, *Economics of Book Digitization* (2009) <http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization/> at 22 August 2009.

668 As suggested by Sun Wei, Chief Engineer of National Library of China, a network of digital libraries has been completed in China, including digital content providers (Tsinghua Tongfang 清华同方, SSReader 北京时代超星, Wanfang Data 万方数据, and VIP Information 重庆维普咨讯); electronic publication agents (Founder 方正科技, and ShuSheng 北京书生数字技术); a digital content producer and system integrator; digitisation system research and integrators (Digital Innovation Technology 北京中数创新技术, China soft 北京中科软件, Founder Technology 方正科技, Tsinghua Tongfang, and ShuSeng); system integrators for search engine (TRS 北京拓尔思信息技术, and Tell You Information Technology 浙江天宇信息技术); and system integrators (Lenovo 联想, Taiji 太极计算机, and Huadi 华迪计算机). In this network, a digital library is both a resources user and a provider. See generally Sun Wei, 'The Development of China Digital Library and its Influence on China and the World' (2005) 20 *Chinese Librarianship*; Hongqing Lou and Julia Zimmerman, 'The Development of Digital Libraries in China and the USA' (2003) 19(1) *Information Development* 13; Huang Qunqing, 'Reading Outside the Library: How has the Internet Affected Reading in China' (Speech delivered at the World Library and Information Congress: 69th IFLA General Conference and Council, Berlin, 1-9 August 2003).

669 Wei Liu, '*The New Development of Digital Libraries in China*' (2004) <http://www.kc.tsukuba.ac.jp/dlkc/e-proceedings/papers/dlkc04pp120.pdf> at 22 August 2009 .

> A library, archives, memorial, museum and art gallery may, in the absence of the copyright holder's permission, provide the relevant digital works as lawfully published and preserved by the aforesaid institutions as well as the works that shall, according to law, be subject to digital photocopying for display or preservation to their objects of service through the information network within their place and without paying any remuneration. Whereas the aforesaid institutions may not directly or indirectly seek for any economic interest from such activities, unless it is otherwise stipulated by the parties concerned.
>
> The works subject to digital photocopying for the purpose of display or conservation as prescribed in the preceding paragraph shall be the works that have been damaged or destroyed or are almost damaged or destroyed, are lost or stolen, whose storage format has been out-of-date, and which cannot be purchased through the market channel or can only be purchased at a price as obviously higher than the standardized one.

It is therefore clear that under Chinese copyright law making works collected by libraries publicly accessible through any information networks is subject to the consent of copyright owners. As discussed above, this rule has also been confirmed by the courts in *Chen Xingliang v China Digital Library Co, Ltd*;[670] *Zheng Chengsi v Beijing Sursen Digital Technology Co, Ltd*;[671] *Du Changwei v Beijing Founder Electronics Co, Ltd*.[672]

In practice, Superstar Licensing and Open Licensing Offer are the approaches to obtain copyright owner's authorisation in China. The Superstar Licensing, developed

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670 Beijing Haidian District People's Court, Civil Judgment (2002) Hai Min Chu Zi No 5702, issued on 27 June 2002.

671 See Beijing Haidian District People's Court, Civil Judgment (2004) Hai Min Chu Zi No 12509, issued on 20 December 2004; Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Zhong Zi No 3463, issued on 10 June 2005.

672 See Beijing Haidian District People's Court, Civil Mediation Order (2006) Hai Min Chu Zi No11270, issued on 18 May 2006.

by the Superstar Digital Library,[673] is a private licensing scheme. Superstar, leading digital library operator and e-book distributor in China, claims that it has managed to obtain private licensing from over 300 000 individual authors.[674] Under the standard Superstar Licence, the individual author exclusively authorises Superstar the right to communicate her/his works to the public through information networks.[675] In return, the author will be granted 10 years membership for free within the period of validity of the licensing contract. The author also has the right to share revenue with Superstar in a variety of ways.[676]

The Superstar approach is not without fault;[677] however, it is workable and the operation of its digital library has been very successful so far.[678] In a large number of cases, Superstar has digitised millions of books into its database without authorisation; but it has been sued for very few of them.[679] In order to minimise its litigation risk, Superstar admits that not all authors have had the chance to give authorisation. In such case, Superstar requires in its copyright statement:

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673 Superstar Digital Library <http://www.ssreader.com/index.asp> at 19 April 2010.

674 Superstar Digital Library, *Superstar Obtained Licences from 300,000 Authors* (Chaoxing Huo Sanshiwan Zuozhe Shouquan trans (insert year) ed) <http://www.ssreader.com/zhuanti/15/sc.htm> at 24 August 2009 [trans of: *insert title in original language*].

675 For the full text of the standard licensing contract, see <http://www.ssreader.com/shengming/card.doc> at 24 August 2009.

676 Superstar Digital Library, *Copyright Statemen't* <http://www.ssreader.com/shengming/shengming.html> at 24 August 2009 [trans of: Banquan Shengming.

677 National Business Daily, *Deep Investigation on Infringements by Superstar* (2009), Sina.com.cn <http://tech.sina.com.cn/i/2007-05-29/07591532995.shtml> at 24 August 2009 [trans of: Chaoxing Qinquanan Shendu Diaocha].

678 See the website of the digital website here: <http://www.ssreader.com/index.asp> at 19 April 2010.

679 For example, *Wu Rui v Beijing Superstar Shenzhou Kechuang Technology Ltd and Beijing Superstar Information Technology Development Ltd*, Beijing Haidian District People's Court, Civil Judgment (2007) Hai Min Chu Zi No 7610, issued on 11 December 2007; Beijing No 1 Intermediary People's Court, Civil Judgment (2008) Yi Zhong Min Zhong Zi No 5282, issued on 2 June 2008.

> Please inform us if you do not want your work to be used in the Digital Library. We will remove your work from the library within 24 hours and pay a reasonable fee for the previous use of your work. We also welcome our readers to offer clues of related authors.[680]

Open Licensing Offer is another copyright licensing scheme that has been put forward to accommodate the high transaction cost of privately negotiated authorisation. This initiative was taken collaboratively by China Copyright Society, Beijing Sursen Company and China Copyright Magazine in September 2004;[681] however, it seems that this scheme has not been widely accepted.

Books published under the Open Licensing Offer come with an open licensing statement:[682]

> Any individual person or organization is allowed to use this book under the following conditions:
>
> 1. The scope of authorisation: reproduction, distribution and communication in digital environment;
> 2. Licensing fee: 5% of the revenue made by users;
> 3. Payment: The fee must be paid to the China Copyright Agency Company within six months since the aforesaid revenue generated;
> 4. The use of the work: The integrity and authorship of the work must be kept without prejudice.

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680 Superstar Digital Library, *Copyright Statemen't*, above n 676.

681 Yang Liu, *Digital Library Industry Got a Food Crisis to Deal With* (2004) Beijing Youth Daily <http://bjyouth.ynet.com/article.jsp?oid=3805142> at 24 August 2009 [trans of: Shuzi Tushuguan Ye Yao Du Lianghuang]. See also, IT168, *IT and Copyright Industry Collaboratively Initiate a Licensing Offer Scheme* (2004) IT168.com <http://publish.it168.com/2004/0914/20040914014701.shtml> at 24 August 2009.

682 *The Last Straw*, written by Zhong Hongqi and published in 2004, is the first book published with the Open Licensing Offer. See, Wu He, *The Last Straw: the First Crab* (2004) China Reading Daily [trans of: Dushu Bao] <http://www.gmw.cn/01ds/2004-09/22/content_105978.htm> at 24 August 2009 [trans of: *Zuihou Yigen Daocao: Diyizhi Pangxie Zhonghua*].

The Open Licensing Offer is formulated to solve the problem of the high transaction costs while seeking a massive amount of licences from individual authors. It is an 'offer of licensing' for commercial exploitation of copyrighted works in digital environment.[683] In contrast to Creative Commons Licensing,[684] the Open Licensing Offer is more commercially oriented and is less flexible.

C. Google Book Settlement

Google is a new kind of giant media firm in the digital age. Google announced its book search service in 2004, aiming to digitise and bring millions of books online and accessible to everyone in the world with Internet access. Google's plan is to scan into its search database materials from a large number of libraries. In this way, Google will create the largest number of card catalogues of books with full-text searching enabled. The full text of public domain materials will be available to users in response to search queries; however, unless otherwise licensed by copyright owners, users will be able to see only a few sentences in books still under copyright on either side of the search term.[685]

On 20 September 2005, the US Authors Guild brought a class-action suit against Google for scanning copyrighted books and creating, reproducing and displaying

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683 Wang Xiuli and Yu Xiuli, 'Licensing Offer: a New Pattern for Digital Copyright Trade' (2008) 9 *Publishing* Research (trans of: Chuban Faxing Yanjiu) 21 [trans of: *Shouquan Yaoyue: Shuzi Banquan Maoyi de Xinmoshi*].

684 Creative Commons <http://creativecommons.org> at 19 April 2010.

685 Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling* (2004) The New York Times <http://www.nytimes.com/2004/10/08/technology/08book.html?_r=1> at 19 August 2009. See also, University of Michigan, 'Google/U-M Project Opens the Way to Universal Access to Information' (Press Release, 14 December 2004) <http://www.umich.edu/news/?Releases/2004/Dec04/library/index> at 19 August 2009. See also, Google, *Google Checks Out Library Books* (2004) Google Press Center <http://www.google.com/press/pressrel/print_library.html> at 19 August 2009.

digital copies without authorisation.[686] Google argues that the scanning, indexing and making only tiny snippets publicly accessible are allowed by fair use provision of copyright law. In particular, Google cites *Kelly v Arriba Soft Corp*[687] as support for the proposition that Internet search engines' indexing activities constitute a fair use.[688]

On 28 October, Google, along with the Association of American Publishers and the Authors Guild, announced a Settlement Agreement,[689] pending approval by the US District Court for the Southern District of New York.[690] The Court will conduct a

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686 See Class Action Complaint, *The Author's Guild v Google Inc*, 05 CV 8136 (SDNY 2005) <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/authors-guild-v-google/Authors%20Guild%20v%20Google%2009202005.pdf> at 19 August 2009. On 19 October 2005, five commercial publishers brought a similar litigation against Google, see the Complaint, *McGraw-Hill Co, Inc, et al v Google Inc*, 05 CV 8881 (SDNY 2005) <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/mcgraw-hill/McGraw-Hill%20v.%20Google%2010192005.pdf> at 19 August 2009.

687 336 F 3d 811 (9th Cir 2003).

688 Robin Jeweler, *The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law?* (2005) CRS Report for Congress <http://www.au.af.mil/au/awc/awcgate/crs/rs22356.pdf> at 21 August 2009. For further fair use analysis of Google book search, see Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, Jonathan Band Technology Law and Policy <http://www.policybandwidth.com/doc/googleprint.pdf> at 19 August 2009. See also, Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual* (2009) Social Science Research Network <http://ssrn.com/abstract=1437812> at 21 August 2009.

689 The settlement agreement is available at settlement administration website: Google Book Settlement <http://www.googlebooksettlement.com> at 19 April 2010.

690 Reyhan Harmanci, *Google, Book Trade Groups Settle Lawsuits* (2008) San Francisco Chronicle <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/28/BU2413PJR1.DTL> at 19 August 2009. See also, *Google, The Future of Google Books: Our Groundbreaking Agreement with Authors and Publishers*, Google Books Press Center <http://books.google.com/googlebooks/agreement/> at 19 August 2009. See also, The Authors Guild, Authors, *Publishers and Google Reach Landmark Settlement* (2008) The Authors Guild Press Release <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/press_release_final_102808/press_release_final_102808.pdf> at 19 August 2009.

final fairness hearing for the class-action settlement,[691] which has been rescheduled from 11 June 2009 to 7 October 2009.[692]

If approved by the Court, the settlement will 'authorize Google to scan in-copyright Books and Inserts in the United States, and maintain an electronic database of Books.'[693] The Agreement continues:

> For out-of-print Books and, if permitted by Rightsholders of in-print Books, Google will be able to sell access to individual Books and institutional subscriptions to the database, place advertisements on any page dedicated to a Book, and make other commercial uses of Books. At any time, Rightsholders can change instructions to Google regarding any of those uses. Through a Book Rights Registry ('Registry') established by the settlement, Google will pay Rightsholders 63% of all revenues from these uses.[694]

A number of concerns and opposition have been raised since the release of the Settlement Agreement; however, the focus of the debate is primarily on the question of commoditisation and control of the availability of books, antitrust policy concerns and the question of privacy in the digital age rather than the issue of copyright infringement.[695]

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691 *Author's Guild et al v Google, Inc,* Civil Action No 05 Civ 8136 (DC).

692 For further information, see the settlement administration website for the Google Book Search Copyright Class Action Settlement: <http://www.googlebooksettlement.com/r/home> at 19 April 2010.

693 *Google Book Settlement Summary Notice* <http://www.googlebooksettlement.com/r/view_summary_notice> at 19 August 2009.

694 Ibid.

695 For example, see Randal C Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* (Forthcoming) Journal of Competition Law & Economics <http://ssrn.com/abstract=1387582> at 21 August 2009. See also, Sag, above n 688.

Among the concerns raised, the issue of orphan works is the most notable. Under the Settlement Agreement, Google would have a *de facto* monopoly to commoditise and control works as to which the rightholder cannot be identified or found. Since it is a class-action suit and Google is the only one being sued, if approved by the court, the Settlement Agreement would grant Google the legitimate right to sell orphan works and other out-of-print books. The class-action character of the settlement makes Google invulnerable to competition; the Settlement would create a 'fenced-off territory', excluding other entrepreneurs from doing the same thing that Google has done, because 'they would have to fight the copyright battles all over again'.[696]

Consequently, as Professor Pamela Samuelson argues, the Settlement would produce a privately negotiated compulsory license and Google would be the only service lawfully able to sell orphan books and monetise them through subscriptions.[697] Nevertheless, the proposed Settlement, Professor James Grimmelmann suggests, should be approved but with strings attached. Five overriding principles are advised: the Registry poses an antitrust threat; Google poses an antitrust threat; consumers need protection; public goods should be widely available; transparency and accountability matter.[698]

D. Concerns beyond the Private Initiatives

'Looking back over the course of digitization from the 1990s', Robert Darnton, professor of cultural history and director of the Harvard University Library, wrote in *The New York Review of Books*, 'we now can see that we missed a great

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696 Robert Darnton, 'Google & the Future of Books' (2009) 56(2) *The New York Review of Books* <http://www.nybooks.com/articles/22281> at 21 August 2009.

697 Pamela Samuelson, 'Legally Speaking: The Dead Souls of the Google Booksearch Settlement' (2009) 52 *Communications of the ACM* <http://ssrn.com/abstract=1387782> at 21 August 2009.

698 See generally, James Grimmelmann, 'How to Fix the Google Book Search Settlement' (2009) 12(10) *Journal of Internet Law* 10.

opportunity'.[699] The initiatives taken by the private sector like Google and its Chinese counterparts raise more concerns than the problem it may solve. As Professor Darnton further suggested in his comments on the Google Book Settlement, 'we are allowing a question of public policy—the control of access to information—to be determined by private lawsuit'.[700]

The private sector would always go about its business in pursuit of potential profit; the public apparently cannot count on it. The Google Book Settlement is still pending; its consequences are predictable but have not come into being yet. However, as we can see from the established business model of Superstar digital library, the privately negotiated but Superstar-dominated licensing system grants the commercial operator *exclusive* licences to digitise and provide access to the authorised books in the digital environment. Consequently, the private licensing scenario enabled by the current copyright law allows the accessibility to the published books legally subject to the absolute monopoly of one commercial operator. In addition, technological protection measures (TPMs) empower the commercial operator to effectively maintain such monopoly.

It must be understood that this digital era differs essentially from the pre-internet age. In the past, the content (writings, music, film) must be fixed into physical and visible medium to be brought to the marketplace and delivered to the users and customers. In the society dominated by press or mass media, the supply of information and

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699 He continued as following:
'Action by Congress and the Library of Congress or a grand alliance of research libraries supported by a coalition of foundations could have done the job at a feasible cost and designed it in a manner that would have put the public interest first. By spreading the cost in various ways—a rental based on the amount of use of a database or a budget line in the National Endowment for the Humanities or the Library of Congress—we could have provided authors and publishers with a legitimate income, while maintaining an open access repository or one in which access was based on reasonable fees. We could have created a National Digital Library—the twenty-first-century equivalent of the Library of Alexandria. It is too late now.'
See Darnton, above n 696.

700 Ibid.

knowledge-based products is significantly reliant on commercial publishers and distributors, but the access to information and knowledge is not. The published books are available to the public in numerous ways, including the bookshops, the libraries, the flea market and even the neighbourhood. It is a traditional model of publishing and distribution on which the current copyright regime was constructed.

Today, the place of the traditional model of publishing has increasingly been taken by digital publishing and online distribution. In 2009, the top 10 Internet applications in China were music (83.5%), news (80.1%), search engine (73.3%), instant message (70.9%), online video game (68.9%), online video and film (62.6%), blog (57.7%), e-mail (56.8%), social networking (45.8%), and online literature and reading (42.3%).[701]

These statistics are of great implications to a number of industries such as the music industry, the publishing industry, the film industry because it is predictable that their business models will face growing pressure to evolve. In the near future, online distribution will be the most dominant means by which information and knowledge-based products or services could be available and accessible. Given the success and popularity of Amazon's Kindle,[702] the rapid of growth of digital publishing in China,[703] and the digital revolution in front of the Australian book

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701 CNNIC, *25th Statistical Report on Internet Development in China* (2010) <http://www.cnnic.cn/html/Dir/2010/01/15/5767.htm> at 28 January 2010. English version of this report will be available soon at China Internet Network Information Center <http://www.cnnic.cn/en/index/index.htm> at 19 April 2010. For the previous 24 reports, see CNNIC <http://www.cnnic.cn/en/index/0O/index.htm> at 19 April 2010.

702 Kindle is a software and hardware platform developed by Amazon for rendering and displaying e-books and other digital media. See further, Amazon <http://www.amazon.com/Kindle-Wireless-Reading-Device-Display/dp/B00154JDAI> at 19 April 2010. See also, Simon Tsang, *Review: Amazon Kindle DX* (2010) The Sydney Morning Herald <http://www.smh.com.au/digital-life/computers/review-amazon-kindle-dx-20100125-muen.html > at 28 January 2010.

703 See further, Xinhua News, *China's Digital Publishing Sector to Maintain High Growth Rate* (2009) <http://www.chinadaily.com.cn/bizchina/2009-07/08/content_8395895.htm> at 28

industry,[704] people can expect that physical books will gradually be replaced by digital books and online distribution will be the primary means to deliver publications. In the music industry, CD sales have declined significantly while downloading increases.[705] Considering the success of the iTunes store[706] and Google Music China, people can also foresee that digital music and online distribution will completely substitute CD sales. In the motion picture industry, digital film and online delivery may also 'displace physical films, videos and DVDs, thus threatening the long-term survival of video rental stores and other middle layers in the value chain'.[707] Nevertheless, given the unique experiences afforded by the audio-visual facilities, the cinema is still playing an irreplaceable role.[708]

In the very near future, the digital publishing and online distribution will dominate the way in which information products and services can be delivered and knowledge-based works can be accessed. The physical carriers (such as paper and

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January 2010. See also, China Publishing Today, *Digital Publishing in China* (2009) <http://www.cptoday.com.cn/En/News/2009-09-10/235.html> at 28 January 2010.

704 See further, Amy Tipper, *Digital Publishing & Online Retailing How is the 'Digital Revolution' Affecting the Evolution of the Australian Book Industry?* (2008) <http://publishers.asn.au/emplibrary/Unwin_Trust_Report_Digital_Publishing_AmyTipper09.pdf > at 28 January 2010.

705 Electronista, *Digital Music up 12%, Yet to Offset CD Slump* (2010) <http://www.electronista.com/articles/10/01/21/online.music.sales.not.yet.at.turning.point/> at 28 January 2010. See also, Pollstar, *Downloading Increases While CD Sales Decline* (2009) <http://www.pollstar.com/blogs/news/archive/2009/03/18/655077.aspx> at 28 January 2010. Also see generally, Stan J Liebowitz, 'Will Mp3 Downloads Annihilate The Record Industry? The Evidence So Far' (2004) 15 *Advances in the Study of Entrepreneurship, Innovation and Economic Growth* 229; David Kusek and Gerd Leonhard, *The Future of Music: Manifesto for the Digital Music Revolution* (2005).

706 Eliot Van Buskirk, *iTunes Store May Capture One-Quarter of Worldwide Music by 2012* (2008) WIRED <http://www.wired.com/entertainment/music/news/2008/04/itunes_birthday> at 28 January 2010.

707 For further discussion on Internet-based distribution of films, see generally Kevin Zhu, 'Internet-Based Distribution of Digital Videos: The Economic Impacts of Digitization on the Motion Picture Industry' (2005) 11(4) *Electronic Markets* 273 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=526582> at 29 January 2010.

708 For general discussion about the cinema-Internet relationship, see Barbara Klinger, *Beyond the Multiplex: Cinema, New Technologies, and the Home* (2006).

optical discs) will become something only in history; information and knowledge would only exist as the digit '0' and '1'. At that time, the access to the digits would be the only thing on which the whole society could rely. In such a context, the commercial operator would obtain the power, the rights and the technology not only to maintain the supply of information and knowledge, but also to control the access to the knowledge that should be available to the public.

4.2.3 LITIGATION TARGETING SEARCH ENGINES

Given searching and linking are the most popular ways for accessing free music files online in China, search engines and URL aggregators are naturally targets for copyright infringement litigation. At the same time, new business models emerge with cooperation between entertainment industries and ISPs.[709]

A. Search Engines Sued by Recording Companies

In *Go East Entertainment Co Ltd*[710] *v Beijing Shijieyuebo Technology Co Ltd* (hereinafter 'ChinaMP3.com case'), the defendant produced lists of hyperlinks to remote websites and made the URLs available to the public on its website (www.chinamp3.com). The plaintiff accused the defendant of communicating unlicensed music files to the public. The defendant argued that no music files were reproduced or stored on its web server. The website did not provide downloading; instead, it merely provided URLs. The court of first trial was of the opinion that providing linking services amounted to communication to the public without

[709] For further discussion, see generally Eric Priest, 'Why Emerging Business Models and Not Copyright Law are the Key to Monetising Content Online ' in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 119.

[710] It is based in Hong Kong, belonging to the Universal Music Group. Its website is at Go East Entertainment Co Ltd <http://www.umg.com.hk> at 19 April 2010.

authorisation.[711] This opinion was overruled by the court of appeal; the appellate court held providing hyperlinks did not amount to reproducing and communicating the unlicensed works to the public. However, the defendant objectively assisted and contributed to the infringement by providing hyperlinks to unlicensed music files without due diligence.[712] In this case, the defendant selected, compiled and edited the hyperlinks. During this process, the defendant had the chance to inspect the legality of the works located on the remote websites. Thus, the defendant should be aware of the infringing nature of the linked music files. Therefore, the defendant was held liable for 'participating in and assisting' the infringement.[713]

In a later case, *Sony Music Entertainment (Hong Kong) Ltd v Jining Window Information Ltd* (hereinafter 'Jining Window case'), the defendant was sued for providing deep linking to infringing works. The local courts (Jining Intermediary People's Court and Shandong High People's Court) requested instructions from the Supreme People's Court.[714] According to the Reply,[715] Internet service providers are not liable for copyright infringement unless: (i) they are proved to be 'actually aware of' the infringement, or (ii) they fail to delete the URLs linking to infringing works upon the receipt of notice from copyright owners. The case ended with the plaintiff's abandonment of action.[716]

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711 See Beijing No 1 Intermediary People's Court, Civil Judgment (2004) Yi Zhong Min Chu Zi No 400, issued 23 April 2004.

712 See Beijing High People's Court, Civil Judgment (2004) Gao Min Zhong Zi No 713, issued on 2 December 2004.

713 Ibid.

714 See Shandong High People's Court, *Request for Instructions: Whether Jining Window Information Ltd.'s Act of Providing Links Infringing the Right of Network Communication Enjoyed by the Sound Recordings and How to Calculate the Amount of Damages*, Document No 7 (2005).

715 See Supreme People's Court of PRC, *Reply* [(2005) Min San Ta Zi No 2] issued on 2 June 2005.

716 For further discussion on the Jinning Window case and the ChinaMP3.com case, see Wangqian, above n 637, 201.

In *Shanghai Push Sound Music & Entertainment Co, Ltd v Beijing Baidu Network Information Technology Co Ltd* (hereinafter 'Push v Baidu case'),[717] the defendant provided music searching service on its website (www.mp3.baidu.com). The searching service is accessible in two ways. Users could locate specific sound recordings by key word searching. On the other hand, users could also readily select from a variety of catalogues of music which were highly structured and organised. In each case, associated hyperlinks to sound recordings which were stored on remote websites would be generated. Clicking the link would trigger a download while the user remained on Baidu's website. At the same time, advertisement would pop up with the downloading or listening page. The plaintiff, an EMI Group-affiliated label, sued the defendant for communicating the sound recordings to the public via the Internet without authorisation.

The court focused on the catalogues and lists in which hyperlinks of sound recordings were structured and organised by artist name, song title, the popular top 500, the Latest top 100, etc. The court was of the opinion that the defendant took advantage of the content generated by the searching service in pursuit of profit. The court found the defendant liable for infringement. Many scholars are critical of this ruling as 'the language used by the court could impose copyright liability on any search engine'.[718] This case was appealed to the Beijing No 1 Intermediary People's Court and the two parties reached a settlement agreement.[719] After the litigation, Baidu adjusted its music searching services, avoiding manipulation of the search results and the display of the results. Moreover, clicking the hyperlinks would only trigger online music streaming instead of downloading.

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[717] See Beijing Haidian People's Court, Civil Judgment [(2005) Hai Min Chu Zi No 14665] issued 16 September 2005.

[718] Wangqian, above n 637, 208.

[719] See Beijing No 1 Intermediary People's Court, Civil Mediation Order (2006) Yi Zhong Min Zhong Zi No 2491, issued on 19 December 2006.

Surprisingly, Baidu won another series of lawsuits; however, Yahoo! China was found liable under similar circumstances. In August 2005, seven major record labels including Sony BMG, Warner and Universal brought Baidu before the Beijing No 1 Intermediary People's Court for the same cause of action (hereinafter '*seven labels v Baidu* case').[720] The plaintiff targeted the defendant's music searching service for allowing online play and download of unlicensed sound recordings. The court based its judgment on the analysis of the nature of search engine. The court was of the opinion that the online play and listening is a necessary way of displaying web search result for audio files, and downloading is an interactive process just between the user and the remote website. Therefore, the court found the defendant was not liable.

In January 2007, 11 labels including EMI, Warner, Universal, etc, sued Yahoo! China (operated by Beijing Alibaba Information Technology Ltd) for MP3 searching and deep-linking services (hereinafter '*eleven labels v. Yahoo! China* case').[721] By

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720 See S*ONY BMG Music Entertainment (Hong Kong) Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 10170, issued on 17 November 2006; *EMI Group Hong Kong Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 8488, issued on 17 November 2006; *WARNER Music Hong Kong Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 8995, issued on 17 November 2006; *Universal Music Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 8474, issued on 17 November 2006; *Gold Label Entertainment Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 7965, issued on 17 November 2006; *Cinepoly Records Co Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 8478, issued on 17 November 2006; *GO EAST Entertainment Co, Ltd v Beijing Baidu Network Information Technology Co Ltd*, Beijing No 1 Intermediary People's Court, Civil Judgment (2005) Yi Zhong Min Chu Zi No 7978, issued on 17 November 2006.

721 See *Warner International Inc v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02630, issued on 24 April 2007; *EMI Group Hong Kong Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No

contrast to the Baidu case, the court of first trial (Beijing No 2 Intermediary Court) found the defendant liable for providing structured catalogues and lists which enabled it to display hyperlinks to remote websites in a systematic way. The court was of the opinion that providing searching service and links to unlicensed music files did not amount to reproducing or communicating the works. However, the defendant facilitated and assisted the infringement by such means. Furthermore, the defendant was unable to respond to the plaintiffs' complaints and notices of taking down. The court thus found the defendant liable. The defendant was ordered to delete the hyperlinks, and meanwhile damages were awarded to the plaintiffs.

The factual variation between the *seven labels v Baidu* and *eleven labels v Yahoo! China* might result in judgments which differ sharply from each other. Under the safe harbour rules established in the *Network Copyright Interpretation* and the *Communication Right Regulations*, network service providers who offer searching or linking services shall not be liable for copyright infringement provided: (i) they, upon the receipt of complaining notices from copyright owners, disconnect the URLs which link to infringing works upon; and (ii) before receiving the notices, they are unaware of or have no reason to know that the URLs linking to unlicensed works.[722] Accordingly, an ISP is liable for copyright infringement only if it does not act to delete the infringing content when it has knowledge of, or when the copyright owner provides the ISP with strong evidence of, copyright infringement. Therefore, the visible variation in *seven labels v Baidu* and *eleven labels v Yahoo! China* is the

02621, issued on 24 April 2007; *EMI Records Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02631, issued on 24 April 2007; *Warner Music Hong Kong Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02625, issued on 24 April 2007; *Universal Music Ltd v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02622, issued on 24 April 2007; *Universal International Music BV v Beijing Alibaba Information Technology Ltd*, Beijing No 2 Intermediary People's Court, Civil Judgment (2007) Er Zhong Min Chu Zi No 02626, issued on 24 April 2007.

[722] See the *Network Copyright Interpretation* of China 2006, art 4; and the *Communication Right Regulations* of China 2006, art 23.

different measures taken by the plaintiff to handle 'take down notice'. In *eleven labels v Yahoo! China*, the defendant failed to take appropriate steps to delete the infringing hyperlinks upon the receipt of the notices. By contrast, in the *seven labels v Baidu*, the plaintiffs lost the case because they were unable to send out the 'take down notice' before the litigation.

In the most recent case, *Zhejiang Fanya E-commerce Ltd v Beijing Baidu Network Information Technology Co Ltd* and *Baidu Online Network Technology (Beijing) Co, Ltd* (hereinafter '5fad.com case'),[723] Baidu was sued for its music searching and linking service again. The plaintiff complained that the searching service provided by the defendant empowered internet users to locate the URL address of unlicensed sound recordings and lyrics. The court focused on the functionality of the key word searching, affirming that the technology could be used for both infringing and non-infringing purposes. It was held that the service of 'music search engine' did not necessarily amount to liability for copyright infringement. It was noted by the court that the defendant had, in due course, deleted the infringing hyperlinks before the lawsuit. Accordingly, it was found that the defendant was not liable. This case has gone up to the Supreme People's Court, and the judges heard the case on 9 June 2009, but no judgment has yet been made.[724]

The conflicts between Baidu and the entertainment industry have continued to grow in the past years. Leading international and Chinese record companies even announced alliance to 'blacklist' Baidu in 2008, calling on businesses to stop

[723] See Beijing High People's Court, Civil Judgment (2007) Gao Min chu Zi No 1201, issued on 19 December 2009.

[724] See, Sina Tech (2009) <http://tech.sina.com.cn/i/2009-06-09/12183162513.shtml> at 19 June 2009.

advertising on its site.[725] However, as Eric Priest claims, emerging business models, not copyright law, are the key to solve the conflicts.[726]

EMI was one of the seven record labels suing Baidu for copyright infringement in 2005 and 2006. Putting the battles behind them in early 2007, EMI and Baidu collaboratively launched a partnership to enable streaming (rather than downloading) of songs on Baidu's music-search Web pages, coupled with advertisements that appear onscreen as they play.[727] In July 2007, Baidu and Rock Music Group established a partnership to provide an advertising-supported online music streaming service.[728]

Google, on 30 March 2009, launched free downloads of authorised music in China while sharing advertising revenue with major record labels.[729] The service[730] offers over 350 000 songs both from Chinese and foreign artists and the number will rise to 1.1 million. In this way, Google puts pressure on Baidu to make similar deals with

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[725] Shu-Ching Jean Chen, *Blacklisting Baidu* (2008) Forbes.com <http://www.forbes.com/2008/06/03/music-baidu-piracy-markets-equity-cx_jc_0603markets2.html> at 22 June 2009.

[726] Priest, 'Why Emerging Business Models and Not Copyright Law are the Key to Monetising Content Online ', above n 709, 119.

[727] Jason Dean, 'EMI, China's Baidu Put Battles Behind', *The Wall Street Journal* 17 January 2007, B14. See also Baidu, 'Baidu and EMI Launch Advertising-Supported Streaming Service' (Press Release, 16 January 2007) <http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-newsArticle&ID=950294&highlight=> at 22 June 2009.

[728] Dan Nystedt, *Baidu Signs Ad-Supported Music Partnership* (2007) ABC News <http://abcnews.go.com/Technology/PCWorld/story?id=3347760> at 22 June 2009.

[729] Reuters, *Google Launches Free, Legal Music Downloads in China* (2009) <http://www.reuters.com/article/technologyNews/idUSTRE52T22P20090330> at 22 June 2009. See also, Jemima Kiss, *Google Launches Free Music Site in China* (2009) The Guardian <http://www.guardian.co.UK/technology/2009/mar/31/google-china-digital-music> at 22 June 2009.

[730] It is located at <http://www.google.cn/music/homepage> at 19 April 2010, and it is only available for internet users within Mainland China.

record labels.[731] It has been reported that Baidu is going to launch a revenue sharing model with recording companies for its music download service.[732]

B. Industrial Reponses: Google Music China

In March 2009, Google along with its partner, the Whale Music Network (www.top100.cn), launched an online music search service at www.music.google.cn, providing free access to licensed music for users in China.[733] It is an advertising supported service allowing users to search, stream and download high-quality songs free of charge. The service offers a catalogue of 1.1 million tracks from more than 140 labels, including the world's four biggest: Warner Music Group Corp, Vivendi SA's Universal Music, EMI Group Ltd, and Sony Corp's Sony Music Entertainment.[734] The service earns revenue from advertising on pages that let users stream or download songs. The income generated from the webpage advertisements is split (50:50) between the record labels and Top100, while Google presumably benefits from the increase of traffic on its site.[735]

The available music files are embedded with a digital watermark that enables the record companies to track how often and which of their songs are downloaded; however, for users, the files are totally free of Digital Right Management (DRM) or

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731 Tina Wang, *Google Puts Heat On Baidu* (2009) *Forbes* <http://www.forbes.com/2009/03/31/google-baidu-music-markets-equity-china.html> at 22 June 2009. See also, iStockAnalyst, *Google's Free Music Download Pushed Baidu Shares Down by 5.55 Percent* (2009) <http://www.istockanalyst.com/article/viewarticle/articleid/3239613> at 22 June 2009.

732 BeijingTimes, *Baidu Plans to Share Music Search Revenue with Music Firms* (2009) <http://www.tradingmarkets.com/.site/news/Stock%20News/2330049/?relatestories=1> at 22 June 2009.

733 J McDonald, *Google, Music Labels Launch China Download Service* [Electronic Version] (2009) *ABC News* <http://abcnews.go.com/Business/wireStory?id=7205789> at 10 October 2009.

734 A Back and L Chao, *Google Begins China Music Service* [Electronic Version] (2009) *The Wall Street Journal* <http://online.wsj.com/article/SB123841495337969485.html> at 10 October 2009.

735 Ibid.

Technological Protection Measures (TPMs). It means that the songs can be played, copied, and shared through any computer or MP3 digital device. During the negotiation for this collaboration with Top100.cn and the record labels, the issue of DRM was a key issue. Google believed that DRM which limits copying and sharing of music files would be inconvenient for users and damage user experience. Google therefore required Top100 to obtain authorisation for the music to be distributed without DRM.[736] Consequently, the only technological restriction of the service is the use of IP geo-location, making the service only accessible from inside China. Nevertheless, the IP geo-location can be circumvented and thus users outside China may also access the service.

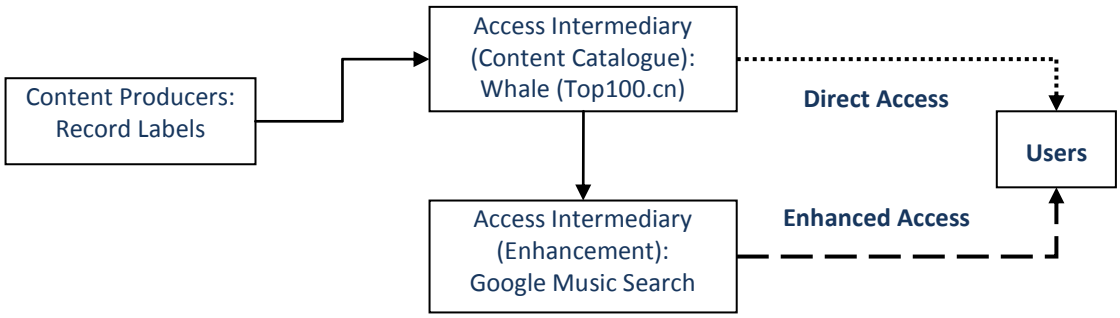

Figure: Google Music China and Enhancement of Access to Music

It is a 'content, access and enhancement' business model and a paradigm for the distribution of digital content on the web. The Whale Music Network (www.top100.cn) is an online digital store maintaining an extensive music catalogue which covers licensed songs from a large number of record labels. In this case, Whale provides a searchable catalogue of content. Google music search merely takes the role of an access enhancement platform; in this way, the service enriches the way people can find desirable music with Google's advanced search engine and technology.

[736] M L Zhang, 'When Google Gets Musical' (2009) *Global Entrepreneur Magazine*. The article was originally published in Chinese and its English translation is available at *Google Blogoscoped* (2009) <http://blogoscoped.com/archive/2009-09-18-n38.html> at 10 October 2009.

What Google Music Search offers is the enhanced access to and facilitated distribution of music files. Apart from Google's brand which is an advantage to attracting more users, the Google Music Search Engine also provides a significant enhancement in music access and user experiences. First of all, the Google service provides a specified and enhanced music searching capacity and a variety of ways in which users can search, choose, listen to or download the song. The search page displays a blank search box and lists of top songs and their artists, along with links enabling users to stream or download the tracks. Users can find a song through the search box and also through the names of artist, title of the song, album, sentence of a lyric, etc.

In addition, the Google Music Player and Playlist not only allow users to stream and listen to the tracks online, but also enable users to choose, archive and save their favourite songs online. If integrated into user's Google account and the next generation of service, Google Wave,[737] it will generate tremendous potential for users to enjoy and share music through the web.

Even more importantly, the system can also recommend similar songs according to the nature and the difference of the tempo, tone, timber, genre, language of specific songs and singer's gender. It also has a 'song screener' which is an automated system and suggests new music based on a listener's preferences for tempo or sound saturation.[738] This is important as Lachie Rutherford, president of Warner Music

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737 Google Wave is an online tool for real-time communication and collaboration. A wave can be both a conversation and a document where people can discuss and work together using richly formatted text, photos, videos, maps, and more. See the potential Google Wave at <http://wave.google.com/help/wave/closed.html> at 19 April 2010.

738 L Chao, *Music-Industry Execs Weigh In on Google's China Service* [Electronic Version] (2009) The WSJ Blogs <http://blogs.wsj.com/digits/2009/03/31/music-industry-execs-weigh-in-on-googles-china-service/> at 10 October 2009.

Asia Pacific, says: 'You have to realize that not all consumers are musically knowledgeable. A lot of people need help to find out what they want.'[739]

This project evidences a win-win reality which makes it possible (and most importantly, legal) for copyright owners to benefit from their copyright while allowing other and complementary businesses to manage and enhance the information flow through an access based rather than control methodology.

4.2.4 LITIGATION TARGETING P2P FILE-SHARING

P2P technology is a marvelous internet application for the dissemination of works, and P2P streaming applications even bring this technology to the next level.[740] Meanwhile, it is also the primary firing line for the copyright war. The US Napster case[741] and the series of Kazaa lawsuits around the world[742] are the most notable. China 'has become the hotbed of' P2P applications,[743] and the Chinese P2P streaming media market has been unbelievably thriving. Chinese P2P streaming service providers, including PPLive,[744] PPStream,[745] Xunlei,[746] UUSee,[747]

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739 Ibid.

740 See generally Yong Liu, Yang Guo and Chao Liang, 'A Survey on Peer-to-Peer Video Streaming Systems' (2008) 1(1) *Peer-to-Peer Networking and Applications* 18; Sachin Agarwal, Jatinder Pal Singh and Shruti Dube, 'Analysis and Implementation of Gossip-Based P2P Streaming with Distributed Incentive Mechanisms for Peer Cooperation' (2007) 2007(1) *Advances in Multimedia*; Yi Cui, Ben Y Zhao, and S Chen, 'Toward the Next-Generation Peer-to-Peer Services' (2007) 2007(1) *Advances in Multimedia*.

741 *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001).

742 For example, see Australia - *Universal Music Australia Pty Ltd v Sharman License Holding Ltd* [2005] FCA 1242; US - *MGM Studios, Inc v Grokster, Ltd* 545 US 913 (2005); Netherlands - *Vereniging Buma, Stichting Stemra v KaZaA BV* [2004] ECDR 16.

743 Geoffrey A Fowler and Sarah Mcbride, *Newest Export From China: Pirated Pay TV* (2005) Wall Street Journal (B1) <http://online.wsj.com/article/0,,SB112560377411829361,00.html?mod=todays_us_marketplace > at 29 June 2009.

744 See <http://www.pplive.com> at 19 April 2010.

745 See <http://www.ppstream.com or http://www.pps.tv>

746 See <http://www.xunlei.com> at 19 April 2010.

747 See <http://www.uusee.com> at 19 April 2010.

QQLive,[748] etc, have not only successfully introduced many advanced P2P applications but also grown to be 'the world leaders in P2P TV and P2P streaming media'.[749]

A. P2P Software and Service Provided Sued by Entertainment Industries

Commentators ever suggested, '[w]ith a relaxed regulatory environment unlike the U.S., Chinese developers have created file-sharing protocols that offer downloads 50 times faster than BitTorrent and real-time streaming of DVD quality video'.[750] However, it is not always true as recent years have witnessed increasing amount of litigation targeting both P2P file sharing and streaming service providers. *Shanghai Push Sound Music & Entertainment Co, Ltd v Beijing Kuro Music Software Exploration Co Ltd and Beijing BoSheng Fang An Information Technology Co Ltd* (hereinafter 'Kuro case')[751] is widely acknowledged as the first P2P case in

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748 See <http://tv.qq.com> at 19 April 2010.

749 See Dialogic, *Joost Entering World's Most Advanced P2P TV Market, i.e. China* (2008) <http://blogs.dialogic.com/2008/01/joost-entering.html> at 29 June 2009. See also, Market Avenue, *Overview of China's P2P Stream Media Market* (2008) <http://www.marketavenue.cn/upload/articles/ARTICLES_1239.htm> at 29 June 2009.

750 ZeroPaid, *China Taking P2P to the Next Level?* (2007) <http://www.zeropaid.com/news/9057/china_taking_p2p_to_the_next_level/> at 29 June 2009.

751 Beijing No 2 Intermediary People's Court, Civil Judgment (2005) Er Zhong Min Chu Zi No 13739, issued on 19 December 2006. The defendant Beijing Kuro Music Software Exploration Co Ltd was affiliated to Taiwan Kuro Co, Ltd, a subscription P2P service provider. In September 2005, a Taiwan court convicted the Taiwan Kuro company of criminal copyright infringement, imposing a fine of NT$3 million (approx US$90 000) and sentencing the three principals of Kuro, along with a user, to jail terms of up to three years. One Kuro member was given a 3-year suspended jail sentence for her part in violating copyright by downloading music over the P2P network. See IFPI, *IFPI Welcomes Landmark Conviction of Taiwan File-Sharing Service Kuro: First Criminal Ruling against an Internet Peer-to-Peer Service in the World* (2005) <http://www.ifpi.org/content/section_news/20050909.html> at 29 June 2009. See also, Taipei Times, *Kuro Bosses Guilty of IPR Violations* (2005) <http://www.taipeitimes.com/News/front/archives/2005/09/10/2003271076> at 29 June 2009. See also, Taiwan Taipei District Court, *Criminal Judgment*, 92 Nian Du Su Zi No 2146.

Mainland China.[752] The defendants were sued for providing file sharing, searching and downloading services through Kuro (P2P file sharing software) on their websites (www.Kuro.com.cn and www.Kuro.cn). The court was of the opinion that the defendants offered substantial assistance for users' infringing activities. The defendants facilitated searching, downloading, streaming and burning of unlicensed music recordings. They heavily advertised to a larger range of audiences and charged users for subscription fee. The court therefore held the defendants liable for contributory infringement.

In another series of litigation targeting POCO (P2P file sharing software), the software and service provider – Guangzhou Shulian Software Technology Co Ltd – was sued for allowing and facilitating video sharing on its website (www.poco.cn).[753] The courts were of the opinion that producing and providing users the P2P software were not infringing. The P2P software might be used for both infringing and non-infringing purposes. Nevertheless, in the case of infringing use, P2P service providers should be liable for substantially and knowingly assisting, inducing and facilitating the infringement. Consequently, POCO service provider was held liable for contributory infringement.

B. Solutions Proposed to Harness P2P File-sharing

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752 See Hong Yunzu, 'How P2P Dash Out From Deadlock' (2007) 17(2) *Intellectual Property Right* (trans of: Zhi Shi Chan Quan trans). See also, Feng Gang, 'On the Infringement Liability of P2P Software Proprietor' (2008) 18(3) *Intellectual Property Right* [trans of: Zhi Shi Chan Quan trans].

753 See *Guangdong Zhongkai Culture Development Co Ltd v Guangzhou Shulian Software Technology Co Ltd and Shanghai CAV Advertisement Co Ltd*, Shanghai No 1 Intermediary People's Court, Civil Judgment (2006) Hu Yi Zhong Min Wu (Zhi) Chu Zi No 384; and Shanghai High People's Court judgment, (2008) Hu Gao Min San (Zhi) Zhong No 7. See also *Beijing Ciwen Pictures Ltd v Guangzhou Shulian Software Technology Co Ltd*, Guangzhou Intermediary People's Court, Civil Judgment (2006) Sui Zhong Fa Min San Chu Zi No 7; and Guangdong High People's Court, Civil Judgment (2006) Yue Gao Fa Min San Zhong Zi No 355, issued on 23 June 2008.

The P2P networks and applications are themselves valuable with great potential, and the legal batters surrounding P2P file sharing are 'a losing proposition for everyone'.[754] In order to allow copyright owners to be fairly compensated and for the works to be made available to the public through P2P services, a number of proposals for a compulsory licensing system have recently been posited. Some are sympathetic with the proposed solutions; however, others remain sceptical about the feasibility of such a system.

Neil Netanel – Levy on P2P: Professor Neil Netanel, in a 2003 article, proposed to impose a levy on P2P-related services and products in return for allowing unrestricted noncommercial P2P file sharing.[755] It is called the 'Noncommercial Use Levy' imposed on the sale of any consumer product or service whose value is substantially enhanced by P2P file sharing. Reciprocally, individual users would be free to make noncommercial reproduction and distribution of any published works under compulsory licenses.[756] This proposed system also allows non-commercial adaptations and modifications of the works under the condition that the secondary creator clearly identifies the underlying work and indicates that it has been modified.[757]

William Fisher – Tax Revenue Sharing: In his 2004 book *Promises to Keep*, Harvard Professor William Fisher also articulated a reform to 'replace major portions of the copyright … with … a governmentally administered reward

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754 Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing* (2008) Electronic Frontier Foundation (EFF) <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> at 30 August 2009.

755 See generally Neil W Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing' (2003) 17(1) *Harvard Journal of Law and Technology* 1.

756 Ibid.

757 Ibid 38-40. For further discussion on adaptations and alterations of works, see next chapter of this thesis.

system'.[758] The proposed system is both an institutional and technological solution to allow copyright works (songs and movies in particular) freely and publicly accessible, and meanwhile make artists fairly compensated. It is reliant upon a centralised registration system to allocate a unique and durable digital fingerprint to each copyright work and to track digital copies of the work. Under the supervision of a government agency, each copyright owner would be paid a share of the tax revenues proportional to the relative popularity of his or her creation.[759] It is noted that Professor Fisher's proposal also claims to accommodate the creating of derivative works, including digital sampling and mash-ups.[760]

André Lucas – Levy on File Sharing: In France, a 2005 legal feasibility study under the supervision of Professor André Lucas concludes that nothing in national law and international obligations constitutes an obstacle to permitting file sharing subject to a levy.[761] The study was conducted upon the request of the *Alliance Public-Artistes* (hereinafter *Alliance*) which was campaigning for a flat rate 'global licence'. In the end of 2005, the *Alliance* proposed the adoption of a system of mandatory collective administration and a global licence for P2P file sharing. The proposal was rejected by a commission established by the French Ministry of Culture and Communication because 'it would have provided too weak a response to

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758 Fisher, above n 104, 202.

759 Ibid 199-258.

760 Ibid 234-6. For further discussion on the rights of derivative works, see next chapter of this thesis.

761 See further, Carine Bernault and Audrey Lebois (under the supervision of Professor André Lucas), *Peer-to-peer File Sharing and Literary and Artistic Property: A Feasibility Study Regarding a System of Compensation for the Exchange of Works via the Internet* (Institute for Research on Private Law, University of Nantes, 2005) the English version is available at <http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf> at 31 August 2009; and the French version is available at <http://alliance.bugiweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf> at 31 August 2009.

the problem of on-line copyright enforcement while, at the same time, veering away from the legal boundaries laid down by international copyright law'.[762]

EML – Levy on Internet Usage: A 2009 study undertaken by the Institute of European Media Law (EML) concludes that a levy on internet usage legalising non-commercial online exchanges of creative works is in compliance with German and European copyright law. The study suggests that a form of licensing and flat-rate fees charged to service providers and users of P2P file-sharing networks is a feasible solution to the proliferation of P2P file sharing.[763] The study was commissioned and has been backed by the German and European factions of the Green Party who have been campaigning for a policy of 'culture flat rate'.[764]

Professor McLeod suggests that '[a] blanket license model, like that legalizing the use of copyrighted material by cable television and radio, can point us to a future system that might work for file sharing'.[765] Chris Gorog, CEO of Napster, gives his most extravagant applause to the idea of blanket license and claims that a compulsory licensing of the music publishing would be a tremendous windfall for digital music and it would be a win-win-win for everyone.[766] Major US P2P software vendors have also called on Congress to consider compulsory licensing of music, a system similar to the fees radio stations pay for music.[767]

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762 Giuseppe Mazziotti, *EU Digital Copyright Law and the End-Use* (2008) 261.

763 Grassmuck, above n 533.

764 Ibid. See also, Janko Roettger, *Green Party Defends P2P Legalization, Collective Licensing Scheme* (2009) p2p-Blog.com <http://www.p2p-blog.com/item-1132.html> at 31 August 2009.

765 Kembrew McLeod, *Share the Music* (2004) The New York Times <http://www.nytimes.com/2004/06/25/opinion/25MCLE.html?ex=1403496000&en=833ac0f87453f807&ei=5007&partner=USERLAND> at 31 August 2009.

766 Peter Rojas, *The Engadget Interview: Chris Gorog, CEO of Napster* (2005) www.engadget.com <http://www.engadget.com/2005/03/14/the-engadget-interview-chris-gorog-ceo-of-napster/> at 31 August 2009.

767 Gross, above n 113.

4.3 FUTURE DIRECTION: RECONFIGURING PUBLIC DISSEMINATION RIGHTS AND LIMITATIONS

4.3.1 THE MONOPOLISED DISTRIBUTION OF WORKS IS AN OUT-DATED PARADIGM FOR KNOWLEDGE DISSEMINATION.

In the 15th century, the invention and widespread application of the printing press gave birth to industrial manufacture and commercial trade of books in Europe,[768] and gradually raised a paradigm of knowledge dissemination. It is a paradigm of centralised distribution of information and knowledge-based products, monopolised in the earlier age by a few publishers and book dealers and later by giant media companies. Since it came into being, contemporary copyright law has accommodated and facilitated this centralised paradigm. With the exclusive rights under the head of the right of public dissemination in material and non-material forms, copyright owners are granted the power to control the availability of knowledge-based products. In most cases, only one (or a very limited number of) agent has the ability and authority to distribute the products. In this way, the selected disseminator enjoys a monopoly power to distribute the products without challenge and without competition.

In the pre-internet age, the centralised paradigm was the most critical mechanism for the dissemination of knowledge because of the inevitable high costs. Even if the authors do not require any momentary return for creating books, the cost of the printing of the physical books and the infrastructure for getting the books into the marketplace are too high to be affordable to individual authors. The centralised

[768] For further discussion on the invention of printing press and the following rise of book trade, see generally Elizabeth L Eisenstein, *The Printing Press as an Agent of Change (Volumes 1 and 2 in One)* (1980); Stephan Fussel, *Gutenberg and the Impact of Printing* (2005); Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing 1450-1800* (1997); Elizabeth L Eisenstein, *The Printing Revolution in Early Modern Europe* (1993).

paradigm has made it possible for the significant investment in reproducing and distributing the knowledge-based products to be compensated for.

In many cases, the monopolised power even makes it a very profitable business for publishers and distributors; however at the same time, access to knowledge is also fully available to the public without substantial restrictions. For instance, there are a large number of public libraries around the world, affording everyone the equal chance to obtain any information and knowledge that are available to society. Under the 'First Sale Doctrine', the second hand book market has also played a key role in providing the reading public an additional but important and affordable access to knowledge. The broadcasting service providers are also allowed to transmit available information products to the public under statutory or compulsory licensing.

Not surprisingly, since the advent of the Internet, the cost has been reduced to a very insignificant level. The increasing number of web applications has brought about great potential for public access to information and knowledge. The advance of ICTs has not only significantly eliminated the cost of publishing and distributing information products, but also transformed knowledge growth and dissemination into a decentralised and distributed paradigm. As a result, the monopolised distribution of creative works has increasingly become an out-dated paradigm for knowledge dissemination. However, the rising potential and possibilities enabled by the technological and social progress have not been made fully available to the public. Restricted by a legal framework that was tailored for the pre-internet media age, copyright is less favourable to the flow of information and to free access to knowledge. The negative forces of the established copyright system must be reconsidered.

4.3.2 DECOUPLING PRODUCTION AND DISSEMINATION

Considering the economic significance of copyright-related industries,[769] the business of delivering knowledge-based products or services or maintaining a controlled access to information (entertainment products in particular) is very profitable. The problem is how to allocate and distribute commercial benefits to those who have invested their intelligence, creativity, labour, and other resources in the production and delivery of the products or services, and how to maintain and promote public access to knowledge at the same time.

Given the participative nature of the web-based media with users widely spread all over the world, it is obviously not effective and not workable to make it completely subject to private negotiation. The lesson learned from the digital libraries[770] tells us that the private initiatives raised by industries based on the current copyright regime may jeopardise the public's access to knowledge. The current regime is 'allowing a question of public policy — the control of access to information — to be determined by private lawsuit [or private negotiation].'[771]

In order to harness the unprecedented opportunities of this digital age**,** the direction proposed by this thesis is to decouple the creative acts of production and the acts of dissemination in a number of ways. Put differently, producers should have certain rights over the works or products which originate from them; however, once their creations are published, their exclusive rights to control the dissemination of the creations should somehow be limited at various levels and in different ways.

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769 'When the international copyright system first developed, the economic – if not the social – importance of the "copyright industries" was quite modest. As western countries moved towards the post-industrial, service-oriented society, so the economic significance of intellectual property grew.' See, Mireille van Eechoud, *Choice of Law in Copyright and Related Rights* (2003) 131-2. See also, WIPO, *The Economic Significance of Copyright and Related Rights Protection* (Document Code: WIPO/IP/YGN/04/1(B)) (2004). See also, Serman W D Chavula, 'Copyright Protection as a Stimulus for Cultural and Copyright Development: the Experience of the Copyright Society of Malawi' (Paper presented at the WIPO National Seminar on the Economic Importance of Copyright and Related Rights Protection, Kampala, 16-17 December 2003).

770 See s 4.2.1 of this ch of this thesis.

771 Darnton, above n 696.

To a certain extent in the past it was possible to do this through compulsory licensing which makes possible the financial and social success of the recording industry and the broadcasting industry. But with the establishment of the extremely expansive right of communication to the public, production has been coupled with dissemination once again. It is therefore argued that, at least in the case of the Internet-based media, the communication or making available of the works to the public should somehow be allowed under the condition that the authors can be fairly compensated.

4.4 SUMMARY

As Goldstein suggested, 'copyright was technology's child from the start',[772] the advance of technologies for copying and distributing works 'affects the optimal scope of copyright protection because technology determines the ease with which copyright may be enforced or infringed'.[773] In order to handle the digital challenges raised by the proliferation of the information and communication technologies, international conventions have provided an 'umbrella solution'. This chapter has examined various approaches to the implementation of the international obligations, taken by the US, the UK, Australia and China.

Through the establishment of a broad communication right, copyright law was successfully extended to the networked digital environment. However, the exclusive rights conferred on the authors and other copyright owners have undertaken considerable expansion. The extension of a regime created in the pre-Internet age to this digital world is problematic. The increasing tension leads to continuous copyright wars between the copyright owners and the geographically widespread users.

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[772] Goldstein, above n 534, 21.

[773] Julie Cohen et al, *Copyright in a Global Information Economy* (2002) 7.

The excessive copyright control sacrifices opportunities of the copyright owners, the emerging industries, the users, and the public. The user cannot take full advantages of advanced technologies; it impedes the development of new business models and new markets, and technological innovation; the possibilities of access to knowledge offered by this digital age are also not made fully available to the public.

The ultimate purpose of the copyright system, as the US Supreme Court contended, is to foster 'broad public availability of literature, music and the other arts'.[774] Thus, the future direction, as argued in this chapter, is somehow to decouple production and dissemination.

[774] *Fogerty v Fantasy, Inc*, 510 US 517 (1994).

CHAPTER 5

THE PERVASIVE RIGHTS OF RE-/USE *VS* THE REALITY OF RE-/CREATION

INTRODUCTION

AIM

This chapter aims to highlight the increasing conflict between the reality of re-/creation and the expansive copyright control over the use and re-use of copyrighted works by means of the pervasive right of (non-literal) reproduction together with the right of making derivative works or the right of adaptation.

SCOPE

Copyright protection, as Professor Kaplan pointed out nearly half a century ago, has extended itself to take more than the simplest cases of copying under impulsion of various forces.[775] The first copyright law 'aimed only at exact replications of printed work'.[776] Defendants in the cases of subsequent creations such as translations and other adaptations of existing works were able to escape infringement 'by contributing "somewhat intellectual" notwithstanding they had used the plaintiff's works pervasively'. [777] Yet, since the mid-19th century, copyright owners

[775] Kaplan, above n 304, reprinted in Benjamin Kaplan et al, *An Unhurried View of Copyright, Republished (and with Contributions from Friends)* (2005) 2. Also see generally, John Feather, 'From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries' (1992) 10(2) *Cardozo Arts & Entertainment Law Journal* 455.

[776] Goldstein, above n 534, 1.

[777] Kaplan, above n 775, 16-17.

increasingly 'could stop the publication not only of exact knockoffs but also of imitations and adaptations'.[778] As a result, copyright owners' rights to control, have expanded significantly from copies to subsequent creations that are built upon the existing works.

This chapter aims to assess the *status quo* of copyright owners' power to control the re-use of works and its impacts on re-creation. The historical expansions of the right to control re-use and re-creation are addressed in the contexts of both international and national laws. Given emerging new forms of re-creation including remixing, sampling, mashing-up and so forth enabled by digital technologies, this chapter argues that appropriation, imitation and borrowing are increasingly crucial for civic engagement in cultural development. The expressive works are becoming increasingly important communication tools in a networked information society.[779] This chapter argues that copyright owners' control over re-use is less justified. The exclusive rights to produce subsequent creations such as translations, adaptations and other derivatives should be limited to commercial activities. The legal system of copyright should allow for non-commercial and productive use of copyrighted materials, facilitating a read/write culture.

5.1 PERVASIVE CONTROL OF RE-/USE AND RE-/CREATING

Given the extension of the reproduction right from the right of literal copying to a broader right of both literal and non-literal reproduction, together with the establishment of the right to make derivatives or adaptations, copyright owners' power to control the re-/use and re-/creating has been expanding tremendously. The

[778] Ibid 1-2.

[779] Kaitlin Mara, *Video Wants To Be Free And Open Too: IP Policy Considerations* (2009) *Intellectual Property Watch* <http://www.ip-watch.org/weblog/2009/06/23/now-video-wants-to-be-free-and-open-too-ip-policy-considerations/> at 9 July 2009.

pervasive control has been increasingly problematic in the context of the rise of civic engagement in cultural activities.

5.1.1 THE HISTORICAL AND INTERNATIONAL DEVELOPMENT

A. The Freedom of Recreation, Once Upon a Time

The first substantial question to arise under the *Statute of Anne 1710*[780] was that of alleged infringement by translation.[781] In *Burnet v Chetwood*,[782] the plaintiff entered a bill of complaint in the Court of Chancery alleging copyright infringement under the Statute. The defendant was accused of printing an English translation of Dr Thomas Burnet's Latin work *Archaeologia Philosophica*. The defendant argued:

> [A] translation of a book was not within the intent of the act, which being intended to encourage learning by giving the advantage of the book to the author, could be intended only to restrain the mechanical art of printing, and that others should not pirate the copy and gain an advantage to themselves by reprinting it; but not to hinder a translation of the book into another language, which in some respects may be called a different book, and the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language; that the translator dresses it up and clothes the sense in his own style and expressions, and at least puts it into a different form from the

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780 It bears the full title: *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 1710* (UK).

781 Kaplan, above n 775, 9.

782 *Burnet v Chetwood* (1721) 2 Mer 441 (London). For further resources about this case, see L Bently and M Kretschmer (eds), *Burnet v Chetwood (1721), Primary Sources on Copyright (1450-1900)* Arts & Humanities Research Council <www.copyrighthistory.org> at 20 April 2010.

> original, and *forma dat esse rei*; and therefore should rather seem to be within the encouragement than the prohibition of the act.[783]

The Lord Chancellor Macclesfield apparently agreed with this argument and was of the opinion: '[A] translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act'.[784]

Gyles v Wilcox,[785] was the next notable case that tested the scope of copyright protection on the question of abridgement under the Statute. The concept of 'fair abridgement' introduced by Lord Chancellor Hardwicke is generally regarded as 'the forerunner to the broader doctrine of 'fair use'.[786] The plaintiff claimed copyright in an edition of Sir Matthew Hale's *Pleas of the Crown* and sought an injunction to stop the printing of the defendant's book *Modern Crown Law*. The plaintiff complained that the defendant's book was 'colourable only, and in fact borrowed *verbatim* from' the plaintiff's.[787]

There was no guidance on whether the reproduction of part of another work without copyright owner's consent was in contravention of the Statute. The Lord Chancellor contended that '[w]here books are colourably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the Statute, and cannot be called an abridgment.'[788] He continued as follows:

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783 J H Merivale, *Chancery Reports, 3 Vols* (1817-1819) 2, 441. See also, Bently and Kretschmer, above n 782.

784 J H Merivale, *Chancery Reports, 3 Vols* (1817-1819) 2, 441.

785 *Gyles v Wilcox, Barrow, and Nutt* (1741) 2 Atk 141; *Gyles v Wilcox* (1741) Barn C 368 (London).

786 Ronan Deazley, 'Commentary on Gyles v Wilcox (1741)' in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> at 20 April 2010.

787 *Gyles v Wilcox, Barrow, and Nutt* (1741) 2 Atk 141.

788 Ibid, 141.

> But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgment may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.[789]

The Lord Chancellor concluded that the defendant's book had been a fair abridgment of the plaintiff's, and it had been understood not to be the same book, and therefore to be out of the Statute.[790]

The court was very cautious about the adverse affect of copyright protection on recreation. The notion of copyright to multiply copies by the art of printing prevailed until the 19th century. Such conception of copyright protection was very favourable to the creations that were based on and derived from existing works. The establishment of copyright infringement was generally decided by 'looking not so much to what the defendant had taken as to what he had added or contributed'.[791]

Therefore, the improvement or re-creation of published works through translation, abridgement or other alterations was allowed and encouraged in the light of public interests. As Justice Willes said in one of the most remarkable copyright cases, *Millar v Taylor* (1769), 'bona fide imitations, translations and abridgments are different, and in respect of the property may be considered new works; but colourable and fraudulent variations will not do'.[792] Justice Aston also agreed that

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789 Ibid, 141..

790 *Gyles v Wilcox* (1741) Barn C 368. The doctrine in Gyles, as commentators point out, was 'extended and developed in the early nineteenth century into a more general doctrine of "fair user"'; and furthermore it was eventually 'recast as a much less flexible series of specific uses that might otherwise be considered to be "fair dealing"'. See further, Deazley, 'Commentary on Gyles v Wilcox (1741)', above n 786.

791 Kaplan, above n 775, 17.

792 *Millar v Taylor* (1769) 98 Eng Rep 205 (KB).

the one who bought a published book 'may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work'.

However, the traditional notion of copyright was gradually superseded by a much broader understanding of copyright as a general right to control the use and re-use of a literary and artistic work and enjoy the market value of its exploitation.[793] The emergence of the exclusive right of translation and the diminishing permission of abridgment in the earlier 19th century were illustrative of this process. Consequently, the making of abridgment, synopsis or summary of a work generally would amount to infringing reproduction, unless: (i) it is authorised by the copyright owner; (ii) the part taken from the work is too insubstantial; (iii) the abridgment is 'in such an outline form that represents only a bare description of the central ideas or themes of the work in question, with little detailed information as to how these are worked out and developed.[794]

B. The Worldwide Concession of the Freedom of Recreation

Throughout the mid-19th century, the question of copyright for translations of works occupied a central place in the development of a system of international copyright protection.[795] As Ricketson pointed out, it was probably 'the most important factor which drew states into international copyright agreements in the late nineteenth century'.[796]

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793 Oren Bracha, 'Commentary on Stowe v Thomas (1853)' in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org> at 20 April 2010.

794 Ricketson and Creswell, above n 569, 9.215.

795 Deazley, 'Commentary on Gyles v Wilcox (1741)', above n 786.

796 Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 384.

In some countries, such as France, Belgium, Haiti, etc, it was argued that 'translation is simply one of the ways in which works of these kinds may be reproduced'.[797] Accordingly, translation rights were completely assimilated to the right of reproduction under national legislations of such countries.[798]

Given the fact that translation might be the only international means of reproduction in the case of books,[799] the grant of copyright protection increasingly became prevalent in the international level in the mid-19th century. Meanwhile, adaptations and other transformations of works were also increasingly recognised as actionable infringement of authors' rights. Nevertheless, whether such transformations of works 'were to be seen as illicit reproductions or "copies", or as the subject of a separate right' remained controversial.[800]

Therefore, the Berne Conference of 1884-1886 turned its attention to two specific forms of reproduction: translations and adaptations.[801] As a result, the translation right became the first right recognised in the Berne Convention.[802] The art 8 of the current Berne Convention provides for the right of translation as follows: 'Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works'.

In terms of adaptation and other transformation of works, art 12 of the Berne Convention states as follows: 'Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works'.

797 See further, ibid 12-13.

798 Ibid.

799 Ibid 384.

800 Ibid 370.

801 See further, ibid 369-70.

802 See further, ibid 384-9.

Although translations, adaptations and other transformations are derived from pre-existing original works, their creators have indeed bestowed 'care and pains' upon them. Thus, they have good claims to be treated as new and independent works in their own right. Accordingly, art 2(3) of the Berne Convention provides as follows: 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.'

The current provisions are results of a number of negotiations and revisions over years.[803] The final terms, 'adaptations, arrangements and other alterations', although overlapping to a considerable degree, represent different ways in which an original work may be changed and re-created into new works.[804]

However, no conceptual clarification of these terms is given by the Berne Convention. Commentators have tried to explore the specific scope of each term. Ricketson suggested that 'adaptation' refers to the rewriting or remodeling of a work into another form such as dramatisations, novelisations, the writing of a prose work in verse and *vice versa*, the telling of a story in pictorial or cartoon form and the execution of an artistic work in another dimension. 'Arrangement' and 'adaptation' may overlap each other. 'Other alterations' may include abridgements, parodies, burlesques, caricatures, or 'rewrites'.[805]

It is notable that there is another kind of alteration that is not covered by art 12. Cinematographic adaptation is separately set forth in art 14 of the Berne Convention:

> (1) Authors of literary or artistic works shall have the exclusive right of authorizing:

[803] For further historical development of these provisions, see ibid 389-99.

[804] Ibid 398.

[805] Ibid 398-9.

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

The broad division between cinematographic reproductions and cinematographic adaptations, as Ricketson pointed out, 'would seem to be as follows: the first would be the fixation in film of a play, ballet or dramatic-musical work as it is actually performed, while the second would be the fixation of a work that has been specifically changed for the purpose of being embodied in film.'[806]

Compilation is also based on pre-existing works, essentially consisting of the selection and arrangement of works by other authors. Compilations such as anthologies, encyclopaedias and biographical directories have long received copyright protection under most national laws. Thus, under art 2(5) of the Berne Convention, compilations are also protectable under certain circumstances:

> 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.

5.1.2 THE DEVELOPMENT OF NATIONAL LAWS

There is a significant lack of conceptual and legislative consistency with regard to translations, adaptations, arrangement or other alterations of works. Such works that are based on other works are also defined as 'derivative works', for example, under US law; however, other countries, such as the UK and Australia, refuse to employ this term in their legislation.

[806] Ibid 399.

A. The Right to Derivatives and Compilations under the US Law

The US *Copyright Act of 1870*,[807] for the first time, provided that 'authors may reserve the right to dramatize or to translate their own work'.[808] Similar provisions on this right of reservation could be seen in the copyright law of many other countries at that time.[809] The 1870 Act overturned the rule in *Stowe v Thomas*[810] which was decided by US Justice Robert Grier in 1853. The plaintiff alleged that the defendant infringed on her copyright by publishing an unlicensed German translation of the book *Uncle Tom's Cabin*. The court affirmed the British tradition that translation was not a copyright of the original and therefore did not infringe copyright.[811] The court decided that the question of infringement 'turned not on how much of a work the second author had taken but on how large a contribution he had made himself'.[812] However, the rule of *Stowe v Thomas* was modified by a later case *Daly v Palmer*[813] which is 'regarded as signaling a switch from "how much is added" to 'how much is taken'.[814]

The right of reservation was, under the *Copyright Act of 1909*, superseded by an outright grant of the exclusive right:

> [to] translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to

[807] The full title of the 1870 Act is *An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights*'. This Act, enacted by the 41st Congress of the U.S. on 8 July 2870, is the second general revision of *Copyright Act of 1790*, the first federal copyright law of the U.S..

[808] *US Copyright Act of 1870*, SEC 86.

[809] Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 12.

[810] *Stowe v Thomas*, 23 F Cas 201 (CCEDPa 1853).

[811] See further, Bracha, above 793.

[812] See generally Lloyd L Weinreb, 'Copyright Unbound' in Benjamin Kaplan et al (eds), *An Unhurried View of Copyright, Republished (and with Contributions from Friends)* (2005) 8.

[813] *Daly v Palmer*, 6 F Cas 1132 (CCSDNY 1868).

[814] Weinreb, 'Copyright Unbound', above n 812, 9.

> convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.[815]

The language of the 1909 Act is regarded as the first codification of derivative rights.[816]

Under the current *Copyright Act of 1976*, an extensive right to prepare derivative works which covers all categories of copyrightable subject matter was further established.[817] The Act explicitly recognises under §103 that the subject matter of copyright as specified by §102 includes compilations and derivative works, and §101 defines a derivative work as follows:

> A 'Derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'.[818]

Further clarification of the division of reproduction right and the right to prepare derivative works can be seen in the House Report of the 1976 Act:

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815 *US Copyright Act of 1909*, SEC 1(b).

816 Cohen et al, *Copyright in a Global Information Society*, above n 773, 375.

817 *Copyright Act of 1976*, 17 USC § 106 provides:
Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
…
(2) to prepare derivative works based upon the copyrighted work;
…

818 *Copyright Act of 1976*, 17 USC § 101.

> The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, where as the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.
>
> To be an infringement the 'derivative work' must be 'based upon the copyrighted work,' and the definition in section 101 refers to 'a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.' Thus, to constitute a violation of section 106 (2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.[819]

The division of the right 'to reproduce the copyrighted works in copies' and the right 'to prepare derivative works based upon the copyrighted works', as Paul Goldstein pointed out, marks the point 'at which the contribution of independent expression to an existing work effectively creates a new work for a different market'.[820]

Under US law, derivative works are also distinguished from compilations. The former involves recasting or transformation of pre-existing works; whereas the later consists merely of the selection and arrangement of pre-existing materials without any internal changes in such materials.[821]

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819 HR Rep No 94-1476, 94th Cong, 2nd Sess (1976) 62.

820 Paul Goldstein, 'Derivative Rights and Derivative Works in Copyright' (1983) 30 *Journal of the Copyright Society of the USA* 209, 217.

821 See further, Nimmer and Nimmer, above n 253, §3.02.

B. The Adaptation Right under UK and Australian Law

As mentioned above in the early case of *Burnett v Chetwood*, authors had no right to prevent others from publishing translations of their works. The authors' exclusive right in a book was limited to the right of multiplying copies under the *Statute of Anne 1710*.[822] But, such objection to translation right was specifically overcome in the UK *Copyright Act 1911*, and remains so under the later legislations including the *Copyright Act 1968* (Cth) of Australia.[823]

The 1911 Act provided for a number of separate exclusive rights, including the translation right and dramatisation right. Section 1(2) of the Act stated as follows:

> For the purposes of this Act, 'copyright' … shall include the sole right, —
> (a) to … publish any translation of the work;
> (b) in the case of a dramatic work (d), to convert it into a novel or other non-dramatic work ;
> (c) in the case of a novel or other non-dramatic work, or of an artistic work (e), to convert it into a dramatic work, by way of performance in public or otherwise;
> (d) in the case of a literary (f), dramatic, or musical work, to make and record, perforated roll, cinematograph film (g), or other contrivance by means of which the work may be mechanically per- formed or delivered (h),
> and to authorise any such acts as aforesaid.

A general concept of the exclusive right to make an adaptation of a work was first introduced by *Copyright Act 1956*. The 1956 Act brought under one head a number of separate exclusive rights provided for under the 1911 Act.[824]

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822 E J Macgillivray, *Copyright Act, 1911 (Annotated)* (1912) 14.

823 Ricketson and Creswell, above n 569, 9.425.

824 Garnett, James and Davies, above n 480, 465.

The 1956 Act explicitly provided that the acts restricted by the copyright in a literary, dramatic or musical work included making any adaptation of the work,[825] and the adaptation of a work was also protected as independent work.[826] Under the 1956 Act, 'adaptation' was defined as the dramatisation of non-dramatic works, conversion of dramatic into non-dramatic work, translation, etc.[827]

This approach is followed and continued by the *Copyright, Designs and Patents Act 1988*. The 1988 Act clearly declares that the making of an adaptation is an act comprised in copyright,[828] and the adaptation of work enjoys copyright as an independent work.[829] Under the 1988 Act, adaptation is defined in s 21(3) as follows:

> (a) in relation to a literary or dramatic work, means—
>
> (i) a translation of the work;
>
> (ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work;

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825 See *Copyright Act 1956* (U.K.), s 2(5)(f).

826 See *Copyright Act 1956* (U.K.), s 2(5)(g).

827 *Copyright Act 1956* (UK) s 2(6):
In this Act 'adaptation'—
in relation to a literary or dramatic work, means any of the following, that is to say,—
in the case of a non-dramatic work, a version of the work (whether in its original language or a different language) in which it is converted into a dramatic work;
in the case of a dramatic work, a version of the work (whether in its original language or a different language) in which it is converted into anon-dramatic work;
a translation of the work;
a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical; and
in relation to a musical work, means an arrangement or transcription of the work, so however that the mention of any matter in this definition shall not affect the generality of paragraph (a) of the last preceding subsection.

828 *Copyright, Designs and Patents Act 1988* (U.K.) s 21(1).

829 *Copyright, Designs and Patents Act 1988* (U.K.) s 21(2).

(iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.

(b) in relation to a musical work, means an arrangement or transcription of the work.

In relation to a computer program a 'translation' includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program.[830]

The dividing line between what amounts to a reproduction of a work and what amounts to an adaptation of a work is unclear.[831] In some cases, the same act may infringe both the reproduction right and the adaptation right.

In Australia, the UK 1911 Act remained in force by virtue of the *Copyright Act 1912* (Cth) until it was repealed by the current copyright statute, *Copyright Act 1968* (Cth).[832] Under the 1968 Act, the formulation of the adaptation right is very similar to that under the UK 1956 Act and the UK 1988 Act.

The exclusive right to make an adaptation subsists in a literary, dramatic or musical work under s 31(1)(a) of the 1968 Act. Separate acts of adaptation are specified under s 10(1) as dramatisation of non-dramatic works, conversion of dramatic work to non-dramatic version, making different versions of computer programs and other acts relating to translation, picture versions, and arrangements or transcriptions of musical work.[833]

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830 *Copyright, Designs and Patents Act 1988* (U.K.) s 21(4).

831 Garnett, James and Davies, above n 480, 465.

832 Rocque Reynolds and Natalie P Stoianoff, *Intellectual Property: Text and Essential Cases* (2008) 16.

833 The specific meaning of 'adaptation' is given under s 10(1) of the *Copyright Act 1968* (Cth):

Under the 1968 Act, adaptation right does not apply to artistic work or to pt IV subject-matter. According to s 31(1)(a)(vii) of the Act, the adaptation right does not subsist in adaptations of a work either . In other words, copyright owner of a work has a reproduction, publishing, performance and communication right in relation to the adaptation of that work, but has no right to make or authorise further adaptations of the adaptation.[834]

C. The Right to Make Adaptation, Cinematographic Adaptation, Translation and Compilation under Chinese Law

In the original text of the *Copyright Law 1990 of China*, there was only one general provision which enumerated a set of exclusive right conferred on authors. Under art 10(5), the 1990 Law provided for the authors' economic right as the right to exploitation by means of, for instance, making cinematographic adaptations, making TV or visual works, and preparing adaptations, translations, annotations, compilations, etc.

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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;
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;
in relation to a literary work (whether in a non dramatic form or in a dramatic form):
a translation of the work; or
a version of the work in which a story or action is conveyed solely or principally by means of pictures; and
in relation to a musical work--an arrangement or transcription of the work.
The leading cases with regard to the adaptation of a work include *Data Access Corp v Powerflex Services Pty Ltd* (1996) 33 IPR 194; *Powerflex Services Pty Ltd v Data Access Corp* (1997) 37 IPR 438; *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 65 ALR 33 (HC); *Coogi Aust Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593.

834 See further, Ricketson and Creswell, above n 569, 9.435.

The 2001 Amendment of the 1990 Law further brought the economic rights to make derivative works under four main heads, namely the right of cinematographic adaptation in article 10(13), the right of adaptation in article 10(14), the right of translation in article 10(15), and the right of compilation in article 10(16).[835]

It is obvious that Chinese law follows the paradigm adopted by the Berne Convention. As far as the formulation of economic rights are concerned, there are 'only semantic differences between the nature o the rights under the [Chinese] Copyright Law and the provisions of Berne'.[836] It brings the right of cinematographic adaptation and the right of translation under two heads separately from that of adaptation right. On the other hand, the law does not employ the term 'derivative work' or 'the right to prepare derivative works'. However, the rights aforesaid are widely grouped under a general right to make derivative works by Chinese academics.[837]

Cinematographic Adaptation: Given that it might be the most substantial means of commercial exploitation, cinematographic adaptation is a special subject matter to

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835 *Copyright Law 1990 of China* (amended 2001), art 10 provides as follows:
Copyright is composed of the following moral and economic rights:
…
(13) Right of making cinematographic work: It is the exclusive right to fix a work on a medium through film production or by virtue of an analogous method of film production;
(14) Right of adaptation: It is the exclusive right to change a work to create a new work of originality;
(15) Right of translation: It is the exclusive right to translate a work in one language into one in another language;
(16) Right of compilation: It is the exclusive right to compile works or parts of works into a new work by reason of the selection or arrangement.
…

836 Zheng Chengsi and Michael Pendleton, *Copyright Law in China* (1991) 92.

837 For example, see Gexin Zhang, *Modern Copyright Law*, (2006) 103-119 [trans of: *Xiandai Zhuzuoquan Fa*]. In a annotation of the Copyright Law, law makers from the National People's Congress also group the rights of adaptation, translation and compilation under the head of 'derivative right'. See Yao Hong (ed), *Annotated Copyright Law of the PRC* (2001) 101 [trans of: Zhonghua Renmin Gongheuo Zhzuoquanfa Shijie].

which particular importance is attached. The cinematographic adaptation right is not only applicable to literary works but also to artistic works and musical works.[838]

Under art 10(13), the cinematographic adaptation right is defined as the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography. In other words, it is the right to transform a work to 'cinematographic works or works created by a process analogous to cinematography'. The *Copyright Implementation Regulations (2002)* further clarifies under art 4(11) that 'cinematographic works and works created by a process analogous to cinematography' refers to the works which are recorded on some material, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means.

In many cases, cinematographic adaptation would inevitably result in alteration of the underlying work. Thus, the *Copyright Implementation Regulations (2002)* provides under article 10 as follows:

> Where a copyright owner authorizes another person to make, based on his works, cinematographic works or works created by a process analogous to cinematography, it is deemed that he has permitted him to make necessary alteration of his works, insofar as such alteration does not distort or mutilate the original works.

Adaptation: The right of adaptation is the right to alter a work so as to create a new work of originality.[839] The meaning of 'adaptation' explained by Chinese authority is in compliance with that given by WIPO.[840] That is to say, adaptation refers to remodeling of a work into another form without changing the primary content or

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838 See Hong, above n 837, 99-101.

839 *Copyright Law 1990 of China* (amended 2001) art 10(14).

840 Chengsi and Pendleton, above 836, 92-3.

meaning of the work. For example, changing a non-dramatic work into a dramatic work, or converting a dramatic work into a non-dramatic work.

However, mere reproduction, for instance transferring a painting onto a mural, does not amount to adaptation because no new work of originality is created.[841]

In a broader sense, both cinematographic adaptation and translation are forms of adaptation. However, unlike the UK and Australian law, the Chinese law subjects them to separate provisions.

Translation: The translation right is defined under art 10(15) of the *Copyright Law 2001* as the right to convert the language of a work into another language. It includes three particular circumstances in China: the translation from a foreign language into Chinese and *vice versa*, the translation of a work of one minority nationality's language in China into another, and the translation of ancient Chinese language into the modern language.[842]

Compilation: The compilation right is provided for under art 10(16) of the *Copyright Law 2001* as the right to compile pre-existing works or passages therefrom by selection or arrangement for creating a new work. It is further clarified that a compilation is a collection of preexisting works or passages therefrom, or of data or other material which does not constitute a work, if manifesting the originality of a work by reason of the selection or arrangement of its contents.[843]

The *Copyright Law 2001* further provides under art 10(17) that copyright shall also comprise 'other rights which shall be enjoyed by copyright owners'. 'Other rights',

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841 Peter Feng, *Intellectual Property in China* (2nd ed, 2003) 122-3.

842 Chengsi and Pendleton, above n 836, 93.

843 *Copyright Law 1990 of China* (amended 2001) art 14.

as posited by scholars, may include the right of annotation[844] and the right of arrangement [*zhengli*].[845]

The derivative works including adaptations, translations and compilations are original works in their own rights. Generally speaking, the one who makes the derivative work shall enjoy such rights provided the copyright of the prior authors is not prejudiced. This is the principle provided for under the law:

> Article 12: Where a work is created by adaptation, translation, annotation or arrangement of a preexisting work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator or arranger, provided that the exercise of such copyright shall not prejudice the copyright in the original work.
>
> Article 14: … The copyright in such a compilation shall be enjoyed by the compiler, provided that the exercise of such copyright shall not prejudice the copyright in the preexisting works contained in the compilation.

The cinematographic adaptation is usually an outcome of collaboration of many parties and thus is composed of various creative contributions. Each party including the author of the underlying works, the director, the composer, the lyricist, the scriptwriter and many others shall be acknowledged. In contrast to US law which grants the copyright of a film to its director, the *Copyright Law of China*, under art

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844 As Professor Zheng Chengsi and Michael Pendleton pointed out, '[the annotation] right is very important because in the very long history of literary works in China (about 5,000 years or more), the same Chinese characters could mean quite different things in different ways. In order to read ancient books many people need a source of annotation. And there is certainly creative intellectual labour in a works of annotation'. See Chengsi and Pendleton, above n 836, 94.

845 The term 'arrangement' used under art 2(3) and 12 of the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715 (entered into force 6 June 1982) refers to arrangement of music. However, this term under the Chinese Copyright Law is quite different. It may refer to the editing of pre-existing materials in a systematical and creative way. See Hong, above n 837, 105-6; see also, see Zhang, above n 837, 118-19.

15, confers the copyright of such works on the producer and meanwhile also confers certain rights on the other contributors:

> The copyright in a cinematographic work to which are assimilated works expressed by a process analogous to cinematography shall be enjoyed by the producer of the work, while the scriptwriter, director, cameraman, lyricist, composer and other authors shall enjoy the right of authorship and shall be entitled to receive remuneration in accordance with the terms of the contract concluded between them and the producer.
>
> The authors of the screenplay, musical works and other works that are included in a cinematographic work to which are assimilated works expressed by a process analogous to cinematography and can be exploited separately shall be entitled to exercise their copyright independently.

5.1.3 NON-LITERAL COPYING: EXPANSIVE REPRODUCTION RIGHT

Since the earlier 19th century, the place of the original notion of copyright to duplicate copies by the art of printing was gradually taken by a broader understanding of copyright as the general exclusive right to control the use and re-use of works in any forms. In the meantime, the scope of copyright protection was inevitably expanded, for the most part, by means of reconfiguring 'reproduction right' to cover 'non-literal copying'.

Such expansion was implemented in at least two ways. The concept of 'copy', first of all, was re-defined and the opinion that translation was not a copy of the original and therefore did not infringe copyright was defeated. In *West v Francis*, 'copy' was re-conceptualised as 'that which comes so near to the original as to give every person seeing it the idea created by the original'.[846] On the other hand, the notion of

[846] *West v Francis* (1822) 5 B & Ald 743.

prohibited taking became more sophisticated.[847] The inquiry of infringement would focus more on what the defendant had taken instead of what he had improved or contributed. For instances, in *D'Almaine v Boosey* the judge contended that the adding variations to new works made no difference in principle that substantial appropriation was infringing.[848] In *Nichols v Universal Pictures Corp*,[849] Judge Learned Hand of US Court of Appeals for the Second Circuit contended that copyright protection of literature cannot be limited to the exact text, or else an infringer could get away with copying by making trivial changes.

Consequently, the exclusive right of reproduction extended beyond verbatim or literal copying to non-literal or indirect copying. It had become a prevalent notion that translation, adaptation and other transformation or alteration of works are simply additional forms of reproduction. Where the re-creations fall within the statutory definitions of derivative works or adaptations, the making of such subsequent works would be subject to separate categories of exclusive rights respectively. Otherwise, it would be governed by the pervasive right of reproduction. Nevertheless, it is notable that granting authors the rights to prepare adaptations, derivative works or other alterations of their works does not affect the established reproduction right.

As a matter of fact, under many domestic laws, it is particularly highlighted that the provision of adaptation/derivative right has no intention to affect the scope of reproduction right. For instance, s 21(5) of the UK 1988 Act particularly clarifies that no inference shall be drawn from the provisions of adaptation right as to what does or does not amount to copying a work. The Australian 1968 Act also provides under s 31(2) that the generality or scope of reproduction right is not affected by the provision relating to the right to make an adaptation of a work.

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847 See further, Kaplan, above n 775, 20.

848 *D'Almaine and Another v Boosey* (1835) 1 Y & C Ex 288.

849 45 F2d 119 (2d Cir 1930).

5.1.4 EXCESSIVE CONTROL IN A PEER-PRODUCTION AGE IS UNREALISTIC

The general expansion of copyright (the reproduction right and the right of making derivatives), from the point of view of users of copyrighted works, is seen as a worldwide concession of the freedom of re-creation. Thus, under the current legal framework, re-creations or improvement upon existing copyrighted works are only allowed on a limited number of occasions: (i) the making of adaptations or derivative works is licensed by copyright owners; (ii) the taking is substantial but permitted by the principle of fair dealing or fair use; (iii) the taking is insubstantial and thus also permitted.

Accordingly, the reproduction right under present copyright law can be summarised as the exclusive right of both literal and non-literal copying which includes the right to copy not only the entire work but also any *substantial* part of a work, to copy the work either directly or indirectly, and even to make transient or incidental copies.[850] The substantiality test is not only a quantitative matter but also includes a qualitative judgment as to the importance of the part taken. These principles had already been articulated in early UK and US cases such as *Bramwell v Halcomb*,[851] and *Gray v Russell*.[852]

Yet, due to the fact that both the substantiality test and the idea/expression dichotomy[853] may require subjective assessments, the law as you might expect,

850 See further, Garnett, James and Davies, above n 480, 392-446.

851 (1836) 2 My & Cr 737.

852 10 F Cas 1035 (CCD Mass 1839).

853 Under no circumstances should copyright protection be extended to ideas; in other words, copyright only subsists in the form in which the idea is expressed. This principle is often referred to as the idea/expression dichotomy. For instances, the US 1976 Act provides under §102(b) as follows:

'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.'

leaves the judgment of allowable taking to the discretion of the courts. The difficulties of applying such test and principle are particularly prominent in cases concerning the constituent elements of literary or dramatic works such as the plots, incidents, characters, scenic effects, emotions and themes. In many circumstances, such elements are likely to be regarded as substantial parts of the works in question. For example, the employment of the characters of a novel to create sequels of the work constitutes infringement in many countries.[854] Such a pervasive control over the use and re-use of copyrighted works is in severe conflicts with the reality of creation and re-creation.[855]

5.2 THE REALITY OF RE-/CREATING

As discussed above, the right to prepare adaptations or derivative works plus the right of non-literal reproduction enable copyright owners to exert extensive control to the use and re-use of creative works. On the other hand, as US Justice Story stated in *Emerson v Davies* over one and a half century ago, '[e]very book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before'.[856] In a broader sense, borrowing and appropriation are the reality of literary and artistic creation and re-creation; however, the established exclusive rights of copyright are unfavourable to this reality. It is particularly true while copyrighted works are increasingly becoming 'raw materials' for civic engagement in cultural activities.[857]

Although it is not explicitly stated in UK and Australian law, this principle has long been accepted and applied by the courts. See further, Fitzgerald and Fitzgerald, above n 11, 84-5.

854 See further, Ricketson and Creswell, above n 569, 9.180-9.206.

855 For further discussion on the copyright's impacts on re-creation and public domain, see generally Alfred C Yen, 'Interdisciplinary Future of Copyright Theory' (1992) 10(2) *Cardozo Arts & Entertainment Law Journal* 423.

856 8 F Cas 615, 619 (No 4,436) (CCD Mass 1845).

857 See generally, Naomi Abe Voegli, 'Rethinking Derivative Rights' (1997) 63 *Brooklyn Law Review* 1213.

5.2.1 SEQUELS AND ONLINE CHINESE LITERATURE

In January 2009, Shanda Literature Co, Ltd (Shanda), a dominant online literature website operator in China,[858] triggered a copyright war against du8.com and its operator Beijing Sursen Electronic Technology Co, Ltd. (Sursen) for an unauthorised sequel of a popular Chinese novel, *Xingchen Bian*.[859] The novel was published under the pseudonym of '*I Eat Tomato*' on one of Shanda Literature's commercial site qidian.com in 2008.[860] In the end of 2008, two fans of the novel published a sequel of the novel under the pseudonym of '*Don't Eat Tomato*' on du8.com with open and free access.

Shanda claims that the creation and publishing of the sequel had infringed on their copyright and insisted that the creation of sequels must be under its permission. On 7 January 2009, two letters of apology for creating unauthorised sequel from the two fans were made public on qidian.com,[861] and Shanda announces further that it would continue its plan to sue du8.com and Sursen for copyright infringement.

Du8.com and its operator, Sursen, disagree with Shanda's complaint, arguing that creating sequels of a published work does not infringe on copyright therein because

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858 Shanda Literature Co, Ltd is one of the affiliates of a Shanghai-based leading interactive media and online gaming company *Shanda Interactive Entertainment Ltd* (Nasdaq: SNDA) and dominates the online literature market in China with its three leading online Chinese literature websites: www.qidian.com; www.jjwxc.net/; and www.hongxiu.com.

859 See further, Sina Tech, *Shanda Literature to Sue Du8 for Copyright Infringement* (2009) Marbridge Daily <http://www.marbridgeconsulting.com/marbridgedaily/2009-01-12/article/22914/shanda_literature_to_sue_du8_for_copyright_infringement> at 10 March 2009.

860 The novel was one of the most popular online fictions in 2008 with more than 36 million clicks and Shanda Gaming Ltd bought the right to develop the novel into online games with 1 million RMB. See further, *Shanda Games Licenses Qidian.com Novel* (2009) JLM Pacific Epoch <http://www.jlmpacificepoch.com/newsstories?id=139344_0_5_0_M> at 10 March 2009.

861 Yapeng Li and Bing Kou, *Letters of Apology* (in Chinese) (2009) Qidian Chinese Literature Network <http://www.qidian.com/news/shownews.aspx?newsid=1004114> at 10 March 2009.

sequels are creative original work independently created.[862] Sursen criticises further that on one hand Shanda has in fact been utilising copyright as its weapon to depress its competitors and to hinder the development of online free literature. Sursen accuses further that Shanda is a swashbuckler, forcing the creators of the sequel to make an apology. On the other hand, Shanda and Qidian.com themselves have been producing sequels of many other novels without authorisation at all.

In April 2009, Sursen and Du8.com brought Shanda and Qidian.com to the Shanghai No 1 Intermediary People's Court, claiming that the defendant had abused its monopoly power to dominate the online Chinese literature market and to eliminate competition.

It is interesting that the disputes between the parties arose from copyright and infringement; however, the case went up to the court under the law of anti-monopoly and it is still pending.

In China, the most remarkable case concerning QIAN Zhongshu's novel *Fortress Besieged*,[863] and several sequels created by other authors is the first copyright dispute after the *Copyright Law 1990*. Some commentators believe that unauthorised sequel is infringing; and they base their argument on the integrity of the prior author's ideas and even competition in good faith.[864] Many others argue that creating sequel and bringing the original author's story to a new ending is an

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862 See Sursen's statement on the issue of the Sequel of Xinchen Bian here: <http://news.du8.com/html/15/n-87915.html> at 27 March 2009.

863 The book is recognised as 'the greatest Chinese novel of the twentieth century. Fortress Besieged is a classic of world literature, a masterpiece of parodic fiction that plays with Western literary traditions, philosophy, and middle-class Chinese society in the Republican era.' It was first published in 1940's and translated into English in 1960's. See generally, Zhongshu Qian, Jeanne Kelly and Nathan K Mao, *Fortress Besieged* (2004). Moreover, an extensive review of this book can be found in C T Hsia, *A History of Modern Chinese Fiction* (3rd ed, 1999).

864 See further, Feng, above n 841, 118-19. See also, Sun Jing, 'On the Copyright of Sequels' (2008) 10 *Electronics Intellectual Property* (trans of: Dianzi Zhishi Chanquan) [trans of: *Xuxie Zuoping de Zhuzuoquan Wenti Yanjiu*].

independent creative activity. The sequel is a creative work of originality and should be permitted under the principle of fair use.[865]

The prior authors' desire of keeping subsequent creations under control is apparent. The motivations of the prior authors are unnecessarily commercial or in pursuit of monetary returns. On the contrary, they are driven in many cases by the concerns of moral rights such as the distortion and integrity of the original ideas and creations. For instance, in the case of *Fortress Besieged*, the prior author, QIAN Zhongshu, had no intention to create any sequel or derivative works at all.[866]

Another notable case in the US is *J D Salinger v Fredrik Colting et al* concerning the plaintiff's 1951 novel *Catcher in the Rye* (hereinafter 'Catcher'). The defendant under the pseudonym J D California wrote and published a book *60 Years Later: Coming Through the Rye* (hereinafter '60 Years'). The plaintiff points out the unauthorised sequel as a 'rip-off, pure and simple'.[867] The plaintiff therefore alleges that the defendant's work is an unauthorised derivative work of the Catcher and thus infringing.

The defendant admits that he has used the same protagonist in his book the 60 Years as the plaintiff used in the Catcher, and has also used the plaintiff's style of writing and the way the protagonist speaks. However, the defendant argues that he has not lifted any passages directly from the Catcher. The defendant defends his work as an important critical work about the Catcher. The defendant therefore argues that the

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865 Li Liang, 'On the Protection of the Copyright of Continuation Works' (2005) 2 *Hebei Law Science* 71 (trans of: Hebei Faxue) [trans of: *Lun Xuexie Zuopin de Zhuzuoquan Baohu*].

866 Luo An, 'Is the "Continuation of *Fortress Besieged*" Created by QIAN Zhongshu?' *Chinese Culture News* 26 June 2003 (trans of: Zhonghua Wenhua Bao) <http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/newscenter/2003-07/06/content_956217.htm> at 6 August 2009 [trans of: *Weicheng Zhihou shi Qian Zhongshu Xiede Ma*].

867 Deborah Nathan, 'Author of "Catcher in the Rye" Sequel to Appeal Ruling' (2009) 16(6) *Intellectual Property Litigation Reporter* <http://news.findlaw.com/andrews/bt/int/20090710/20090710_salinger.html> at 6 August 2009.

sequel should be allowed under the principle of fair use and should be protected as a parody of the Catcher.

The judge from the US District Court for the Southern District of New York found that the defendant was likely to succeed on the merits of his copyright claim and thus the preliminary injunction was granted on 1 July 2009 and the book has been banned in the US.[868]

The court applies the four-factor analysis of fair use to the work at issue. US *Copyright Law 1976* provides for a four-factor test under §107:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[868] No 09-5095, 2009 WL 1916354 (SDNY 1 July 2009).

According to the findings of the court, the defendant completely failed each of the four sub-tests. The court, first of all, has denied the defendant's claim that his work is a parody of the Catcher because the 60 Years contains no reasonably perceived parodic character as to the plaintiff's work. The 60 Years is merely a work that recasts, transforms or adapts the original work into a new mode of presentation; thus it is not transformative in the sense of fair use under the *Campbell v Acuff-Rose Music*.[869]

In terms of the amount and substantiality of the portion of the Catcher used by the defendant, the court holds that the plaintiff has taken well more, in both substance and style, than is necessary for the alleged purpose of criticising. It is because, for example, the defendant has utilised the primary character of the Catcher, reanimated as the protagonist of the 60 Years. In addition, the dependant's work depends upon similar and sometimes nearly identical central theme, supporting characters, setting, tone, and plot devices of the Catcher.

It is also notable that the court is of the opinion that whether the defendant admits his work as a sequel or not, the work as a novel that continues the story and protagonist of the original work constitutes a derivate work as defined under US copyright law. The court therefore affirms that creating a continuation of the original work and subsequent works in a series or sequels falls within the ambit of the exclusive right of the copyright owner.[870]

5.2.2 JAZZ MUSIC HAS BEEN DYING; COPYRIGHT LAW MIGHT BE ACCOUNTABLE

[869] 510 US 569 (1994).

[870] The court quotes Nimmer and Nimmer, above n 253, §2.12 and the decision of *Micro Star v FormGen, Inc*, 154 F 3d 1107, 1112 (9th Cir 1998).

The 20th century witnessed the bloom and glory of jazz;[871] however, today jazz has been less and less popular and 'many have been saying that jazz is passing away'.[872] Copyright law, as commentator posits, may not have caused the precipitous end of jazz; however, its ill-fitting doctrines will not help to save jazz from its descent.[873]

Jazz is an art-form very much reliant on existing, usually copyrighted, music. The creation of jazz is based on 'standards' generally written by non-jazz musicians. Part of the impact of a jazz performance derives from the underlying music being familiar to the listeners.[874] Generally speaking, jazz musicians make their own spontaneous compositions, borrowing the harmonic skeleton and parts of the melody from other musical works.

The essence of jazz music is its improvisation; jazz is supposed to be the way it is played, not the way it is composed. Although other commentator has pointed out that it might be untrue,[875] such understandings are still illustrative of the legal dilemma encountered by jazz music.

On one hand, the creation of jazz by default is not allowed by the law. Jazz music extensively borrows substantial parts of underlying musical works. By incorporating

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871 Jazz is a musical art form that originated in New Orleans, Louisiana, United States around the start of the 20th century. Jazz uses improvisation, blue notes, swing, call and response, polyrhythms, and syncopation. However, different people may use different criteria for deciding whether a given performance is jazz. See generally, Mark Gridley, Robert Maxham and Robert Hoff, 'Three Approaches to Defining Jazz' (1989) 73(4) *The Musical Quarterly* 513.

872 Richard Cook, 'A Hundred-Year Mayfly' (1999) 128(4467) *New Statesman* 104 <http://www.newstatesman.com/199912200063> at 5 January 2010.

873 See generally, Anonymous Note, 'Jazz has Got Copyright Law and That ain't Good' (2005) 118(6) *Harvard Law Review* 1940.

874 See generally, Barry Kernfeld (ed), *The New Grove Dictionary of Jazz* (1994); Piero Scaruffi, *A History of Rock and Dance Music: From the Guitar to the Laptop; From Chicago to Shanghai (vol 1, 2)* (2009).

875 As Piero Scaruffi contended, however, there is little in jazz music to support this viewpoint, though. Given a chance, many jazz musicians chose to compose, not only to improvise. See further, Scaruffi, above n 874.

'jazz elements' in their performances or recordings, musicians created new works based on the preexisting songs. Without authorisation by copyright owners of the underlying works, the performances or recordings of jazz musicians might be violating copyright law.[876] On the other hand, the creativity of the jazz artists is not fully recognised by the law. It is jazz musicians' performances, improvisations or compositions that give birth to the music. Such contributions by jazz artists however are 'not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered "derivative"'.[877] Without authorisation by the copyright owner of the underlying musical work, the jazz creations are infringing works. Accordingly, the jazz artists are not only liable for infringement, but also would not receive copyright protection under US copyright law.[878]

Copyright law therefore essentially discourages jazz creation and vital reinterpretation of music by privileging the composers of the underlying musical works but affording scant protection for the improvised material and performances of jazz musicians.[879]

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[876] The violation may arise under a variety of circumstances:
In the case that the jazz musician merely performs a musical work by the means of 'jazzing', he/she might be immune from copyright infringement under statutory licensing. See, for example, *US Copyright Act 1976* §115, Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory license for making and distributing phonorecords;
If the performance is fixed into a sound recording, it is infringing upon the exclusive right of communication to the public of the performance of the underlying works. See, for example, art 11 of the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715 (entered into force 6 June 1982).
In the case that the musician creates compositions based the underlying songs, he/she infringes the reproduction right (and the right of making derivative works if applicable) of the underlying works.

[877] Anonymous Note, above n 873, 1941.

[878] Under the US copyright law, a work based substantially on pre-existing works shall not be subject to protection as a derivative work except with the express consent of the copyright owners of the underlying works. See, for example, *US Copyright Act 1976* §103, 115.

[879] *US Copyright Act 1976* §103, 115.

A remarkable doctrinal solution suggested by commentators to the aforesaid problems is to allow jazz creation under the principle of transformative use.[880] However, unless being further clarified by the law, the proposed solution would be hardly operational in the current legal framework. Transformative use is an unclear principle even under US law; it has not been explicitly recognised in the UK, Australia or China.

5.2.3 SAMPLING AS A FORM OF MUSICAL CREATION

In the musical sense, sampling is the process of taking short segments of prior sound recordings and incorporating the appropriated parts into new recordings,[881] and it involves the conversion of analog sound waves into digital codes.[882] The origins of sampling in this sense can be traced to the musical practices of the rap, hip-hop culture in 1960's and 1970's and also to later movements like pop, funk, dance, house, techno, trip-hop and acid jazz.[883] The appropriated segments of the sampled sound may be as small as a single note or beat, or may be a longer phrase or musical passage.[884]

Many commentators have suggested that sampling is by definition copying and thus constitutes copyright infringement;[885] in contrast, others argue that depending on a

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880 See generally, Stephen R Wilson, 'Rewarding Creativity: Transformative Use in the Jazz Idiom' (2003) 4 *University of Pittsburgh Journal of Technology Law and Policy*. See also, Anonymous Note, above n 873, 1940-61.

881 *Newton v Diamond* 349 F 3d 591, 596 (9th Cir, 2003).

882 *Jarvis v A & M Records*, 827 F Supp 282, 286 (DNJ, 1993).

883 See generally, Brian Fitzgerald and Damien O'Brien, 'Digital Sampling and Cultural Jamming in a Remix World: What does the Law Allow?' (2005) 10(4) *Media and Arts Law Review* 279; Rachael Carnachan, 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law' (1999) 8(4) *Auckland University Law Review* 1034.

884 See further, Jeffrey H Brown, 'They don't Make Music the Way They Used to: the Legal Implications of "Sampling" in Contemporary Music' 1992 (6) *Wisconsin Law Review*, 1941, 1943.

885 For example, see generally Juan C Thom, 'Digital Sampling: Old-Fashioned Piracy Dressed Up in Sleek New Technology' 1998 (8) *Loyola Entertainment Law Journal* 297.

finding of 'substantial similarity' sampling does not amount to the level of infringement in many instances.[886]

In the case of music, there are two separate copyrights that are granted to the musical composition and to the sound recording. They are different sets of exclusive rights subsisting in a recorded song and conferred on different copyright owners. The musical composition is referred to as 'musical work' composed of the lyric and melody of a song; copyright subsisting in such a work is conferred on its creators – composer of the melody and writer of the lyric. In contrast, the sound recording is embodied in a phonorecord[887] or exists in digital form as sound tracks; copyright granted to the tracks is the neighboring or related rights conferred on performers and producers of the sound recording.[888]

Accordingly, in order to sample a recorded performance of a musical composition, separate permissions from the composer and from the performer are required.

In *Newton v Diamond*,[889] the defendant obtained authorisation from the sound recording producer but failed to get permission from the composer. The focus of the court's reasoning therefore was on the musical composition. The defendant took and sampled a portion (three notes) of the composition in question. The court held that the appropriated segment was not the heart of the work and was insubstantial.[890]

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886 For example, see Brown, above n 884.

887 *US Copyright Law 1976* define 'phonorecords' under §101 as 'material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.'

888 For further discussion on the scope of the exclusive rights for musical compositions and for sound recordings, see Gorman and Ginsburg, above n 307, 589.

889 349 F 3d 591, 596 (9th Cir, 2003).

890 Ibid.

The *Newton* case is in sharp contrast with (but not in conflict with) a later case *Bridgeport Music, Inc v Dimension Film*.[891] The key issue and analysis in the *Bridgeport* case is copyright infringement on the sound recording. The US Court of Appeal for the Six Circuit court ruled that the taking of any section of sound recording, regardless of length, would be infringing unless permission have been given by the copyright owner of the sound recording. The judges based their analysis and decision on § 106[892] and 114(b)[893] of the *US Copyright Law 1976*.[894]

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[891] 410 F 3d 792 (6th Cir 2005).

[892] It provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> to reproduce the copyrighted work in copies or phonorecords;
> to prepare derivative works based upon the copyrighted work;
> to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

[893] It provides:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118 (g)): [1] Provided, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

[894] 410 F 3d 792 (6th Cir 2005).

The *Bridgeport* rule effectively excludes the substantial similarity or *de minimis* inquiry from the instance of digital sampling of a sound recording.[895] The judges contended in *Bridgeport* that they 'do not see this [rule of "get a license or do not sample"] as stifling creativity in any significant way'. The reality of creation and re-creation however does not get along with such opinions without doubts.

This US approach notably is not recommended for Australian courts by commentators as 'a rigorous "substantial part" doctrine is informed by an understanding of the creative innovation system – especially in its digital and remix aspects – is vital to allowing flexibility in our copyright system and innovation in our information society'.[896]

5.2.4 MASHUPS AND REMIXES: CULTURE JAMMING & WEB 2.0

Mashups (mash-ups) are known by a number of names such as smashups (smash-ups), bootlegs, cutups (cut-ups), etc, and exist in many forms including sound recordings, visual works, web application hybrid and other digital media works.[897] After reviewing comprehensively the existing literature on the increasingly prevalent practice of music mashups, a commentator points out that no one can agree on a definition of the term and how a mashup differs from similar genres that employ other people's original material.[898]

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895 As a result, under the current US copyright law, if someone wants to sample a song, he or she would have to obtain licensing from whoever owns the copyright of the sound recording in any circumstances (the *Bridgeport* rule). In terms of the permission from the copyright owner of the musical composition, in the case that only insubstantial part is taken from the sampled song, no licensing would be necessary. However, if a substantial part is needed, the sampler is still entitle to sample the song under the principle of Statutory Licensing.

896 See generally Fitzgerald and O'Brien, above n 883.

897 See further, Wikipedia, *Mashup (Music)* <http://en.wikipedia.org/wiki/Mashup_(music)> at 10 August 2009; Wikipedia, *Mashup (video)* <http://en.wikipedia.org/wiki/Mashup_(video)> at 10 August 2009; Wikipedia, *Mashup* <http://en.wikipedia.org/wiki/Mash_up> at 10 August 2009.

898 Joseph Grobelny, 'Mashups, Sampling, and Authorship: A Mashupsampliography' (2008) 11(3-4) *Music Reference Services Quarterly* 229, 229.

Notwithstanding the inability to make a clear definition, mashups are characteristic of recombination, rearrangement, reconstruction or remixing of existing works to create a new work. It is new in the sense that it is distinguishable from the plundered works of its own devising and meaning. The new work therefore is unnecessarily 'original' because it borrows extensively from and consists substantially (if not entirely) of parts of the original works.

The recombination and recontextualisation comprised in mashups are in most cases creative and innovative; however, on the other hand, they are 'reviled as derivative, unauthentic, and illegal because they do nothing more than appropriate and reconfigure the intellectual property of others'.[899]

In web development, mashup is an emerging web application development paradigm. It consists of a web application that enables users to combine digital content or web functionality from multiple external sources and results in new integrated services. The appropriated raw data and content serve completely distinct purposes that were not the original reason for producing them.

In other words, a web mashup exists as a web page that 'uses Web 2.0 technologies, which may include JavaScript, PHP, and XML, to present information from a variety of sources or in a variety of ways where the presentation enhances the information'.[900] Prominent web mashups include, for example, many applications based on combinations of Flickr, Google maps, Amazon, Del.icio.us, Yahoo! Pipes, etc.[901]

The rise of web mashups is enabled both by the prevalence of a social computing environment and by the advance of the web 2.0 technologies. The participative web

[899] David J Gunkel, 'Rethinking the Digital Remix: Mash-ups and the Metaphysics of Sound Recording' (2008) 31(4) *Popular Music and Society* 489, 489.

[900] Jesse Feiler, *How to do Everything with Web 2.0 Mashups* (2007) 17.

[901] For further applications of web mashups, see generally Raymond Yee, *Pro Web 2.0 Mashups: Remixing Data and Web Services (Expert's Voice in Web Development)* (2008).

applications such as blogs, wikis, MySpace, Facebook, Flickr, etc have enabled nearly anyone to publish, edit and manipulate digital contents, and have consequently produced an explosive amount of data and information.[902] As a result, there are impending demands for mechanisms 'to harness the collective intelligence of the masses, and to design well thought-off solutions to address particular concerns',[903] and the popularity of web mashups can be regarded as a response.

In music, mashups have also become an emergent musical genre with the prevalence of electronic devices for producing sound recordings. Music mashups 'take the vocal track from one song and add it to the accompanying track of another, but some might incorporate many more in order to produce just one track'.[904] They therefore are produced by combining and re-contextualising the borrowed materials. Given the large scale of raw materials appropriated, music mashups are apparently more controversial than music sampling in the light of copyright infringement.

The Grey Album, created by an American artist and producer Brian Joseph Burton, aka DJ Danger Mouse,[905] is one of the most notorious and compelling music mashups. This mashup album is a remix of vocal tracks taken from Jay Z's *The*

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902 The massive participation and collaboration for content production and processing have triggered hot debates. For example, Kevin Kelly contends in an article that a global collectivist society is coming online and he call it the new socialism. See Kevin Kelly, 'The New Socialism: Global Collectivist Society Is Coming Online' (2009) 17.06 *Wired Magazine* <http://www.wired.com/culture/culturereviews/magazine/17-06/nep_newsocialism?currentPage=all> at 13 August 2009. Professor Lawrence Lessig strongly disagrees with Kevin Kelly and argues that it is completely unreasonable to call that 'socialism'. See further, Lawrence Lessig, *Et tu, KK? (aka, No, Kevin, this is not 'socialism')* (2009) Lessig Blog <http://www.lessig.org/blog/2009/05/et_tu_kk_aka_no_kevin_this_is.html> at 13 August 2009.

903 Narayanan Kulathuramaiyer, 'Mashups: Emerging Application Development Paradigm for a Digital Journal' (2007) 13(4) *Journal of Universal Computer Science* 531, 532.

904 Grobelny, above n 898, 229.

905 See further, <http://www.djdangermouse.com> at 21 April 2010; and <http://www.dangermousesite.com> at 21 April 2010.

Black Album and The Beatles' *White Album*.[906] The album became unbelievably successful and popular with millions of downloads from the Internet,[907] named the best album of 2004 by *Entertainment Weekly*[908] and granted the 2005 Wired Rave Award 'for bringing mash-ups to the masses'.[909] Given the large number of copies circulating in stores and on the Web, EMI who owns the rights to The Beatles' recordings served cease and desist orders[910] to the artist and the shops stocking the album.[911] The attempted clampdown raised widespread civil disobedience; the online protest reached a climax on the so-called 'Grey Tuesday' (24 February 2004).[912]

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[906] See further, Ben Greenman, *The Mouse That Remixed* (2004) The New Yorker <http://www.newyorker.com/archive/2004/02/09/040209ta_talk_greenman> at 25 August 2009. See also, Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles: Danger Mouse makes 'Black' and 'White' Equal 'Grey'* (2004) Rollingstone.com <http://www.rollingstone.com/news/story/5937152/dj_makes_jayz_meet_beatles> at 25 August 2009.

[907] Editor, '*Music Review: The Grey Album*' Entertainment Weekly *(Spring 2004)*<http://www.ew.com/ew/article/0,,600274,00.html> at 25 August 2009.

[908] Editor, '*Music: Best & Worst*' (2004) Entertainment Weekly <http://www.ew.com/ew/article/0,,1009259,00.html> at 15 August 2009.

[909] Editor, 'The 2005 Wired Rave Awards' (2005) 13(3) *WIRED* <http://wired-vig.wired.com/wired/archive/13.03/rave.html?pg=6&topic=rave&topic_set=> at 15 August 2009.

[910] The cease and desist letter from EMI is available here: http://waxy.org/2004/02/danger_mouses_t/, and here: http://www.chillingeffects.org/fairuse/notice.cgi?NoticeID=1132

[911] *EMI Blocks Beatles Album Remix* (2004) BBC News <http://news.bbc.co.uk/1/hi/entertainment/3493091.stm> at 25 August 2009. See also, Rob Walker, *The Way We Live Now: 3-21-04: Consumed; The Grey Album* (2004) The New York Times <http://www.nytimes.com/2004/03/21/magazine/the-way-we-live-now-3-21-04-consumed-the-grey-album.html> at 25 August 2009.

[912] Katie Dean, *Grey Album Fans Protest Clampdown* (2004) WIRED <http://www.wired.com/entertainment/music/news/2004/02/62372> at 25 August 2009. See also, Bill Werde, *Defiant Downloads Rise From Underground* (2004) The New York Times <http://www.nytimes.com/2004/02/25/arts/music/25REMI.html> at 25 August 2005.

The legal fracas of *The Grey Album* has attracted significant attention.[913] The Electronic Frontier Foundation (EFF) gave a quick overview of the legal issues raised by the album and suggested that there were at least 4, and maybe 5, 'rights-holders' potentially involved[914] and noted that EMI had no federal copyright rights in the *White Album* which was released in 1968 because US federal copyright protection was only for sound recordings made after 15 February 1972.[915] Notwithstanding the federal law, sound recordings made before 15 February 1972 may remain protected under common law or state statute.[916]

Once again, the distinction between two separate rights, namely the copyright of musical compositions and the neighbouring rights of sound recordings, is significant. What DJ Danger Mouse took (sampled) was segments of the sound recording of the *White Album*, which raised the aforesaid controversy. According to the *Bridgeport* rule,[917] it is illegal in the US to sample or borrow any section of sound recordings. Even if in countries other than the US the *de minimis* inquiry could be applicable and insubstantial appropriation is allowable, artist's freedom to borrow from pre-existing sound recordings through electronic devices is still very limited.

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913 Noah Shachtman, *Copyright Enters a Gray Area* (2004) WIRED <http://www.wired.com/entertainment/music/news/2004/02/62276> at 25 August 2009.

914 See further, EFF, *Grey Tuesday: A Quick Overview of the Legal Terrain* <http://w2.eff.org/IP/grey_tuesday.php> at 25 August 2005. EFF continued that the parties involved were:

> Owners of the rights to the sound recording ('master') for the Beatles' White Album. That's EMI.
>
> Owners of the rights to the musical works (songs or 'compositions') that appear on the Beatles' White Album. For the Lennon and McCartney songs, that appears to be Sony Music/ATV Publishing, a joint venture between Michael Jackson and Sony. It's unclear who owns the rights to the George Harrison songs.
>
> Owners of the rights to the sound recording for Jay-Z's Black Album.
>
> Owners of the rights to the musical works that appear on Jay-Z's Black Album.
>
> And, possibly, the owner of the rights to the Grey Album (presumably DJ Danger Mouse).

915 Ibid.

916 US Copyright Office, *Copyright Registration for Sound Recordings* (2009) US Copyright Office Circular 56 <http://www.copyright.gov/circs/circ56.pdf> at 25 August 2009.

917 *Bridgeport Music, Inc v Dimension Film*, 410 F 3d 792 (6th Cir 2005).

Musicians however are allowed to do a 'cover' – a new version of another artist's song – without permission by paying a fixed amount of licensing fee based on sale of the song. It is called compulsory licensing for making and distributing phonorecords under the US law.[918] That is to say, it is allowed to use an existing musical composition to produce new sound recording; whereas direct borrowing from existent sound recordings is not permitted in any circumstances unless other reason for fair use established.[919]

The established regime is obviously incapable of accommodating the emerging potential of creativity. In order to allow for greater latitude for digital remixes and mashups, Professor Lessig has called for a system of compulsory licensing for sampling and remixing of sound recordings.[920]

5.2.5 NEW FORMS OF CREATIONS AND ORIGINALITY

Opponents and critics see sampling and mashups as puerile and patently criminal.[921] From this point of view, as Kembrew McLeod points out, the rise of mashups is the very sign of the end of the world, the proof that our culture has withered and run out

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[918] See *US Copyright Law 1976* § 115 for the scope of exclusive rights in nondramatic musical works and compulsory license for making and distributing phonorecords. However, US Register of Copyrights has suggested to remove this compulsory license. See, Cathy Kirkman, *Register of Copyrights Advocates Repeal of Compulsory Licensing Under Section 115* (2005) Silicon Valley Media Law Blog <http://www.svmedialaw.com/content-register-of-copyrights-advocates-repeal-of-compulsory-licensing-under-section-115.html> at 27 August 2009.

[919] See further, US Copyright Office, *Compulsory License for Making and Distributing Phonorecords* (2008) US Copyright Office Circular 73 <http://www.copyright.gov/circs/circ73.pdf> at 27 August 2009.

[920] Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands Off my Ipod* (2007) 143-6. See also, Lawrence Lessig, *The Black and White about Grey Tuesday* (2004) Lessig Blog <http://www.lessig.org/blog/2004/02/the_black_and_white_about_grey.html> at 27 August 2009.

[921] Gunkel, above n 899, 489.

of ideas.[922] Fans and advocates, on the contrary, argue that they are forms of new creation and potentially revolutionary development in literary and arts. After highlighting the traditional understanding of technologically enabled reproduction and the often unquestioned value it invests in the concept of originality, David Gunkel suggests that mashups have deliberately intervened in this tradition, advancing a fundamental change to the original understanding and privilege of originality.[923]

In copyright legislation of many countries, it is expressly stated that copyright subsists only in so-called 'original works',[924] especially in the cases of literary, dramatic, musical and artistic works.[925] But, what constitutes an 'original' work?

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922 See further, Kembrew McLeod, 'Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist Academic' (2005) 28(1) *Popular Music and Society* 79, 86.

923 See further, Gunkel, above n 899.

924 For example, *US 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); *UK 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) s 32 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).

925 For other subject matters 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, Fitzgerald and Fitzgerald, above n 11, 86-7. '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 pt

Most copyright legislation deliberately leave this term undefined in order to allow the Court to exercise their discretion.[926] Nevertheless, the distinction between the lines followed by US courts and Australian courts is not difficult to see.[927] The departure is particularly remarkable while the courts are dealing with the 'sweat of the brow' test. The elements of originality considered by the US Supreme Court, especially after *Feist Pubs, Inc v Rural Tel Svc Co, Inc,*[928] are 'independent creation' plus 'modicum of creativity';[929] however, the prevalent factor considered

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IV films, sound recordings, broadcasts and printed editions of works.' See Reynolds and Stoianoff, above n 832, 36.

926 For example, in enacting the *Copyright Act of 1976*, the US 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.' See (US) H R Rep No 94-1476, 51 (1976).

927 The key US cases concerning originality test include, for example, *US v Steffens*; *US v Witteman*; *US 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 2d 49 (2nd Cir 1936); *Feist Pubs, Inc v Rural Tel Svc Co, Inc* 499 US 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; *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.

928 499 US 340 (1991).

929 The US courts held that 'copyright rewards originality, not effort' and '[t]he constitutional requirement necessitates independent creation plus a modicum of creativity.' See further, *Feist Pubs, Inc v Rural Tel Svc Co, Inc,* 499 US 340 (1991). In fact, the rule of 'independent creation' could be seen quite consistent through many cases of US courts. As Russ VerSteeg commented, '[US Courts] have long held that in order for a work to be original, it cannot have been copied'. See 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. 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'. See, 536 F 2d 486 (2nd Cir 1976). However, whether originality requires an element of creativity was not articulated expressly until the Feist case. Prior the Feist, many courts found

by the courts of Australia is 'independent creation' plus 'exercise of skill or labour' employed to produce the work and consequently 'intellectual creativity is not required' under Australian law.[930]

Can remixes, sampling and mashups been recognised as original works and thus copyrightable? In many cases, remixes, sampling, mashups and other forms of digital creations are just generated from the acts of re-combination, re-editing,

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that a work that exhibits a non-trivial variation would satisfy the originality requirement. For example, in *Alfred Bell & Co v Catalda Fine Arts, Inc*, 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'. See 191 F 2d 99 (2d Cir 1951). In Feist, the US 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'. See Howard B Abrams, 'Originality and Creativity in Copyright Law' (1992) 55(2) *Law and Contemporary Problems* 5. 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.' See *Feist Pubs, Inc v Rural Tel Svc Co, Inc*, 499 US 340 (1991).

930 The approach taken by the US 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*. 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'. After reviewing the English legislative and judicial tradition and further considering the principle and policy in respect of the Feist approach, the Court asserts 'the course of Anglo-Australian authority recounted earlier shows that it does not'. The Court furthermore points out that the Feist approach 'depended on constitutional considerations peculiar to the United States'. The Court expressly endorses the propositions: 'The concept of originality is correlative with that of authorship' and '[a]uthorship (likewise originality) does not require novelty, inventiveness or creativity, whether of thought or expression, or any form of literary merit'. 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. See, *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112. Therefore, Australian courts primarily consider the labour, skill and expense (so-called 'sweat of the brow') that are employed to produce the work. As 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.

representation or re-interpretation of existing materials. The entire expressive elements of such creative outputs are usually copied from its pre-existing works; however, the borrowed materials are 're-contextualised'. 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 re-contextualisation of existent recordings has been substantially enlarged by computer technology'.[931]

Such acts are the exercise of *skill, knowledge, labour, and creativity* and therefore the creations generated by such acts qualify for copyright protection. In Australia, the court holds that '[t]he test of originality is whether the work was not copied, but originated from the putative author'[932] 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'.[933] It can be deduced from many courts' opinions that the authorial contribution is the independent application of knowledge, judgment, skill or labour on the part of the author that are represented in the literary or artistic expression.[934] 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.'[935] Therefore, the process of 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

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

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

933 Ibid.

934 Ricketson, *The Law of Intellectual Property: Copyright, Design & Confidential Information*, above n 160, 7.60.

935 Ibid.

well as the more conventional activities of writing, composition and representation'.[936]

In addition, as being derived from earlier works, the new work must be a product of *independent* efforts. It must be something more than a copy and must possess a 'distinguishable variation' or 'non-trivial variation' from prior works.[937] In relation to derivative works which form a series of evolving productions, the Australian courts 'have been 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'.[938] 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, although a number of doubts on the cultural merits of these creations remain.[939]

5.3 FUTURE DIRECTION: BENEFIT-SHARING AND PERMISSIVE RULES

A. Differentiating Authorship

As Michel Foucault suggested, the modern notion of authorship comes with 'the privileged moment of individualization in the history of ideas, knowledge, literature,

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936 Ibid 7.45.

937 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).

938 Ricketson, *The Law of Intellectual Property: Copyright, Design & Confidential Information*, above n 160, 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.

939 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?', *New York Times* (New York) 27 August 1989, Arts & Leisure.

philosophy, and the sciences'.[940] This notion leads to a view in which the authorial process is a self-contained and isolated phenomenon, and consequently it warrants the author's private rights over her creations.[941] This view, however, overlooks the social and relational nature of creativity; on the contrary, in the legal context, 'authorship' should be conceptualised with emphasis focused on the 'situatedness' of creativity and on the relations within which the creative process is located.[942]

Under copyright law, the regime of authorship should aim to construct a meaningful relationship between a variety of creators who contribute their creativity, labour and knowledge to meaning-giving and the generation of works. The specific authorship conferred on the author should be the manifestation of her creative contributions and the underlying contributions of those who precede her. It is thus proposed that '*first authorship*' is granted on those whose works are highly original,[943] '*derivative authorship*' on those whose works are derivatives of the first authors,[944] '*affiliated authorship*' on those whose works are substantially based on the works of the first authors, and '*related authorship*' on phonogram producers, broadcasters and performers.[945]

For instance, J K Rowling's popular Harry Potter series of books are highly original, and hence she is a '*first author*' under copyright law. The books were adapted into a

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940 See generally, Michel Foucault, 'What is an Author?' in Josué V Harari (ed), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 (this essay is the text of a lecture presented to the Societé Francais de philosophie on 22 February 1969; Foucault gave a modified form of the lecture in the United States in 1970.)

941 For further discussion on the notion and growth of authorship, see generally Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' (1992) 10(2) *Cardozo Arts & Entertainment Law Journal* 279. See also, Feather, above n 775, 455.

942 For further discussion, see ch 6, s 6.3 below of this thesis.

943 See further, ch 6, s 6.3 and ch 7, s 7.2 below of this thesis.

944 Ibid.

945 Ibid.

series of motion pictures by Warner Bros,[946] and the producers of the movies are '*derivative authors*'. Additionally, the creators of the Potter fan fictions are '*affiliated authors*' because their creations are, in major cases, substantially based on the content appropriated from the original books or movies. Harry Potter is so popular and so inspiring that it raises a large number of Harry Potter fandom.[947] Inspired by the books and the movies, the fans have created tremendous amounts of fan fictions.[948] In 2007, 'Harry Potter' was the top one fan fiction subject in search,[949] and the creation of Potter fan fiction is also supported by Rowling who 'gives her blessing to fans who write their own Potter stories online'.[950]

B. Statutory Permissive Rules for Recreation

Remixes, sampling and mashups are, by their very nature, a re-combination of the elements and components appropriated from pre-existing works[951] so that they are very unlikely to be able to pass the 'substantiality test' for copyright infringement. Although the empirical study of online user-generated videos shows that a

946 See the official site of the movie series: *Harry Potter* <http://harrypotter.warnerbros.com/harrypotterandthehalf-bloodprince/dvd/index.html> at 21 April 2010.

947 For a general introduction of the Harry Potter fandom, see Wikipedia, *Harry Potter Fandom* <http://en.wikipedia.org/wiki/Harry_Potter_fandom> at 21 April 2010.

948 See Yahoo! Directory for a number of listed Potter fan fiction sites: <http://dir.yahoo.com/Arts/Humanities/Literature/Authors/Children_s/Rowling__J_K_/Harry_Potter_Series/Fan_Fiction/> at 21 April 2010.

949 Gordon Hurd, *Fantastic Fiction* (2007) Yahoo! Buzz <http://buzz.yahoo.com/buzzlog/67161/fantastic-fiction> at 31 January 2010.

950 Darren Waters, Rowling *Backs Potter Fan Fiction* (2004) BBC News Online <http://news.bbc.co.UK/2/hi/entertainment/3753001.stm> at 31 January 2010.

951 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, the US 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.

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.

Apart from reconsidering fair use and establishing an open-ended principle of fair use, this thesis argues, in ch 7, that non-commercial productive use should be allowed. In addition, a statutory permissive legal framework with regulatory emphasis focused on the dynamics the authorial process should be established.

5.4 SUMMARY

As Professor Lessig argues, '[o]nce a work is made, rather, we need to recognize that it has its own claim within our culture.'[952] The exclusive rights to control the use and reuse of creative works, as discussed in this chapter, has become less reasonable. Given the popularity of digital devices for creating and the participative web for communicating, the works are increasingly becoming raw materials for the people in a networked information society to participate in cultural life.

In the first section of this chapter, the problem has been suggested as being the extension of copyright owners' power to control the use and re-use of copyrighted works; on the other side, the world witnessed the significant concession of the freedom of creating and re-creating. The following section examines the gap between the established legal framework and the reality of creativity. It is found that creative borrowing and re-contextualising have become appealing elements of creativity. The production of expressive works has become, more than ever, a dynamic process of collaboration. To this end, this chapter, apart from the introduction of a general system of fair use and transformative use, suggests that a

[952] Lawrence Lessig, *For the Love of Culture: Google, Copyright, and our Future* (2010) The New Republic <http://www.tnr.com/article/the-love-culture?page=0,0> at 9 February 2010.

statutory permissive legal framework should be established to allow for greater latitude for creation and recreation.

CHAPTER 6

A RELATIONAL THEORY OF AUTHORSHIP

INTRODUCTION

AIM

This chapter aims to articulate a relational notion of authorship which emphasises individual creators' social relations spawned in their activities of learning, reading, originating, sharing and exchanging of information and knowledge, and consequently to reconceptualise the long established notion romantic authorship.

SCOPE

In order to explore the origins and principles of copyright, the perspective provided by legal doctrines alone is not enough. It must be 'set in a larger context which encompasses the organization of cultural and economic life, the social attitude towards intellectual creations and their uses, and the position of the creator in society'.[953] The story of the romantic author in the East (China in particular) and the West (for example, UK and US) is a prominent demonstration that the law of authorship in a given society is a concrete reflection of this context.

In modern copyright law, the author is 'defined by, rewarded because of the "originality" of his creation',[954] and the distinguishing characteristic of authorship is intrinsically associated with 'proprietorship' which means 'the author is conceived as

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953 Edward W Ploman and L Clark Hamilton, *Copyright: Intellectual Property in the Information Age* (1980) 5.

954 Carys J Craig, 'Reconstructing the Author-self: Some Feminist Lessons for Copyright Law' (2007) 15(2) *Journal of Gender, Social Political Policy & the Law* 207, 215.

the originator and therefore the owner of a special kind of commodity, the work'.[955] However, the question how this regime of authorship and thus proprietorship acquired its position in the history and the reality of copyright law needs closer scrutiny.

This chapter, first of all, addresses the history of the contemporary notion on the writer and the author in both the Chinese and the West cultural contexts. In the following sections, this chapter analyses how the romantic author has been challenged by a less romantic notion of and a social approach to authorship in the West. To this end, this chapter suggests that the author should be regarded as *Homo sapiens Oeconomicus* instead of so-called 'economic man'. Hence, this chapter articulates a relational notion of authorship based on the concept of contributorship. Relational authorship is a descriptive system that focuses on cultural contributors rather than the solitary romantic author and aims to allocate power and rights in the light of the relational and multiple contributions to the development of culture and the growth of knowledge.

6.1 THE NOTION OF 'WRITER' AND 'AUTHOR'

6.1.1 THE CONCEPTION OF 'AUTHOR' IN CHINESE SOCIETY

China has the first and most advanced printing technologies in history[956] and possesses one of the most distinct and continuous literary and artistic accomplishments in the world; however, it is believed that there is no indigenous

[955] Rose, *Authors and Owners: The Invention of Copyright*, above n 304. See also, Mark Rose, 'The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship', in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (1994) 23,.

[956] For a further discussion of printing technologies and its spread, see Thomas Francis Carter, *The Invention of Printing in China and its Spread Westward* (first published 1925, revised 1931); and Denis Twitchett, *Printing and Publishing in Medieval China* (1983).

Chinese notion of copyright and authorship.[957] As Ploman and Hamilton pointed out, '[t]his fact alone should give pause for thought'.[958]

During the Warring States Period (around 500 BC – 221 BC) of ancient China,[959] only a well-known master or founder of a school of intellectuals had the right of attribution according to the writing practices; however since the Wei-Jin Period (around AD 220 — AD 589) it became an universally accepted rule that every writer had the right of attributing his writings to his name.[960] The combination of the writer's reputation with his writings resulted in the rise of the sense of handling individual's creative outputs with due respects.[961] Before 400 BC, plagiarism was regarded as a shame and condemned by moral norms. By the Tang Dynasty,[962] there had been systematic analysis on plagiarism.[963]

However, no claims for private property rights over intellectual creations were developed in ancient China which is partially ascribed to Confucianism philosophy concerning intellectual knowledge. Confucianism believes that knowledge, literary and artistic creations as a whole are the common heritage of all Chinese. It emphasises on 'looking to the past for moral guidance and cultural constancy; thus

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957 William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995) 34. For a further discussion of indigenous copyright protection in feudal China, see Qu, above n 494, 3-14.

958 Ploman and Hamilton, above n 953, 140.

959 The Warring States Period, also known as the Era of Warring States, covers the period from some time in the 5th century BC to the unification of China by the Qin Dynasty in 221 BC. See further, Wikipedia, *Warring States Period* <http://en.wikipedia.org/wiki/Warring_States_Period> 13 May 2008.

960 Yufeng Li, *Ideology Control and Rights Protection* (PhD Thesis, South-West China University of Political Science and Law, 2003) 47 [trans of: *sixiang kongzhi yu quanli baohu*].

961 Ibid.

962 The Tang Dynasty (AD 618– AD 907) was an imperial dynasty of China preceded by the Sui Dynasty and followed by the Five Dynasties and Ten Kingdoms Period. See further, Wikipedia, *Tang Dynasty* <http://en.wikipedia.org/wiki/Tang_Dynasty> 13 May 2008.

963 袁逸 [Yuan Yi],《中国古代剽窃史论（先秦至宋篇）》[A Historical Study on Plagiarism in Ancient China], 1992 (1) 著作权 *Copyright* 50, 50-1.

art in imperial China stressed allusion and continuity over inventiveness'.[964] Confucius said: 'I transmit rather than create; I believe in and love the Ancients.'[965] Consequently, the relationship between a creative work and its writer/author in Chinese tradition is not as romantic as that in Western literary theories.

As Carla Hesse pointed out:

> [t]he measure of the greatness of a Chinese scholar was not to be found in innovation, but rather in his ability to render or interpret the wisdom of the ancients, and ultimately God, more fully and faithfully than his fellows. Wisdom came from the past, and the task of the learned was to unearth, preserve, and transmit it. Confucian thought despised commerce and thus also writing for profit; authors practiced their craft for the moral improvement of themselves and others. Reputation, and especially the esteem of future generations, was its own reward, even if it might, incidentally, bestow the worldly gifts of patrons upon its bearer.[966]

Until the end of 18th centure, the feudal China was dominated by Confucianism philosophy concerning intellectual creation. The authors themselves believed they are just the mouths of the ancients and the nature. In sharp contrast, it is notable that the authors, as this chapter will address later, were regarded as the mouths of the God in the Western world before the early 18th century.

The call for the introduction of copyright protection appeared in the late Qing Dynasty (around the late 19th century and the early 20th century). It was raised by pressures coming both from inside and outside China. The foreign pressure in relation to international trade and piracy was the primary force for the establishment

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964 Alford, above n 957, 25, 46.

965 Arthur Waley (translated and annotated), *The Analects of Confucius* (1989). These notions on literary and artistic creation are still influential in modern Chinese society.

966 Carla Hesse, 'The Rise of Intellectual Property, 700 BC-AD 2000: an Idea in the Balance' (Spring 2002) 131(2) *Daedalus* 26, 27.

of a copyright protection system.[967] As a matter of fact, the birth and development of copyright in China resulted from the immediate need for international trade[968] and from the pursuit of foreign investment.[969]

There were also pressures arising inside for the protection of the authors' labour and publishers' investment. In the early 20th century, the increasing industrialisation enabled Chinese enterprises to duplicate copyright works on a very large scale. Meanwhile, the growth of public literacy through the 'Baihua Vernacular Movement'[970] spawned a huge market for pirated books. Accordingly, the need for copyright protection was brought to the focus of some printers and writers.

A few years before the Qing government's unsuccessful introduction of the *Law of Author's Right of Great Qing Dynasty* in 1910, the world witnessed the first public debate on copyright protection in China. The contributions of Western missionaries

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967 In order to prevent both foreigners and Chinese from infringing foreign copyright works in China, the Western powers put more pressure upon the Qing government, and commenced a series of negotiation with it about mutual protection of copyright. See Qu, above n 494, 20.

968 China's motive for co-operation with the Western powers in making copyright law during the early 20th century was not copyright protection itself. See further, ibid 25.

969 As Feng pointed out that a strong motivation for establishing copyright law in China has been to attract investments from, or to appease, copyright-rich foreigner. See Feng, above n 841, 4. Eric Priest further argues that instrumentalist concerns ofen form the true motivations behind Chinese copyright law development. And Chinese officials frequently cite international opinion and attracting foreign investment, in addition to the encouragement of domestic economic growth, as primary justifications for inproving intellectual property protection. See Eric Priest, 'The Future of Music and Film Piracy in China' (2006) 21 *Berkeley Technology Law Journal* 795, 818.

970 It is a social movement in the area of Chinese literary practices in the early 20th century in China, which successfully replaced classical Chinese or literary Chinese with vernacular Chinese that is a modern writing style similar to modern spoken Mandarin Chinese. For a comprehensive introduction of the *Baihua* Movement, see generally, Edward M Gunn, *Rewriting Chinese* (1991). *Baihua* ('plain speech') is '[t]he vernacular literary language as opposed to the Classical literary language, *wenyan*. Such a vernacular-based form of written Chinese has been employed since Tang and Song times. Its use was originally limited to certain genres of popular literature; after the May Fourth Movement in 1919, it became the ordinary form of written Chinese. For all practical purposes it has now completely replaced literary Chinese. See Jerry Norman, *Chinese* (2002) 136. Also see generally, John DeFrancis, *The Chinese Language* (1986).

are the most remarkable. The article, *On the Matter of Copyright*,[971] published on Wanguo Gongbao[972] in 1904 by Young John Allen,[973] is one of the first and foremost attempts to introduce Western copyright system to Chinese readers. In addition, a number of translations of English literature on British copyright law were also published.[974]

A preliminary review on these foremost literatures on Copyright shows that China's knowledge about copyright law was initially learned from Britain. Nonetheless, the romantic philosophy on the justification of copyright protection beyond the legislation was not prevailing at that time.

In reality, the most frequent explanation for the justification of copyright protection was the need of protecting writers' labor and publishers' investment. For instance, Young J Allen argued for the justification of copyright protection by saying:

> A book is the fruit jointly produced by the writer and the printer. To the publication the writer has dedicated all his/her mental efforts and the printer has invested capital of huge amount. Their contributions to the society enable the public to benefit from

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971 Young John Allen, 《论版权之关系》 [On the Matter of Copyright] (1904) 183 万国公报 *A Review of the Times*.

972 Wanguo Gongbao (A Review of the Times) was a monthly publication in China from 1868-1907. It was founded and edited by the American Methodist missionary the Reverend Young John Allen of Georgia. Its subject matter ranged from discussions on the politics of Western nation-states to the virtues and advantages of Christianity. See further, Wikipedia, *Wan Guo Gong Bao* <http://en.wikipedia.org/wiki/Wan_Guo_Gong_Bao> at 11 June 2008.

973 Young John Allen (3 January 1836 – 30 May 1907) was an American Methodist missionary in late Qing Dynasty China with the American Southern Methodist Episcopal Mission. He is best known in China by his local name Lin Yuezhi. See further, Wikipedia, *Young John Allen* <http://en.wikipedia.org/wiki/Young_John_Allen> at 11 June 2008.

974 'A Study on Copyright' was the first translation of Western works on copyright. It was translated from *Encyclopedia Britannica* by Yijun Zhou and published by the Commercial Press in 1903. See further, 王兰萍 [Wang Lanping], 《近代中国著作权法的成长(1903-1910)》*The Growth of Modern Chinese Copyright Law (1903-1910)* (北京大学出版社 [Peking University Press], 2006), 39-44.

the book. To compensate the writer and the printer for their contribution, copyright was awarded.[975]

To this end, it is reasonable to say that there was no in-depth debate and analysis on the philosophy beyond copyright legislation when this legal institution was introduced into China one hundred years ago. No clear distinction between the terms 'writer' and 'author' could be found; both refers to the person who created the work.[976]

There was a saying in China during the Cultural Revolution (1966–76), 'Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?'[977] This saying might be unable to summarise the complete copyright theory of Communist China; however, it does reveal the Communist party's attitude towards intellectuals and cultural creation.

Intelligentsia is a group of intellectual workers and literary production is to process cultural commons to make cultural works. The creation of literary works is believed to be 'social activities that drew on a repository of knowledge that belonged to all members of society'.[978] 'What I myself produce,' Marx wrote in 1844, 'I produce for society and with the consciousness of acting as a social being'.[979] Whether the author are creating something original or just reproducing something from the existing natural world and society? Chairman Mao Zedong believed that literary

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975 See further, Allen, above n 971.

976 In contrast, as discussed later in this chapter, until the end of Renaissance in the early 18th century, the term 'writer' was the dominant appellation of the producer of writings. The writer, however, became 'author' after the Romantic Movement in 18th century.

977 Alford, above n 957, 56.

978 Ibid.

979 See further, ibid 57.

works, as ideological existence, are the products of social life as reflected in human's brain.[980]

6.1.2 THE BIRTH OF THE ROMANTIC AUTHOR IN THE WEST

With the passage of the *Statute of Anne*,[981] the first copyright statute,[982] the concept of authorship eventually entered the domain of law in the Western world in 1710 and further the law and judicial practices affirmed the 'very identity of the author as author',[983] although not very soon.[984] While it was new to law at this time, however, the terminology of authorship had already acquired its meaning in the area of literature and philosophy for a long while.[985] In a modern sense, the term 'author' refers to an individual who is the sole creator of unique works the originality of which warrants their protection under copyright laws.[986] But this modern author is 'a relatively recent invention' and a by-product of the professionalisation of writing and the growth of public literacy.[987]

Until the end of Renaissance in the early 18th century, the term 'writer' was the dominant appellation of the producer of writings. A writer was a mere translator of God and a channel for truth (merely 'one mouth among many')[988] and was 'first and

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980 Li, above n 960, 134.

981 It carried the full 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'. See the full text at The History of Copyright: A Critical Overview with Source Texts in Five Languages <http://www.copyrighthistory.com/anne.html> at 7 May 2008.

982 See generally, Ransom, above n 251.

983 Rose, 'The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship', above n 955.

984 In the following 64 years after the *Statute of Anne*, booksellers and publishers were combating to restore their monopoly power and the battle culminated in a single court case (*Donaldson v Beckett*) in 1774. See further, ibid.

985 Peter Jaszi, 'Toward a Theory of Copyright: the Metamorphoses of "Authorship"' (1991) 2 *Duke Law Journal* 455, 468.

986 Martha Woodmansee, 'On the Author Effect: Recovering Collectivity', above n 941, 279.

987 Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17(4) *Eighteenth-Century Studies* 425, 426.

988 James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996) 53.

foremost a craftsman'.[989] However, there were some moments when a writer's achievement was much higher than craftsmanship the writer was said 'to be inspired – by some muse or even by God'.[990] Consequently, the two seemingly incompatible conceptions of the writer- as craftsman and as inspired- coexisted until the 17th century.[991]

The following 18th century witnessed a decline of the craft-inspiration model of writing. Theorists departed from this compound model in two significant ways as Martha Woodmansee observed.[992] On one hand, they minimised the elements of craftsmanship (in some instances they simply discarded it) in favor of the element of inspiration. On the other hand, they internalised the source of that inspiration. That is, inspiration came to be regarded as emanating not from outside or above, but from within the writer himself.[993] As inspiration and writing were increasingly credited to the writer's original genius, the writer eventually became an 'author' in aesthetics.

The romantic notion on authorship in aesthetics was immediately introduced into the law when a group of writers who sought to live on their pens instead of their patrons. At the same time, the writers' independence movement was also accelerated by the expanding reading market and the rapid growth of public literacy during the Renaissance. In alliance with booksellers,[994] the writers, lobbied for 'some kind of legal right in the text – the right that we would call copyright'.[995] However, the part taken by writers in the formulation of the attitudes toward the property their pen

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989 Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"', above n 987, 426.

990 Ibid 426-7.

991 Ibid 427.

992 Ibid.

993 Ibid.

994 'In close communication with the trade and sometimes in alliance with booksellers, authors contributed their own concepts of "benefit" or right-in-copy.' See further, Ransom, above n 251, 10-11.

995 Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, above n 988, 52.

created needs further scrutiny in the historical context. Harry Ransom pointed out that the authors 'contributed their own concepts of "benefit" or right-in-copy'[996] which is obviously distinct from the booksellers' idea. Before the passage of the *Statute of Anne* in 1709, as Ransom said, 'a precise definition of the author's legal significance was not written into law'.[997] With very rare exceptions, 'writers of great talent were usually silent on this subject before 1710',[998] and furthermore 'most of those who were vocal defended booksellers' copy rather than author's right'.[999] For example, John Locke was believed to be 'concerned in some fashion with authorial right', but evidences seem to suggest that he just 'thought of literary property as a bookseller's affair'.[1000]

As a matter of fact, booksellers' commitment to bringing the romantic author into law was obviously not for the sake of writers, but for their own. Before the invention of the *Statute of Anne*, the law makers' resolution to break the monopoly of the London booksellers was very apparent and strong.[1001] The booksellers then decided to accept this conception of author when they found that it could also be a useful instrument for their own purpose.[1002] Even after its introduction into the law, the

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996 Ransom, above n 251, 10.

997 Ibid 11.

998 Ibid.

999 See further, ibid 11-12.

1000 Rose, above n 304, 32-3.

1001 'The end of legally sanctioned censorship after 1694 meant that the booksellers had no public protection for their private stationers' copyrights, and in the following years they frequently petitioned Parliament for relief. Their first efforts were to secure full reinstatement of censorship laws, but when these attempts failed, the booksellers tried a new tactic: they sought legal protection not for themselves but for authors, who would be expected to convey their copyright to the bookseller as in the past.' See further, Patterson and Lindberg, above n 164, 27.

1002 As Sherman and Strowel said: 'In pressing for the bill that was to become the statute, the booksellers had spoken about benefits to authors, but the property rights they had claimed had been their own. Thus an early broadside from the period of agitation for the bill was called *The case of the Booksellers Right to their Copies*. However, in the 1730s, when the statutory copyrights began to expire, the London booksellers found that the author, employed by parliament as a weapon in the statute, could also be useful instrument for their own purposes. Thus *The Case of Authors and Proprietors of Books*, a representative booksellers' pamphlet from

term ‘authorship’ still ‘remained a malleable concept, generally deployed on behalf of publishers rather than writers’.[1003]

‘Despite its failures’, Harry Ransom commented, the *Statute of Anne* introduced several developments in literary property one of which is ‘a general acceptance of the author as the source of property rights in literature and an increase in the rewards of authorship’.[1004] Consequently, the publishers’ copyright was shifted to author’s copyright and author eventually found a place in law.[1005] Furthermore, the author established their position as a proprietor, the originator and first owner of copyrighted works. However, neither the *Statute of Anne* nor the subsequent copyright legislations in other countries provides any sort of legal definitions on the term ‘author’ or ‘authorship’.[1006]

6.2 THE DEATH OF THE ROMANTIC AUTHOR

6.2.1 ROMANTICISM AND INDIVIDUALISM OF CREATIVITY

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this period, opened with a militant assertion of the author’s property right’. See further, Brad Sherman and Alain Strowel, *Of Authors and Origins* (1994) 31.

[1003] Peter Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’ in Martha Woodmansee et al (eds), *The Construction of Authorship* (1994) 29, 33. ‘Indeed’, Jaszi continued, ‘the interests most directly at stake in disputes over the content of copyright law usually are those of firms and individuals with capital investments in the means by which the productions of creative workers are distributed to consumers.’

[1004] Ransom, above n 251, 105-6.

[1005] The shift happened gradually over the 18th century, as more people learned to read and write, and as ‘professional writer’ became a more respectable profession. See further, Jacqueline Rhodes, ‘Copyright, Authorship, and the Professional Writer: the Case of William Wordsworth’ in Cardiff Corvey (ed), (2002) 8(1) *Reading the Romantic Text* <http://www.cf.ac.U.K./encap/corvey/articles/cc08_n01.html> at 7 may 2008.

[1006] For example, The United States Copyright Office defines copyright as ‘a form of protection provided by the laws of the United States (title 17, US Code) to authors of “original works of authorship”’. Holding the title of ‘author’ over any ‘literary, dramatic, musical, artistic, [or] certain other intellectual works’ gives this person, the owner of the copyright, exclusive right to do or authorize any production or distribution of their work. *Copyright, Designs and Patents Act 1988* (UK) s 1: In this Part ‘author’, in relation to a work, means the person who creates it. See further *Copyright, Designs and Patents Act 1988* (UK) s 9.

Michel Foucault wrote in 1969, '[t]he coming into being of the notion of "author" constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences.'[1007] He suggested further, 'it would be worth examining how the author became individualized in a culture like ours'.[1008]

Indeed, the prevalence of the romantic notion authorship and individualism embodied in this notion was significantly defined by its historical context. Since they became 'author' from 'writer', the authors were enshrined as a group of individual genius whose 'vivid sensation' and the 'spontaneous overflow of powerful feelings' became the elements of creativity and thus authorship.[1009] They were regarded as creating something entirely new and original.[1010] Consequently, by the middle of the 18th century this romantic notion on authors had become a 'universal truth about art',[1011] and furthermore, the doctrine of originality, generated by this notion of authorship,[1012] was so orthodox that Samuel Johnson could state flatly, '[t]he highest praise of genius is original invention'.[1013] Such romantic notion, on one

[1007] See further, Foucault, above n 940, 141. (This essay is the text of a lecture presented to the Societé Francais de philosophie on 22 February 1969; Foucault gave a modified form of the lecture in the United States in 1970.)

[1008] Ibid.

[1009] Rhodes, above n 1005.

[1010] 'Genius is the introduction of a new element into the intellectual universe.' See further, Paul M Zall (ed), *Literary Criticism of William Wordsworth* (1966) 182.

[1011] Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, above n 988, 54.

[1012] Woodmansee posited that 'it is a by-product of the Romantic notion that significant writers break altogether with tradition to create something utterly new, unique – in a word, "original"'. See Woodmansee, above n 986, 280.

[1013] Rose, above n 304, 5. However, the legal definition of 'original' has significantly departed from the common conception of the term. The literal meaning of 'original' was defined as something that is existing from the first primitive; earliest; not imitative or derive; creative. In contrast, the legal meaning given to 'original' is shaped in the process of judicial practices and the legal requirement for 'originality' has two aspects. The form of expression must, first of all, 'originate' with the author; and additionally it is not copied or produced by a 'mere conduit' or anamnesis. See Reynolds and Stoianoff, above n 832, 36. The test for originality in copyright law is set at relatively low level so long as an author has exercised skill, labour and effort in the creation of a

hand, easily found its position and attracted its advocates in the area of literature and aesthetics in the Romantic Movement in the late 18th century. Romanticism, acknowledged as a complex artistic, literary, and intellectual movement in history, was partly a revolt against aristocratic social and political norms of the Age of Enlightenment and a reaction against the scientific rationalisation of nature, and was embodied most strongly in the visual arts, music, and literature.[1014] During that period, there was 'a desire to discover why some works of art made a strong emotional appeal and others did not',[1015] and then many perceptions saw 'all the rules which had been derived from the masterpieces then accepted as the greatest products of the human mind and hand.'[1016]

On the other hand, the articulation of the romantic authorship couldn't have been successful without the popularity of possessive individualism presented by John Locke since the 17th century.[1017] In his seminal works such as *Two Treatises of Government*[1018] and *An Essay Concerning Human Understanding*,[1019] Locke

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work – whether it is a new work, a derivative work or a compilation of existing materials and the work has not been copied – the work will most likely be original. See further, Mark J Davison et al, *Australian Intellectual Property Law* (2008) 211-13. The work is said to have originated with the author if it is the product of the author's skill, labor and expertise or experience. In *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608-10 Peterson J wrote, 'the Act does not require that the expression must be original or novel form, but that the work must not be copied from another work – that it should originate with the author.' Therefore, copyright law perceives the author as the 'originator' of the expressive materials. 'Copyright is concerned with the originality of expression, rather than the originality of ideas. This is a version of the so-called idea-expression dichotomy which provides that mere ideas are not protected by copyright'. See further Mark J Davison et al, *Australian Intellectual Property Law* (2008) 211.

1014 See further, Wikipedia, *Romanticism* <http://en.wikipedia.org/wiki/Romanticism> at 8 December 2008. For further discussion on romanticism, see generally Scott Masson, 'Romanticism' in Andrew Hass et al (eds), *The Oxford Handbook of English Literature and Theology* (2007); Edward Larrissy, *Romanticism and Postmodernism* (1999); Hugh Honour, *Romanticism* (1979).

1015 Honour, above n 1014, 24-5.

1016 Ibid.

1017 See further, Macpherson, above n 300; See also Carens, above n 300.

1018 *Two Treatises of Government* is a work of political philosophy published anonymously in 1689 by John Locke. The first treatise attacks patriarchalism in the form of sentence-by-sentence refutation of Robert Filmer's Patriarcha and the second treatise outlines a theory of political or

claimed that governments in civil society was created for the protection of property rights and the origins of property resided in acts of appropriation from the general state of nature. He emphasised further, '[b]y property I must be understood here, as in other places, to mean that property which men have in their persons as well as goods.'[1020] 'Here was an indication that if we take ideas to "reside" in persons,' Boisot et al pointed out, 'then ideas too could be subject to a property rights regime.'[1021] Labour gives a man a natural right of property in that which he produces. Literary compositions are the effect of labour; authors have therefore a natural right of property in their works. This is actually the argument for author's right proposed by the London booksellers in the 18th century.[1022]

Individualism therefore is intensely pervasive in the law of authorship and thus copyright. Consequently, in the eyes of the law, intellectual and artistic creation is a separated phenomenon, and a self-contained process of individual and personal activity of the author. The author is seen as an isolated individual without any social relations and his creativity and inspiration emanate from something inside his body. As a commentator has pointed out, the existing legal definition of authorship implicitly embraces the presuppositions that individuals live in isolation from one another while ignoring 'the individual's relationship with others within her community, family, ethnic group, religion – the very social relations out of which and for the benefit of whom the individual's limited monopoly rights are supposed to exist'.[1023] Furthermore, the individualisation of authorship and propertisation of an author's product also resulted from the endorsement and facilitation of possessive

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civil society based on natural rights and contract theory. See generally, John Locke, *Two Treatises of Government* (edited by Peter Laslett, 1988).

[1019] *An Essay Concerning Human Understanding* first appeared in 1690. See generally, John Locke, *An Essay Concerning Human Understanding* (1994).

[1020] John Locke, *Two Treatises of Government* (1689) s 173.

[1021] Boisot et al, above n 192, 175.

[1022] See further, Rose, above n 304, 31-48.

[1023] Shelley Wright, 'A Feminist Exploration of the Legal Protection of Art' (1994) 7 *Canadian Journal of Women and the Law* 59, 73.

individualism in history. In addition, the established copyright regime sees the work as a finished product, and sees further the relationship between authors and readers/audiences as producers and consumers. Once the work is created and made available to the public, the process of meaning-making will be completely done; the readers and audiences are just passive receivers of information and have nothing to do with the discourse process at all.

6.2.2 TOWARDS A LESS ROMANTIC NOTION OF AUTHORSHIP

In recent years, it has been argued that the traditional concept of authorship, with its implications of individualism and authority over the interpretation of textual meaning, has been overthrown in theory, if not entirely in practice.[1024] Since the Romantic Movement, literary definitions of 'author' have changed a lot; however, the changes in literary definitions have not appreciably influenced legal definitions.[1025]

Romantic aesthetics emphasise that the author is the monarch of their writings; however, this proposition has been challenged since Roland Barthes' 1968 essay *The Death of the Author*.[1026] Barthes argues that a text cannot be attributed to any single author because 'it is language which speaks, not the author'.[1027] Barthes therefore removes the author out of the text produced by him and declared the birth of the reader which is at the cost of the death of the author. This theory, labelled as 'structuralism' or 'poststructuralism', demonstrates that an author is not simply a 'person' but a socially and historically constituted subject.

[1024] See generally, Jacques Derrida, *Of Grammatology* (1997).

[1025] Martha Woodmansee and Peter Jaszi, 'The Law of Texts: Copyright in the Academy' (1995) 57 *College English* 769, 771. Woodmansee and Jaszi continued, 'while legal theory participated in the construction of the modern "author", it has yet to be affected by the structuralist and poststructuralist critique of authorship'.

[1026] See generally, Barthes, 'The Death of the Author', above n 296.

[1027] Ibid.

Michel Foucault argues in his 1969 essay *What is an author?* that all authors are writers, but not all writers are authors.[1028] In Foucault's theory, an author exists only as a function of a written work, a part of its structure, but not necessarily as part of the interpretive process, although the author has been used as an anchor for interpreting a text. The author's name 'indicates the status of the discourse within a society and culture'.[1029] In this approach the reader's importance is re-examined and more explicitly asserted in the construction of meaning.

Emerging notions of 'hypertext' and 'intertextuality' further highlight the need for the reconsideration of the reader's position.[1030] They disclose the evolutionary, modifiable, and open nature of the text and support the concept that the meaning of an artistic work does not reside in that work, but in the viewers.[1031] More recent post-structuralist theory re-examines 'intertextuality' as a production within texts, rather than as a series of relationships between different texts.[1032]

Along with the critique of romantic authorship by literary theory, questions are also raised by emerging legal practices and theories.[1033] Modern copyright law is an author-centred regime, and creativity in this model is 'an individual activity, and the rights over its outcomes are clearly attached to the individual whose labour (mental

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[1028] Foucault, above n 940, 141.

[1029] Ibid.

[1030] Intertextuality is 'the shaping of texts' meanings by other texts. It can refer to an author's borrowing and transformation of a prior text or to a reader's referencing of one text in reading another. The term "intertextuality" has, itself, been borrowed and transformed many times since it was coined by poststructuralist Julia Kristeva in 1966.' See further, Wikipedia, *Intertextuality* <http://en.wikipedia.org/wiki/Intertextuality> at 22 April 2010.

[1031] See generally, Roland Barthes, *Image, Music, Text (Essays Selected and Translated by Stephen Heath)* (1977).

[1032] See generally, Daniela Caselli, *Beckett's Dantes: Intertextuality in the Fiction and Criticism* (2006).

[1033] The perception of the author as a 'creative genius' possessing the 'capacity to leap significantly beyond present knowledge and produce something new' is problematic to those challenging existing copyright standards. See further, Lior Zemer, *The Idea of Authorship in Copyright* (2007) 76.

creativity) is apparent in that outcome'.[1034] However, networked media technologies have presented the world with a completely different picture. The peer production of information and knowledge is a new creativity model and a decentralised innovation pattern. In this sense creativity is being recast as a collaborative activity rather than an individual activity.

The collaborative nature of literary and artistic creation has been pointed out by many scholars. As Jack Stillinger has explained in many cases, the singular authorship concept does not accord with the facts of literary production. He found that 'numerous texts considered to be the work of single authorship turn out to be the product of many hands'. Therefore, he asked: how many authors are being banished from a text or apotheosised in it?[1035] It has also been argued that current copyright law fails to recognise the collective nature of authorial and artistic creations. Lior Zemer has complained that as a legal and social institution copyright rejects the very nature of copyright creation as a collectively imagined and produced activity, and denies the contribution of the public to the copyright creation process, imposing and maintaining an imbalance between private and public interests.[1036]

Additionally, some scholars have proposed that authorship is not at all a matter of heroic, individual creation but rather it is a social process. This proposition is composed of three aspects. First, there is collaboration, the fact that creative acts depend on interactive networks. Second, authorship is social in that it involves the recombination of existing symbolic materials from a historically deposited common stock. Third, social authorship is incremental in nature. Significant new

[1034] James Leacb, 'Modes of Creativity and the Register of Ownership' in Rishab Aiyer Ghosh (ed), *CODE: Collaborative Ownership and the Digital Economy* (2005) 31.

[1035] See generally, Jack Stillinger, *Multiple Authorship and the Myth of Solitary Genius* (1991).

[1036] See further, Zemer, *The Idea of Authorship in Copyright*, above n 1033, 16.

developments result from many small innovations rather than major breakthroughs by single creators.[1037]

To this end the *copyleft* movement can be seen as a better translation of the postmodern space of creation rather than *copyright*.[1038] From open source to art, a radically new view of creation has been mapped out, within which not only the location of the author, but also the location of the work and of the user, have been shifted and reconfigured.[1039]

In summary, over recent years the western world has witnessed the romantic notion of authorship being questioned both by literary critics and by legal scholars. The former argue that the work/text is a product of the author's cultural influences rather than her mere persona, and furthermore, readers/audiences are as important as the author in the discourse process. The latter point out that the authors assemble, transform and adapt their works from the components of their cultural environment rather than make anew; thus, the contribution of the public in this process should not be ignored.

6.2.3 THE SOCIAL APPROACHES TO AUTHORSHIP

The contemporary scholarly writings on authorship presented above convincingly argue that the author is a socially constructed and historically contingent figure. The social approaches to authorship theoretically deconstruct the author into 'a vessel through which many influences and experiences are poured'.[1040] Accordingly, these social views refuse to accept the idea that works are creations of the solitary

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[1037] See further, Jason Toynbee, *Beyond Romance and Repression: Social Authorship in a Capitalist Age Open Democracy* (2002) openDemocracy <http://www.opendemocracy.net/media-copyrightlaw/article_44.jsp> at 22 April 2010.

[1038] Severine Dusollier, 'Open Source and Copyleft: Authorship Reconsidered?' (2003) 26 *Columbia Journal of Law & the Arts* 281, 288-9.

[1039] Ibid 288.

[1040] Lior Zemer, 'The Copyright Movement' (2006) 43(2) *San Diego Law Review* 247, 251.

individual geniuses, and remind us further that relying on the romantic notion of authorship may foster authorial rights that are too broad or too powerful for the good of society.[1041]

Nevertheless, the conceptualisation of the social constructed authorship and associated propositions also incur pointed critiques. For instance, a commentator argues that the influences of other authors, existing works and culture or external experiences and perceptions upon an author neither makes the author less autonomous nor significantly challenges the notion of the individual creator as being the locus of authorship and creativity in the copyright system.[1042] Professor Depoorter also does not believe we really owe the expansion of the intellectual property system to the romantic conception of authorship.[1043]

Such comments on the social approaches to authorship and copyright are inaccurate and are actually misinterpretations of the conception of the social constructed author. Both the author and the authorial process are absolutely located and situated within a particular cultural context and creative practice is substantially determined by this context. But just as Cohen argued, recognising the situatedness of creativity does not 'require submerging the individual irretrievably within the social; creativity has "internal" dimensions as well as "external" ones'.[1044]

The existing definition of authorship embraces the presuppositions that individuals live in isolation from one another while ignoring 'the individual's relationship with others within her community, family, ethnic group, religion – the very social

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[1041] See generally, Alan L Durham, 'Copyright and Information Theory: Toward an Alternative Model of "Authorship"' (2004) 69(1) *Brigham Young University Law Review* 69, 101.

[1042] See further, Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System* (2008) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270175> at 4 February 2009.

[1043] See further, Ben Depoorter, 'The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law' (2004) 9(4) *Virginia Journal of Law and Technology* 4, 23-4.

[1044] Cohen, 'Creativity and Culture in Copyright Theory' , above n 49, 1178-9.

relations out of which and for the benefit of whom the individual's limited monopoly rights are supposed to exist.'[1045] Accordingly, copyright as a legal institution based on this definition has 'focused primarily on the relationships among those who write works of authorship and disseminate those works to the public.'[1046]

However, the growing public digital literacy and the rise of a 'participative web'[1047] have afforded a world of peer production and an age of mass participation.[1048] The production of artistic and literary works is no longer considered a 'privilege' and 'the genius' of social and cultural elite, but rather a daily engagement for a mass of individuals, which is enjoyable and provides for instance, communication, entertainment, creative play and self-development.[1049] In the new context, the creation of literary and artistic works is more than a process of creative expression. It is also a process of communication. The application of interactive information technology and participatory web infrastructure has given rise to an interactive

[1045] Wright, above n 1023, 73.

[1046] Litman, above n 103, 111.

[1047] 'The use of the Internet is now characterised by increased participation and interaction of users to create, express themselves and communicate. The "participative web" is the most common term and underlying concept used to describe the more extensive use of the Internet's capacities to expand creativity and communication. It is based on intelligent web services and new Internet-based software applications that enable users to collaborate and contribute to developing, extending, rating, commenting on and distributing digital and developing and customising Internet applications.' See Wunsch-Vincent and Vickery, above n 106.

[1048] In contrast to the Web 1.0 age, the Internet in the Web 2.0 age (the participatory media age) is not only 'characterised as a giant copying machine that facilitates widespread and undetectable copyright infringement', it also enables a new creativity model and a new way for producing information and knowledge. Yochai Benkler calls the decentralised creativity model a 'commons-based peer production'. In this model, innovation has been democratised as Eric Von Hippel described, to the extent that people (users of information and knowledge) are 'picking up the creative ball and running with it, making their own version with remixes, mash-ups and derivative works'. The distinction between 'works of mine' and 'works of yours' is blurred, whilst new cultural movements envision a third position, 'ours'. See further, Sampsung Xiaoxiang Shi, 'Chinese Copyright Law, Peer Production, and the Participatory Media Age' in Brian Fitzgerald et al (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 257, 268-9.

[1049] Ibid 262. See also, Cohen, 'The Place of the User in Copyright Law', above n 48, 347; Cohen, 'Creativity and Culture in Copyright Theory', above n 49.

information arena. If it continues to keep authors isolated and users irrelevant, copyright law will be in very real danger of becoming irrelevant.

6.3 A RELATIONAL THEORY OF AUTHORSHIP

6.3.1 DEFINING A RELATIONAL NOTION OF AUTHORSHIP

'Instead of calling for the death of the author', Debora Halbert proposed, 'we should think more relationally about authorship.'[1050] She advised further that the concept of authorship as identifying to whom something owes its origin is appropriate if we can emphasize a framework focused on sharing and exchange instead of personal ownership.

It has been suggested that authorship should be understood 'within the context of cultural dialogue and participative processes, and in recognition of its audience and the public as a whole.'[1051] Carys Craig proposes to 're-imagine authorship as the formation of individual identity and the development of self and community through discourse'[1052] and copyright should aim to 'encourage meaningful relations of communication and participation with others.'[1053] Craig articulates a relational theory of authorship. A *relational author* is 'always-already situated within, and constituted by, the communities in which she exists, and the texts and discourses by which she is surrounded.'[1054] Craig posits that 'copyright must be understood in relational terms'[1055] and it 'structures relationships between authors and users, allocating powers and responsibilities amongst members of cultural communities,

[1050] Debora Halbert, 'Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures' in Lise Buranen and Alice Myers Roy (eds), *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (1999) 111, 118.

[1051] Craig, above n 954, 266.

[1052] Ibid 234.

[1053] Ibid.

[1054] Ibid 261.

[1055] Ibid.

and establishing the rules of communication and exchange.'[1056] In addition, 'the importance of copyright lies in its capacity to structure relations of communication, and also to establish the power dynamics that will shape these relations. Its purpose is to maximize communication and exchange by putting in place incentives for the creation and dissemination of intellectual works.'[1057]

Instead of seeing authorship as commencing with the act of the individual who puts pen to paper or paint to canvas we should conceptualise authorship as being a product of the eco-system in which it is born. This chapter furthers the arguments for a relational theory of authorship, looking at creativity 'from a systematic perspective'.[1058] Relational authorship is a descriptive system that talks about cultural contributors rather than the solitary romantic author, and its subject focuses on the relational and multiple contributions. Grounded in the postmodernist social and cultural theory,[1059] this theory perceives that the creative process and cultural progress is an open-ended and communication-oriented discourse and interpretation. Accordingly, copyright should be a legal institution aiming to structure relations of the participants in and contributors to this system.

In contrast to the romantic authorship that focuses on the solitary romantic author and excludes any other cultural participants, relational authorship articulates an approach that includes and internalises the evolving, emergent and dynamic relations between the public, authors and users/consumers. Therefore, this theory argues for

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[1056] Ibid.

[1057] Ibid.

[1058] From a systematic perspective, 'artistic and intellectual culture is most usefully understood not as a set of products, but rather as a set of interconnected, relational networks of actors, resources, and emergent creative practices.' See further, Cohen, 'Creativity and Culture in Copyright Theory', above n 49, 1183.

[1059] Social and cultural theories that emphasise the contingent, iterative, and performative development of knowledge are rooted in several philosophical traditions that liberalism has resisted, and of which copyright scholars have remained largely skeptical. See further, ibid 1166-7.

an account of 'contributorship' that supports a relational authorship which in turn aims to 'construct relationships of communication between authors, users, and the public by allocating powers and responsibilities'.[1060]

Based on evolutionary economics, this chapter proposes that the construction of legal definition of authorship and thus copyright should be situated in social relations between the existing culture, the author, user/consumer and the potential authors. This theory may be called 'relationalism' which can be traced back to Communitarianism; but essentially different from Communitarianism.

A previous effort to introduce social relations into the construction of law could be seen in Macneil's relational contract theory. The relational theory of contract, developed by Professor Ian Macneil, claims that all contracts are embedded in a matrix of social relations so that all contracts are relational; however, traditional contract theory treats contracts as if there were no such relations.[1061] The relations between contracting parties are on-going, co-operative, complex and dynamic, and are furthermore governed by a diversity of contract norms rather than merely by the

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[1060] Craig, above n 954, 267.

[1061] Macneil's relational contract theory is established and refined in his writings such as Ian R Macneil, 'Whither Contracts?' (1969) 21 *Journal of Legal Education* 403; Ian R Macneil, 'Restatement (Second) of Contracts and Presentiation' (1974) 60 *Virginia Law Review* 589; Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691; Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854; Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); Ian R Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classifactory Apparatus"' (1981) 75 *Northwestern University Law Review* 1018; Ian R Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340; Ian R Macneil, 'Relational Contract: What We Do and Do Not Know Law, Private Governance and Continuing Relationships' (1985) 1985(3) *Wisconsin Law Review* 483; Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94 *Northwestern University Law Review* 877; Ian R Macneil, 'Reflections on Relational Contract Theory after a Neo-classical Seminar' in H Collins, D Campbell and J Wightman (eds), *The Implicit Dimensions of Contract* (2003) 207.

positive law.[1062] For Macneil, law is just a back-up system seldom used actively but always used passively and law is an index which tells society what is most important among its customs and practices.[1063]

Macneil's contract theory is very influential, but of course also very controversial.[1064] While commenting on Macneil's theory, Randy Barnett criticizes that '[a]ny concept of individual rights must assume a social context. … It makes no sense, however, to speak about this person's rights.'[1065] Barnett explains further that we need rights in a social context because some rights are important to enable the existence of a relational order of actions that permits persons to solve the pervasive problem of limited accessibility of personal and local knowledge[1066] and the problem of personal interests that spring from the common tendency of persons to make judgments or choose actions that they believe will serve their subjective preferences.[1067] Therefore, Barnett concludes that Macneil's contract theory is communitarian,[1068] whereas his is liberal.[1069]

[1062] See further, Ian R Macneil, 'Values in Contract: Internal and External', above n 1061, 340.

[1063] See generally, Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, above n 1061.

[1064] On 29 January 1999, the symposium, *Relational Contract Theory: Unanswered Questions*, was held in honor of the scholarship of Professor Ian MacNeil. Many articles and comments on Macneil's theory were presented and later published in the *Northwestern University Law Review*. See further, (2000) 94(3) *Northwestern University Law Review*.

[1065] Randy E Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269, 294.

[1066] Randy E Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78(4) *Virginia Law Review* 821, 829-48.

[1067] Ibid 848-59.

[1068] Communitarianism contrasts sharply with libertarianism and liberalism, and it arose in 1980s as a response to the limits of liberal theories, Rawls's *A Theory of Justice* in particular. The image of humans presented by Rawls is atomistic individuals so that values and beliefs exist within a single person's mind. In contrast, communitarians believe that autonomous individuals do not exist in isolation, but are shaped by the values, beliefs and culture of communities in which the individuals are situated. Moreover, communitarians criticise the one-sided emphasis on rights in liberalism, and therefore argue that individual rights and interests should be balanced with that of the community as a whole. Social relations and membership in communities are the breakthrough points adopted by communitarians. Communitarian writings include but not limited to: Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1st ed, 1981; 2nd ed, 1984; 3rd ed, 2007);

Communitarianism in fact has been an attempt to re-construct the image of individual and the definition of individualism that are presented by traditional liberals with its extension of focus on individuals plus the communities in which they are situated. In order to analyses human behavior and mind, communitarianists seek to replace liberal's man-outside-society with the man-in-society through the emphasis on that individuals are embedded in communities and thus beliefs, values and identities are constituted by their membership of a community.[1070] Alasdair MacIntyre states: 'We all approach our own circumstances as bearers of a particular social identity'; 'I am someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation.'[1071]

6.3.2 CREATIVE CONTRIBUTIONS AND CONTRIBUTORS

Michael Walzer, *Spheres Of Justice: A Defense Of Pluralism And Equality* (1984); Charles Taylor, 'Atomism' in *Philosophical Papers: Volume 2, Philosophy and the Human Sciences* (1985) 187; Robert Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (1985); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); Ezekiel Emanuel, *The Ends of Human Life: Medical Ethics in a Liberal Polity* (1991); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (1992); Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society* (1993); Amitai Etzioni (ed), *New Communitarian Thinking: Persons, Virtues, Institutions and Communities* (1995); Michael J Sandel, *Liberalism and the Limits of Justice* (1998).

[1069] See generally, Randy E Barnett, 'Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract' (1992) 78(5) *Virginia Law Review* 1175.

[1070] 'Community' is indeed an easy target for attack, and thus it makes communitarian weak. There is proclivity to interpret 'community' mistakenly as a form of human association just like government, country or state. However, communitarian community is not a form of unity; instead it is a descriptive term, just like the term 'society'. As it has been correctly pointed out, the communitarian community is 'more than a mere association; it is a unity in which the individuals are members'. See further, Shlomo Avineri and Avner De-Shalit, *Communitarianism and Individualism* (1992) 4. Accordingly, the dependence of the individual upon his/her community and other community members is just meant as descriptive as well. Therefore, obedience or disobedience never exists as an issue in this context; the issue is whether the individual share the same beliefs and values with the majority within the community.

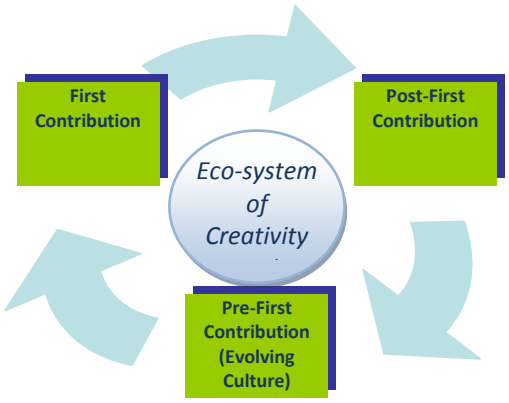
[1071] MacIntyre, above n 1068, 220-1.

If we suggest a creative act – let us call it the act of 'first contribution' (FC) – as being preceded by culture, associated communication protocols and markets then we must somehow incorporate these contributions into our system of knowledge flows, usage and ownership. This role that the culture plays prior to the first contribution could be labelled 'pre-first contribution' (pre-FC); and the role that the fans/admirers, consumers and users play following the first contribution could be 'post-first contribution' (post-FC).

Therefore, the contributions to creativity and cultural innovation that raise the evolving culture could be mapped comprehensively by the following chart.

A. Pre-first Contributions: the Culture & Inhabitants

Culture as a pre-first contribution to creativity generated by the public (individuals and associated social groups and communities) is where the writer and artist are situated. Its role is evidenced in a small way in the limitations on or exceptions to the author's exclusive rights found in copyright law but these provisions are expressed and implemented in a manner that defers to the romantic notion of the author.



a) The Recognition of Culture as a Contributor to Creativity

In the past few years, the popularity of everyday creativity and other affordance of the participative web have dramatically challenged the copyright regime's arrogance towards the culture. The contribution of culture and cultural inhabitants to creativity

has come to play a more obvious role in the processes of meaning-making and the evolution of culture itself.

First of all, the advance of media technology has dramatically facilitated the civic engagement in cultural activities, giving rise to the decentralisation of innovation. The increasing civic engagement would result in the augment of diversity and complexity of relations between individuals and the exuberance of species and amounts of social groups and communities. As Cohen has described, social groups 'play a dual role in creative processes, functioning both as users and as immediate cultural environments for individual users';[1072] and 'within copyright law, the relative salience assigned to contributions of individuals and contributions of groups affects the designation of authorship'.[1073]

Additionally, the relatively low barriers to artistic and intellectual expression and civic engagement have increased the demands of intellectual commons as raw materials for individual development. From the perspective of the non-utilitarian, freedom is not simply defined as a function of the absence of restraint, but also depends critically on access to resources and on the availability of a sufficient variety of real opportunities.[1074] For that reason, the access to extant cultural resources, characterised by Cohen as 'cultural landscape',[1075] is playing a more and more important role in accommodating the fulfilment of human freedom. Furthermore, open access to knowledge and information has become a worldwide

[1072] Cohen, 'Creativity and Culture in Copyright Theory', above n 49, 1188.

[1073] Ibid.

[1074] Ibid 1159. Also see generally, Amartya Sen, *Inequality Reexamined* (1992); Amartya Sen, *Development as Freedom* (1999).

[1075] Cultural landscape is 'neither geographically discrete nor composed entirely of resources that are publicly owned; therefore, it does not map neatly to the legal category of public domain expression. It is defined, instead, by the ways in which artistic and intellectual goods are accessible to individuals in the spaces where they live, and by the forms of interaction with preexisting expression that are possible and limited. The cultural landscape is what supplies the elements in culture that are experienced as common, regardless of their ownership status.' See further, Cohen, 'Creativity and Culture in Copyright Theory', above n 49, 1180.

movement, paving the way for a seamless access to culture and for a profound growth of the cultural landscape. The situated nature of creativity is becoming more and more prominent because of the evolution of cultural context. The relations between individuals, social groups and the culture are more complicated and multiform. As a result, the creative process is accordingly converted into more complex and dynamic interactions between the culture and individual creators.

The popular culture dominated by the mass media has been undermined and replaced in more and more instances by a distributed culture which is incubated in a variety of distributed social groups and communities. It is a participatory culture, generated from individual cultural inhabitants' daily engagement in learning, sharing and exchanging of information and knowledge. In major cases, a distributed culture will not be meaningful outside the community or the meaning must be understood associated with its particular cultural context. Accordingly, both the cultural creations and creators are more than ever situated in a given cultural landscape in this networked information world. The culture (including the inhabitants of the culture – the public) must be regarded as a key contribution to creativity prior to a creative act of the author.

b) The Pre-First Contributions

The pre-first contributions are multi-dimensional, ranging from the cultural commons, inhabitants and markets.

First, the accumulated cultural elements such as language, knowledge, texts and conceptions of artistic and intellectual merit are creative commons and raw materials for creativity.

Second, the cultural context within which the author is located and from which the author obtains her experiences, insights, values, education and skills is another portion of contribution that should be attributed to the culture.

Third, individuals located in a given culture are social markets playing crucial roles, particularly in the new value chain approach to cultural production, in consuming, appreciating and facilitating creativity.[1076] Theorists believe that personal decisions about information consumption, under fair competition, will produce results that make sense,[1077] especially in a networked information society.

Fourth, social groups and communities within which the author and creative practices are situated are also a crucial contribution of the culture. The relational author is always related to various social groups such as family, ethnic group, religion, local culture and communities. Although concrete creativity is always initiated and maintained by particular individual authors, their dynamic complex interconnections with the groups or communities determine the overall path.

Last but not least, the infrastructure for getting people connected to each other through learning, sharing and exchanging information and knowledge are significant contribution of the culture and the society as well. The role taken by information intermediaries (the publishers, book dealers, producers of information products, performers and other disseminators of information, and associated investors) is the core element of the infrastructure.

[1076] 'This new value chain approach to cultural production is as follows: (i) agents (who may be individuals or firms) are characterised by choice, decision-making and learning (origination); (ii) social networks, both real and virtual adopt this choice; and (iii) market-based enterprise, organisations and coordinating institutions retain these choices.' See further, John Hartley, 'The Evolution of the Creative Industries – Creative Clusters, Creative Citizens and Social Network Markets', above n 36.

[1077] 'The truest and most beautiful works will be the ones that appeals most strongly to the citizen's deliberative faculty, to the consumer's enlightened self-interest.' See further, Cohen, 'Creativity and Culture in Copyright Theory', above n 49, 1165.

Nonetheless, it is notable that the pre-first contributions are not authorial as it is unrealistic to acknowledge all individuals and associated culture as authors of a given piece of intellectual and artistic work. Copyright, even put in relational terms, could only be resident in individuals despite the fact that the individual contributors are already and always situated in particular relations with other individuals and associated culture. However, the recognition of the culture as a pre-first contribution to creativity would pave a way for a better balanced copyright regime that sees the public and the culture within the relations of contributors of cultural innovation.

B. First Contributions: New Dialogues and Communications

a) The Nature of Authorship Reconsidered

The romantic aesthetics saw the creative process as a result of the author's own genius. Of genius the only proof is 'the act of doing well what is worthy to be done, and what was never done before … Genius is the introduction of a new element into the intellectual universe.'[1078] This aesthetic view of intellectual creation entered the domain of law through the conceptualization of 'originality'. Although the legal definition of 'original' has significantly departed from the literary conception of the term,[1079] the copyright regime built on the romantic authorship still primarily focuses on individual author with the perception that authorial process is an isolated individual phenomenon.

Instead of seeing authors as independent and unattached individuals, the relational theory conceptualises one group of authors as the initiators of relatively new

[1078] Zall, above n 1010, 184.

[1079] In *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608-10, Peterson J stated: 'the Act does not require that the expression must be original or novel form, but that the work must not be copied from another work – that it should originate with the author.'

discourses, dialogues and conversations, and another group of authors as consequential contributors who follow the initiating authors and take part in the discourse processes. In the process of authorship, the dialogues and conversations always begin from the cultural materials at hand. However, these materials of authorship are always both original and dependant.[1080] The author creates from the given materials around them. It is a process of reinterpretation, recombination and transformation.[1081] Therefore, the relational theory of authorship 'recognises the social dimension of the author, but also her duality: she encapsulates both our connectedness and our capacity for critical reflection'.[1082]

b) The First Contribution (FC)

Through the interpretation and reinterpretation of the culture and experiences, the initiating author opens a new dialogue and starts a new conversation. Such initiating contribution is a breakthrough or spore of the evolving culture and makes it possible to shift the existing cultural conversation to next level and next dimension.

Accordingly, this initiating contribution could be called the 'first contribution' to creativity. The contributor is first and foremost an initiator. In retrospect, their creative expression should be seen as an outcome of the entire human culture and should be attributed both to their intellectual labours and to the cultural context in which he/she is situated. The contribution of the initiating author is not in the sense of inventing an original thing *ex nihilo* but nonetheless it is in the sense of initiating new directions bringing innovation to culture and society.

[1080] These materials are 'always, and from the beginning, both given and created. They are given in that they are shaped by forces beyond any individual's control; they are created in that each new repetition of such cultural and personal artifacts is always a reinterpretation rather than merely a replication'. See further, Susan H Williams, 'A Feminist Reassessment of Civil Society' (1997) 72(2) *Indiana Law Journal* 417, 430.

[1081] Craig, above n 954, 263.

[1082] Ibid 261-2.

C. Post-first Contributions: Standing on the Shoulder of Giants

a) The Recognition of Post-first Contribution

From the perspective of the emergent and complex evolution of the culture, the FC contributors' intellectual breakthrough is not an end; instead, it is a beginning. The first contributions generated by them would only be valuable in the context of stimulating further creativity and captivating users, admirers, fans, followers and responders.

The ensuing creative acts and creations inspired by the first contributions and generated by the users, fans or followers are the post-FC contribution to the innovation of culture and the growth of knowledge. Furthermore, even the mere acts of reproducing, distributing and sharing of the first contributions should also be regarded as post-FC contributions.

Accordingly, the users, fans or even disseminators who base their creations and their activities on the first contributions are post-FC contributors. Thus, the post-FC contributors are those who take part in and continue and disseminate the conversation and discourse that were initiated by the first contributor. Such post-FC contributions are also situated in a particular cultural context; however on the other hand, they are directly and immediately derived from and dependent on the pre-existing works (the first contributions) done by the FC contributors.

The continuous growth of culture is a result of a variety of post-first contributions and the creative activities of the post-FC contributors. The post-FC contributors play a key role in shaping meanings and sustaining the dynamic and conversational creative process and cultural growth. The post-first contribution is a dynamic process of appreciation, adaptation, derivation, translation, recombination, imitation or transformation of the first contributions and other pre-existing cultural materials.

b) Copyright Monopoly Reconsidered

Once a new discourse is initiated, the existing law awards copyright owners the monopoly power to control the ensuing conversation and dialogue with very limited and narrow exceptions. Copyright owners decide who can speak to take part in this conversation, how the participants should speak and even what they should speak for. A copyright regime that merely focuses on a set of products without adequate rectification could be problematic, particularly in the networked information society. In the worst instance, it could be employed to depress and attack dissents, dissidences and opponents. In contrast, the relational authorship sees copyright in the light of a set of relational networks of actors and contextual culture. The post-first contributions are recognised by the relational copyright as authorial contributions and the post-FC contributors are relational authors.

However, under the current copyright framework, the post-FC contributors are very likely to be held liable for copyright infringement because they base their post-contributions on the re-interpreting, re-contextualising, rendering or even mere disseminating of the first contributions which are copyrighted works in most cases. The post-FC contributions may appear in the form of re-creations or creative activities associated with the pre-existing contributions of the FC contributors.

It is therefore argued in this chapter that no such liability should occur where the commercial viability of the works produced by the first contributors is not destroyed. Put it different, provided that the FC contributors are fairly payed or compensated, anyone shall be free to disseminate the first contributions in various ways and by different means, for instance, reproducing and sharing, performing, re-use or re-creating.

As part of the bargain for this immunity from liability, the post-FC contributors should be required to share the benefits that are generated from their activities, and moreover a limited level of economic rights may subsist in the post-FC contributions depending on the nature of such contributions. In the existing copyright laws, the post-FC contributors may appear as both copyright owners and neighbouring rights owners.

6.3.3 CONTRIBUTORS AND RELATIONAL AUTHORSHIP

The relational theory of authorship is constituted by the notion of 'contributorship'. The 'authors' are those who make contributions of some kind to a work instead of the one who creates the work. This analytical perspective on authorship is also in accordance with the findings of information theory.[1083]

The decentralisation of information production and innovation has 'incorporated multiple contributing factors and made none primary'.[1084] Therefore, contributions of all sorts should be encouraged and valued. In the networked information society, any contribution including creation of new works, interpretation and re-interpretation of pre-existing culture, and even combination and re-combination of copyright materials are crucial to the production of information and knowledge.

Contributors are those who make contributions to creativity and the progress of culture and take part in the discourse process in whatever manners. Contribution is defined in a very broad way, disregarding its intellectual or artistic merit but

[1083] The potential relationship between 'originality' in copyright and 'entropy' in information theory suggests at least two alternatives to the romantic model of authorship. The first alternative equates authorship with the addition of noise to a signal. The second proposes that authorship, like the addition of information to a message, reflects 'freedom of choice' in the selection of one means of expression from a variety of available means. The second alternative is less disparaging of the talents of authors than the first, yet it is still 'unromantic' enough to be more inclusive, and less dependent on the notion of genius or personality, than the traditional model. See Durham, above n 1041, 145.

[1084] Cohen, 'Creativity and Culture in Copyright Theory', above n 49, 1177.

emphasising its substantial functional values for the free flow of information. But not all contributions are authorial and meanwhile not all contributors are authors.

A. Pre-FC Contributors, Authorship, and their Rights

In particular, the pre-first contribution is not authorial. The culture itself and the people inhabiting the culture could not be attributed as authors but their contributorship should be acknowledged in a variety of ways or by different means.

The general human culture and cultural commons are pre-FC contributions to any works produced by a human being. In the case where the origin of the involved cultural elements is identifiable or distinguishable, the pre-FC contributorship should be conferred on the public inhabiting the given culture. For instance, if a work is largely derived from a particular indigenous culture such as folk song and folklore, a pre-FC contributorship should be attributed to the indigenous group within which the culture is originated. Therefore, the Hollywood movie *Fa Mulan* should be attributed as 'This movie is adapted from an old Chinese story.'

All individuals and associated social groups or communities of a culture – global or local – are pre-first contributors. They should have certain rights regarding the use of the first contributions and the post-first contributions. The users should have the right to read, enjoy and share the works generated from the first contributions and the post-first contributions. The users should also have the right to use the works in various ways including contributing their own creativity through re-using the works. In this case, the user would become a post-FC contributor and should be granted 'derivative' or 'affiliated' authorship. Accordingly, the derivative authors, affiliated authors and even the related authors are, first and foremost, users. Therefore, the users should have the rights as below:

The users should have the rights:

(i) to use the works enabled by personal use or fair use;

(ii)to base their creating on the use or re-use of the pre-existing works.

B. FC Contributors, Authorship, and their Rights

All first contributions are authorial and their contributors should be attributed as 'first authors'. The first authors are the creators of works with high level of originality so that they produce a breakthrough or spore of the evolving culture. The works created by the first authors are independent productions of the authors. The first authors may base their creations on pre-existing knowledge and materials, to a certain extent that the uses of underlying works are *de minimis* or covered by other principles of fair or free use.

Therefore, the first authors are the creators whose creative contributions to knowledge growth and cultural innovation amount to the expressive works with a high level of originality. Their works (for instance, Rowling's Harry Potter) are substantially independent of the text or content of any pre-existing works.[1085]

The first authors should be awarded the substantial power to harvest the benefits arising from the exploitation of their first contributions under the condition that their rights should not impede the occurrence of the post-first contributions. Hence, the first authors should have the rights as below:

The first authors should have the rights:

1. of commercial exploitation of the works produced by them;
2. to share the benefit derived from commercial exploitation of works produced by the derivative authors;

[1085] See further, ch 6 of this thesis, s 6.3.

3. of commercial exploitation of the works produced by the affiliated authors, but the coming benefits must be shared with the affiliated authors upon request;
4. to share the benefit derived from commercial exploitation of works produced by the related authors.

C. Post-FC Contributors, Authorship, and their Rights

Producers of translations, adaptations, transformations or other alterations and those who disseminate the works to the public are all post-FC contributors. Accordingly, they should be treated as a special kind of authors and various levels of authorship should be granted by virtue of the specifications of their post-FC contributions.

Derivative Authors are post-FC contributors whose contributions amount to the works that are comparatively new, or constitute derivative works or adaptations of the pre-existing works (the first contributions). In this case, the post-first contributions are substantially independent enough from the underlying first contributions. Therefore, the producers of translations, adaptations or other alterations are derivative authors.

The derivative authors should have the right as below:

The derivative authors should have the right:

(i) of commercial exploitation of the works produced by them, but the coming benefits must be shared with the first authors.

Affiliated Authors are post FC contributors whose contributions that are substantially composed of and thus highly reliant on the first contributions, and therefore, their authorship is affiliated to the first authorship. For instance, the producers of the works such as mashups, remixes, Jazz music and fan fictions are affiliated authors. It is noticed that there does not exist a clear-cut line between ‘derivative authors’ and ‘affiliated authors’.

The affiliated authors may appear as creators of mashups, remixes, or fun fictions, and should have the rights as below:

The affiliated authors should have the right:

(i) to share the benefit derived from commercial exploitation of works produced by them.

Since their post-FC contributions are considerably affiliated to the underlying works which are creations of the first authors, the affiliated authors are thus associated with the first authors. Therefore, the first authors should have the right to commercially exploit the post-first contributions, however the affiliated authors should have the right to share the benefits generated from such exploitation. For example, fans are set free to create any fictions based on their beloved works; however the copyright owners of the underlying works rather than the fans have the right to commercially exploit the fan fictions created by them. Instead, the fans should have the right to share the commercial benefits generated from their contributions.

Related Authors are performers of performances, producers of sound recordings and broadcasting service providers. They are also post-FC contributors who contribute to the dissemination of the works produced by other authors; at the same time their contributions also take shape as works such as sound recordings, broadcasts, or performances.

The related authors, who are producers of phonograms, performers and broadcasters, should have the right as below:

The related authors should have the right:

(i) of commercial exploitation of the works produced by them, but the coming benefits must be shared with the first authors.

6.4 SUMMARY

The participatory and collaborative production of knowledge and information is inherent to the very nature of the creative process. As this chapter has argued, the creative process is always situated in a particular cultural context and is all the time undertaken by a set of relational networks of actors: they are characterized as contributors.

Instead of seeing the author as an isolated solitary genius, this chapter has articulated a relational theory of authorship, situating authors within a network of relations with other contributors, users and the public. The mission of copyright law is to structure the relations of the contributors of creativity and cultural innovation through the allocation of rights and powers within the dynamics of creative processes that shape these relations.

The set of relational networks of creators and their contributions are summarised as dynamic relations between the Pre-First contribution (Pre-FC contributor, the culture), the FC (Initiating contributor, the First author), and the Post-First contribution (Ensuing author and Secondary Initiating Author).

This relational approach sponsors a more conversational and flexible copyright regime; however this regime is conscious of economic value as well. The public and consumers are entitled to more freedom and rights of using, sharing and disseminating copyright works. It allows individuals the freedom to make contributions to human culture and knowledge based on any existing intellectual materials in a more dynamic and accommodating context. However, it also admits the author's right to share economic benefits arising from commercial exploitation (reproduction and distribution) of their creative works.

CHAPTER 7

A RELATIONAL APPROACH TO COPYRIGHT

INTRODUCTION

AIM

Following the future direction identified in the prior chapters, this chapter aims to articulate a relational approach to copyright, suggesting possible solutions to the key problems for this digital age.

SCOPE

Evolutionary economics suggests that the free flow of information and the variations generated from the flow are the core ingredients of the growth of knowledge and thus the evolution of economy.[1086] The creative acts which shape the growth are driven by individuals' propensity to originate, adopt and retain novel ideas and their needs of communication. The authorial process therefore is a process of dialogue and communication between individuals, groups and communities situated in a given cultural context.

It is thus argued that copyright law should be set as a legal institution aiming to construct meaningful relationships of communication between authors, users and the public. In contrast to the romantic authorship that focuses on the solitary authors, a relational approach includes and internalises the evolving, emergent and dynamic

[1086] See further, ch 2 above of this thesis.

relations between the contributors who have made a variety of creative contributions to the growth of knowledge and the evolution of the economy.

Copyright owners have property rights to commercially exploit their works, but just as property owners, they have obligations too. 'Copyright is a two-way deal', as Jacob Varghese argued, '[b]ut today copyright holders want the quid without the quo'.[1087] Copyright owners are rightholders and content holders in general. The technological, social and economic changes have raised a different matrix within which the law of copyright is created and maintained. Today, the content is becoming the raw material for people to participate in cultural and social activities. In this networked digital world, the copyright owners have obligations to make the content accessible and available to the people at a fair price. The people should be able to take full advantage of the advance of technology and social infrastructure.

In the first section, this chapter summarises the key challenges to copyright in this digital age, and suggests the reconsideration of the established exclusive regime of the authors' economic rights. In the second section, the future of the digital world is envisaged as a digital utopia. People could freely share, distribute and communicate the works to the public through various technologies and platforms; at the same time, the authors could also be fairly compensated for their creative contributions. To this end, this chapter proposes a number of possible solutions which might be able to bring this digital world closer to the digital utopia. The emphasis of the proposed solutions is focused on the imposition of fair legal obligations on the copyright owners, and on the maintenance of equitable compensation for them too.

7.1 THE KEY ISSUES

[1087] Jacob Varghese, 'Content Holders Need to Try to Lighten up', *The Australian Financial Review* 12 February 2010.

Since the advent of the Internet, it appears that copyright has 'got a bad name for itself'.[1088] The key issues are not only when and why it happened, but also how the 'good' copyright could be restored.

7.1.1 EXCESSIVE CONTROL *VS.* POTENTIAL OF THE DIGITAL AGE

As has been highlighted in chapter 4 of this thesis, copyright has expanded significantly in the digital age: first, the scope of copyright (communication right) is fully conferred not only on the authors but also on the producers of phonograms, broadcasters, and performers; second, fewer limitations on and exceptions to copyright are available to the emerging industries; third, the extensively established rules of indirect liability led to significant strengthening of copyright protection in the digital environment.[1089] As a result, copyright control over the dissemination of the works to the public is so excessive that it prohibits users from taking advantage of technological innovation, suppresses the development of new market and new business models, and obstructs the possibility offered by the digital age to enhance the free flow of information and the public's access to knowledge.

In chapter 5 of this thesis, it is argued that in the social computing environment, the creative works have increasingly become raw materials for people to engage in creativity and culture. The pervasive copyright control over the use and reuse of the works has been in growing conflict with the reality of creation and recreation. In the context of the new forms of creation, copyright control stifles rather than encourages creativity, limits public use of creative works, and impedes production of new content.

The potential of the digital age for disseminating information and for accessing knowledge must be made fully available to the public. Evolutionary economists have made it very convincing that the origination, adoption and retention of knowledge

[1088] Jane C Ginsburg, 'How Copyright Got a Bad Name For Itself' (2002) 26(1) *Columbia Journal of Law and the Arts* 61, 61.

[1089] See further, ch 4 above of this thesis.

are the locus of economic change. The production and dissemination of knowledge-based works are not only itself of economic significance, but most importantly are the key elements supporting the growth of economy.[1090]

7.1.2 RECONSIDERING THE ESTABLISHED EXCLUSIVE REGIME

The established regime of copyright (economic rights) is first and foremost about a set of private rights subsisting in information (to be concise, the expression of the information). It defines the boundaries within which a copyright owner could dispose of the information free of forcible interference of others. Accordingly, copyright is acknowledged as a sort of property or something that is very much close to property.[1091] In *Copinger and Skone James on Copyright*, it is stated that copyright 'is a statutory property right, the rights of property granted being the exclusive right to do various "restricted acts" in relation to the copyright works'.[1092] The initial acquisition and ownership of property (in which property rights or entitlements subsist) is justified by John Locke as the application of individual's labour.

Under this legal framework, the distribution and use of copyrighted works are regulated through an exclusive regime of economic rights conferred on the authors, with limitations under exceptional conditions. This approach is based on a regulatory framework that prohibits anyone, except the copyright owner, from doing specific acts such as reproduction, distribution, and communication of the copies to the public.

[1090] See further, ch 2 above of this thesis.

[1091] Henry Smith argues that intellectual property's close relationship to property stems from the role that information costs play in the delineation and enforcement of exclusive rights. See generally Henry E Smith, 'Intellectual Property as Property: Delineating Entitlement in Information' (2007) 116(8) *The Yale Law Journal* 1742.

[1092] Garnett, James and Davies, above n 480, 389. But, as Professor Lawrence Lessig argued: 'in ordinary language, to call a copyright a "property" right is a bit misleading, for the property of copyright is an odd kind property'. See Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 83-4.

The exclusivity of the economic rights, by default, enables copyright owners to charge for each use of the works, mainly through privately negotiated licences. This legal and institutional arrangement treats copyright as property and lets the price for the use of the property be decided by the market. In *Harper & Row Publishers, Inc v Nation Enterprise*, the US Supreme Court contended: 'By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'[1093]

Economic analysis of copyright law argues that the exclusive rights comprised in copyright promote the optimal allocation and use of information resources by enabling the operation of markets.[1094] For copyright advocates, the market mechanism allowed by such a system is one of the most valued elements. They argue that, in order to have sufficient incentives, the producers must be able to charge more than marginal cost of producing and distributing the works.[1095]

However, no one knows '*how much* above marginal cost should the price be'.[1096] It is thus suggested that the optimal solutions could only be generated in the marketplace as 'the affected parties will by their actions establish what is best',[1097] and the law should create property rights to make bargains possible and should make the rules clearer to promote bargains.[1098] In addition, the market allows the producers to charge different prices for various uses of the works. The price reveals

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[1093] *Harper & Row Publishers, Inc v Nation Enterprise* 471 US 539 (1985).

[1094] See generally, David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002).

[1095] For further definition of and discussion on marginal cost, see generally Roger L Conkling, *Marginal Cost in the New Economy: A Proposal for a Uniform Approach to Policy Evaluations* (2004); Paul R Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (2008).

[1096] See further, Frank H Easterbrook, 'Cyberspace versus Property Law?' (1999) 4 *Texas Review of Law and Politics*, 103, 105.

[1097] Ibid 111.

[1098] Ibid 111-13.

'at least some information about consumer preferences';[1099] the signals of consumer preference trigger and direct the producers' investment.[1100]

For those reasons, such legal arrangements as compulsory licensing and other statutory schemes are undesirable to the market advocates because they make the price control to be set by the government or by other non-voluntary means.[1101] In different countries, there are various compulsory and non-voluntary licences available and the criteria for deciding the amount of royalty and the manner of payment might also be different. Notwithstanding these systematic variations, the non-voluntary nature of the licences and non-market price control are the most prominent features shared by such legal arrangements.

Regardless of the non-voluntary nature, statutory arrangement is a better scenario preferable to the high cost of private negotiations in lots of circumstances.[1102] In the case of 'market failure' caused by high transaction cost, compulsory licensing is more efficient than private negotiation for a fair price. In retrospect, compulsory and statutory licensing systems have provided many positive outcomes, enabling the development of the recording industry and the broadcasting industry.[1103]

However, both the established market mechanism and the non-voluntary licensing systems have been unable to generate workable solutions to the digital challenges raised by the emerging technological, social and economic changes as articulated in

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[1099] Goldstein, above n 534, 178.

[1100] Ibid 179.

[1101] Katie Dean, *The Answer to Piracy: Five Bucks?* (2004) WIRED <http://www.wired.com/entertainment/music/news/2004/02/62434> at 31 August 2009. See also, Executive Perspective, *Compulsory Licensing: A Palatable Compromise?* (2003) ISP-Planet <http://www.isp-planet.com/perspectives/2003/p2p_sidebar.html> at 31 August 2009.

[1102] For instance, compulsory licensing is more efficient than the market mechanism in certain circumstances. See further, s 4.1.3 of this chapter.

[1103] For further discussion on the historical development of non-voluntary licensing schemes, see s 7.3.3.A of this thesis.

the preceding chapters. The failure of the current copyright regime to maintain a sensible balance between the competing interests of the parties involved is increasingly apparent. Copyright owners retain pervasive control over the transmission and the use of protected, but have been unable to offer practicable licences to users, particularly in the online world. The users, including web-based access intermediaries, are on the other side and might also be responsible for their failure to seek authorisation from the copyright owners. The proposal for creating a voluntary blanket licensing system for online music is a rational solution,[1104] but it appears to be unattractive to both sides.

In addition, considering the lesson learned from the digital library industry, private initiatives based on the current legal framework of copyright may jeopardise the public access to knowledge. In a world where the digital publishing and online distribution would dominate the market for accessing knowledge-based works, granting copyright owners the exclusive right of communication to the public may lead to an excessive monopoly over public access to knowledge.

7.2 LONG TERM VISION FOR THE FUTURE

7.2.1 IMAGINING A DIGITAL UTOPIA

In a digital utopia, the production of the creative works is not coupled with the distribution and use of the works. Once a work is created and published, both commercial and non-commercial users can make copies of the works, share with others, or communicate to the public; the appropriation of existing works to create new works is permitted if plagiarism is not an issue. At the same time, as Dr Francis Gurry, Director General of WIPO wishes,[1105] the culture can also be renumerated. It

[1104] See, s 4.2.4 above of this thesis.

[1105] Francis Gurry, 'The Changing Landscape of Intellectual Property' (Speech delivered at the launch of the QUT WIPO Master of Intellectual Property Law, Brisbane, 5 August 2009) <http://www.law.qut.edu.au/community/lectures/index.jsp> at 23 February 2010.

is because the creative contribution of various authors could be acknowledged and compensated (if desirable), and authorship is also fairly attributed.

In this world, there would not only be a marketplace for the delivery of information products and associated services, but also a wide variety of markets for the services and products that *facilitate* the access to information, enabling more productive use of the works. There could be profound markets for the development of new web applications and technological innovations too. In order to acknowledge the creative contribution of the relational authors, the attributions and specifications of the authorship is maintained. In correspondence with their creative contributions, the authors are entitled to share the financial benefits with commercial users if the commercial value of their services and products is significantly enhanced by the use of their works.

7.2.2 COPYRIGHT IN A DIGITAL UTOPIA

Copyright in the digital utopia is not a set of exclusive rights to do specific acts. Instead, it is merely the right to share financial benefits from business operators. It is a default rule that the profits created by business operators should be shared with the authors and others who have invested in the production and dissemination of ideas. In return, users are free to share the works on the web through various applications, but the business operators are responsible to get authors paid fairly. Users are also free to appropriate the existing works to re-/create new works and to make the new works available to the public; but they are required to share any receivable revenues with the authors of the underlying works.

In this digital utopia, it could be imagined that technologies would be able to produce a way of identifying revenue streams and distribute the money to the relevant parties. A recalibrated regime of copyright owners' economic rights would be there just to answer such questions as how the revenue is to be allocated and who

is eligible to claim the corresponding proportions. It is a 'win-win' world because the works are freely and publicly available to the users who can share the works and can also take any part of the works to create new works; meanwhile, the authors and other creative contributors can be compensated fairly.

The digital utopia sounds great; but the problem is how we can get there. Our world has its own reality. For instance, we cannot expect that everyone would abide by a gentleman's agreement, so that the revenues generated could be declared with due diligence, and thus creators can get their proportions fairly in any circumstances. In our real world, it is believed that the optimal solution can only be achieved through effective bargains among the affected parties in the marketplace.

Professor Easterbrook argues: 'If you start from property rights, you can negotiate for free distribution; if you start from an absence of property rights, it is very hard to get to the best solution when a charge is optimal.'[1106] But with a carefully tailored institutional arrangement under copyright law, we can have a world much closer to that digital utopia.

7.3 RECOMMENDATIONS FOR THE DIGITAL AGE: A RELATIONAL APPROACH TO COPYRIGHT

> Historically, however, Congress has deferred to established rights holder to negotiate among themselves and draft legislation. Today, established copyright holders have failed to adapt to changes in technology, leading them to push not for more openness, but instead for more protection.
>
> – Michael Katz[1107]

7.3.1 OVERVIEW

[1106] Easterbrook, above n 1096, 112.

[1107] Michael Katz, 'Recycling Copyright: Survival & Growth in the Remix Age' (2008-2009) 13 *Intellectual Property Law Bulletin* 21, 61.

Openness is the 'spirit of the Internet'; it is also the potential that this digital age can offer. A copyright regime that leads to 'enclosure' is not the right answer.[1108] A number of proposals have been put forward for both the industries and law-makers to consider. Some are suggesting that copyright owners should join together to present the public a solution; others are arguing that the state should take the initiative. For instance, somehow limiting the expansive rights of authors and allowing emerging industries to take breath out of the 'copyright cold' of today for growth and development.

The relational approach taken in this thesis reconsiders the authors' rights within the social relations and interactions within which the authors and the authorial processes is located, aiming to facilitate the sharing of information and the communication of novelties. The principal rule is that the creative contributors of cultural innovation should have the rights to share the benefits generated from the commercial exploitation of their contributions, provided that the negative impacts on the trajectory of knowledge growth is minimised. The core force that intervenes in the trajectory and slows down the growth is brought about by the exclusivity of the economic rights. Therefore, a solution with emphasis focused on diminishing the exclusivity of the exclusive rights would result in a world that is much closer to the digital utopia.

The growing conflicts between the excessive copyright control of the authors and the increasing alibility of the users to distribute, share and recreate their own cultural objects must be reconciled. The regulatory emphasis of copyright law should focus on the commercial exploitation of creative works rather than personal and non-commercial use by individuals.

[1108] See generally James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (2008).

The following recommendations are set forward in this thesis to minimise the impacts of the exclusivity of the exclusive rights conferred on the authors, and at the same time to 'remunerate culture' with possible market-oriented paradigms.

 # I. In order to harness the potential of the digital age for public access to knowledge and allow for a sharing culture, it is proposed to recast the right of public dissemination and associated limitations and exceptions:

- # A. Encourage voluntary blanket licensing;
- # B. Establish a 'Relational Blanket Licensing' system for online communication;
- # C. Reconfigure exhaustion of rights for the digital environment;

 # II. In order to allow for greater latitude for creation and recreation, it is proposed to set out a benefit-sharing scheme and a statutory permissive framework.

- # A. Standardise a general principle of fair use at both international and domestic levels, accepting transformative use as one of the parameters to be considered in determining whether a particular use is fair;
- # B. Allow for non-commercial and productive use that cannot fall within the ambit of fair use, particularly in the digital environment;
- # C. Maintain the exclusive rights of translation, adaptation, making derivatives, etc, for the productive use that comprises commercial pursuits.

 # III. In order to make the copyright system more efficient, it is proposed to reconsider the restoration of a digital copyright registration and renewal system.

A. Establish international and national digital copyright registration systems;

B. Create institutional inducements for copyright owners to make registration at both international and national levels;

C. Configure a copyright renewal system, and a relational licensing scheme for the copyright owners who fail to renew their copyright.

The proposed changes made to the established copyright system can be summarised into the following table. The proposed changes can be categorised as Recommendation #I.A (see s. 7.3.2 of this thesis); #I.B (see s. 7.3.3); #I.C, #II.A, #II.B, #IIC (see s. 7.3.5); #III.A, #III.B, #III.C (see s. 7.3.6).

#I. Public Dissemination		**#II. Reuse and Recreation**	**#III. System Efficiency**
The established system:			
Exclusive rights to reproduce, distribute, perform, broadcast, communicate, etc (exclusive rights of public dissemination)		Exclusive rights to make translations, adaptations and other derivative works plus the exclusive right of (non-literal) reproduction	Copyright protection obtained automatically and lasting for the lifetime plus 50 or 70 years, without requirement to renew
The Proposed changes made to the established system:			
#A.	**Voluntary blanket licensing**	**Open-ended principle of fair use**	**Voluntary registration systems**
#B.	**Relational blanket licensing**	**Allow for non-commercial productive use that doesn't constitute fair use**	**Legal inducements to make copyright registration**
#C.	**Exhaustion of (communication) right**	**Maintain exclusive right of commercial productive use**	**Copyright renewal system + Relational licensing activated upon failure to renew**

The production of creative works and the innovation of culture is a cumulative and gradual process based on the interaction and collaboration between the culture, the

individuals, the communities, and the public. The consumption, dissemination and sharing of the works are part of the process; making comments on the works and borrowing certain elements to create new works are also part of the process.

The law should not create a 'fenced-off territory' for the authors, isolating them from the world in which they are situated. Instead, the law should facilitate the interactive and collaborative process of creation and production by encouraging communication and sharing of novelties. The relational copyright regime as suggested above is a legal framework, which aims to facilitate growth and sponsor communication.

7.3.2 RECOMMENDATION #I.A: VOLUNTARY BLANKET LICENSING

A. Voluntary Blanket Licensing Suggested by Scholars

Since 2003, the Electronic Frontier Foundation (EFF) has championed an alternative approach to ensure artists are paid while making file sharing legal. This is a plan for copyright owners to voluntarily join together to offer 'blanket' licences (Voluntary Collective Licensing).[1109] The EFF argues that this approach is analogous to the way chosen by songwriters to bring broadcast radio in from the copyright cold in the first half of the 20th century.[1110] In the event that copyright holders refuse to grant

[1109] 'The concept is simple: the music industry forms several "collecting societies," which then offer file-sharing music fans the opportunity to "get legit" in exchange for a reasonable regular payment, say a total of $5-10 per month (after all, services like Rhapsody sell all-you-can-eat music for around $10 per month, so we know the rate should be below that). So long as they pay, the fans are free to keep doing what they are going to do anyway—share the music they love using whatever software they like on whatever computer platform they prefer—without fear of lawsuits. The money collected gets divided among rights-holders based on the popularity of their music.

In exchange, file-sharing music fans will be free to download and share whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in applications, the more rapid the innovation and improvement. The more freedom to fans to publish what they care about, the deeper the catalog.' See, von Lohmann, above n 754.

[1110] Ibid.

licenses at any price, the EFF also calls for considering the introduction of a compulsory licensing system.[1111]

In May 2009, Professor J A Sterling proposed a Global Internet Licensing (GIL) scheme to legitimate file sharing and social networking at the conference, Copyright Future: Copyright Freedom.[1112] It was projected that collecting societies should establish a central licensing agency (GILA) to provide global Internet licences for the uploading and transmission of copyright material throughout the world. According to the proposal, it would be a voluntary licensing system with which rightholders provide the GILA with the necessary mandate to exercise their rights on the Internet. Users would be able to upload, stream, transmit or download protected material under specific conditions. Where payment for a GILA Global Licence is required by the rightholder, the tariff is fixed by the rightholder.[1113]

This scenario provides the best solution; however, further controversies remain and no significant move has been raised yet. For instance, Adam Thierer criticised that 'collective licensing proposals and efforts almost always become compulsory in practice' and '[t]hey inevitably involve government mandates to determine (1) who pays in, (2) how much they pay in, as well as (3) how much gets paid out and, (4) who gets the money.'[1114]

[1111] EFF, *Making P2P Legal*, EFF.org <http://w2.eff.org/share/legal.php> at 31 August 2009.

[1112] The conference was held at the Old Parliament House, Canberra, Australia, on 27-28 May 2009. For further information, see the conference website at: <http://www.ip.qut.edu.au/copyrightfuture/index.html> at 23 April 2010.

[1113] An early version of the proposed GILA system (version of 1 November 2008) is available at <http://www.qmipri.org/documents/Sterling_JALSGILASystem.pdf> at 5 February 2010.

[1114] Adam Thierer, 'Lessig's Call for a "Simple Blanket License" in *Remix*' (2008) The Technology Liberation Front <http://techliberation.com/2008/12/01/lessigs-call-for-a-simple-blanket-license-in-remix/> at 7 February 2010. See also, Adam Thierer, 'Collective Licensing Debate Creates Some Seriously Strange Bedfellows' (2008) *The Technology Liberation Front* <http://techliberation.com/2008/11/20/collective-licensing-debate-creates-some-seriously-strange-bedfellows/> at 7 February 2010.

B. Voluntary Solution is Good, but What if it Wouldn't Happen at All?

Under the conditions which are fair to the public and consumers, privately negotiated licences are always the preferable solution. Voluntary blanket licensing has already been widely adopted, by the collecting societies representing the songwriters, composers, lyricists and music publishers, to license the right to perform songs and musical works. For instance, the American Society of Composers, Authors and Publishers (ASCAP) provides blanket licence for the use of musical works and licensees pay an annual fee for the licence.[1115] Similarly, the Phonographic Performance Company of Australia Limited (PPCA) also offers blanket public performance licence.[1116]

Nonetheless, it is arguable that copyright owners would join together to offer the public a practical blanket licensing scheme for the transmission and distribution of the works in the networked digital environment. Who would the proposed voluntary licensing system target? How could the licences be implemented? Unlike the users of musical works who are usually commercial producers of phonograms, commercial distributors or business operators, the individuals who transmit and distribute the works online are generally non-commercial users. It is unrealistic to request each individual user to appear in front of the copyright owners or their collecting society (even just their online licensing system), applying for and processing a blanket licence for uploading, downloading, sharing or making a song available on the web.

Indeed, it might be possible that some key Internet portals and platform or service providers, such as YouTube, Facebook, Google, AT&T, Vodafone or Telstra, would

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[1115] See further, The American Society of Composers, Authors and Publishers (ASCAP), *Customer Licensees* <http://www.ascap.com/licensing/> at 21 February 2010.

[1116] See further, Phonographic Performance Compnay of Australia (PPCA), *Homepage* <http://www.ppca.com.au/PPCAHome.html> at 21 February 2010.

be able to take the place of individual users and negotiate with the copyright owners for a deal. In return, the portals or ISPs can charge the users for a price they see fit. But given the ongoing copyright war, it appears to be very unlikely that the rightholders, the portals or the IPSs could voluntarily join together to produce such a workable solution. Without further institutional incentives, the market could hardly generate a sensible plan for itself and the public.

The Google Music China project, as mentioned in s 4.2.3 of this thesis, is exceptional, and the outcome is not predicable yet. In addition, the advertisement supported model works for Google, but it would unnecessarily work for other business operators. Likewise, in the US, the Warner Music Group Corp was about to license music in YouTube videos.[1117] The British Broadcasting Corp (BBC) was also reported to be in 'advanced negotiations' with YouTube and Google to make programming available via a branded channel on the Web site.[1118] However, these initiatives have not produced any significant outcomes yet, and it appears that 'paying YouTube content creators easier said than done'.[1119]

7.3.3 RECOMMENDATION #I.B: RELATIONAL BLANKET LICENSING

Given that it is unfeasible to wait and let the market work out solutions in on number of occasions, it is suggested that a carefully tailored 'relational blanket licensing' system could make a significant difference. This thesis proposes to introduce a

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[1117] Marshall Kirkpatrick, *Warner to License Music in YouTube Videos* (2006) Tech Crunch <http://techcrunch.com/2006/09/17/warner-music-to-license-music-to-youtube/> at 23 February 2010.

[1118] Chris Noon, *BBC Seen Making YouTube Deal With Google* (2007) Forbes <http://www.forbes.com/2007/01/24/bbc-youtube-google-markets-equity-cx_cn_0124markets07.html> at 23 February 2010. See also, Rachel Rosmarin, *Google Adds Video Ads* (2007) Forbes <http://www.forbes.com/2007/01/25/youtube-google-ads-tech-media-cx_rr_0125google.html> at 23 February 2010.

[1119] Greg Sandoval, *Paying YouTube Content Creators Easier Said Than Done* (2007) CNET News <http://news.cnet.com/2100-1024_3-6155002.html?part=rss&tag=2547-1_3-0-20&subj=news> at 23 February 2010.

'relational blanket licensing' scheme along with a licence registration system. The 'relational blanket licensing' system appears to share certain similarities with the compulsory or statutory licensing schemes that have already existed for one century, but also comprise substantial differences and variations.

A. Historical Development of Compulsory Licensing

Under the international conventions and national laws as discussed in chapter 3, a number of compulsory licences for broadcasting of works,[1120] broadcasting of performances[1121] and retransmission of free-to-air broadcasts[1122] are allowed; by contrast, no such scheme has been created for the Internet-related media.

In general, compulsory licensing is to 'excuse uses that would have been licensed but for insurmountable transaction costs',[1123] and meanwhile copyright owners can receive equitable remuneration.[1124] It is a legislative compromise between exclusive rights and absolute exemptions, reflecting 'the legislator's judgment that to extend an exclusive right would hamper socially important uses, typically because of the high transaction cost of negotiating a license, but to make the use entirely free would seriously impair needed rewards for the author'.[1125]

This system was first introduced into the law by the US *Copyright Act of 1909* and was later extended in the US *Copyright Act of 1976* to many other situations. Established under the 1909 Act, the phonorecords compulsory license for making recordings of nondramatic musical works is the most important and longstanding one.

[1120] See *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 11*bis*(2) (entered into force 6 June 1982).

[1121] See *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, art 7(2)(2).

[1122] See, for instance, *Copyright Act 1968* (Cth) pt Vc.

[1123] See further, Paul Goldstein, *International Copyright: Principles, Law, and Practice* (2001) 293.

[1124] See generally Merges, above n 99.

[1125] Goldstein, *International Copyright: Principles, Law, and Practice*, above n 1123, 309.

This US scheme along with Germany's proposals was very influential on the formulation and revision of the Berne Convention.[1126]

The introduction of the compulsory licensing system in the US was a legislative response to the Supreme Court's decision in *White-Smith Music Publishing Company v Apollo Company*.[1127] In the *White-Smith*, the Court held that piano rolls were not copies of the original musical works and thus the creation of phonorecords or other mechanical reproductions of musical works did not infringe on the copyright in the musical works. The decision was overruled by the US congress in the 1909 Act which recognised the mechanical recording right of the creator of musical works. As a compromise, the Act subjected this right to the regime of compulsory licences in favour of the sound recording manufacturers.[1128]

In the UK, it was also initially held by the court that the reproduction right would not extend to 'mechanical reproductions'.[1129] In order to reconcile the competing interests of the newly established phonogram industry and the copyright owners of musical works, the *Copyright Act 1911* conferred a 'mechanical reproduction right' on the authors of musical works, but a compulsory licence was made available to the recording industry, permitting the recording of musical works and accompanying works for a fixed royalty of 5% of the retail selling price.[1130] In Australia, this provision applied by virtue of the *Copyright Act 1912* (Cth), and was substantially enacted in Pt III, Div 6 of the *Copyright Act 1968* (Cth).[1131]

[1126] For further discussion on the establishment of the compulsory licensing scheme in the Berne Convention, see Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 513-32.

[1127] 209 US 1 (1908).

[1128] Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 55-8.

[1129] See, for example, *Boosey v Whight* [1899] 1 Ch 836; affirmed [1900] 1 Ch 122.

[1130] See *Copyright Act 1911* (UK) s 19.

[1131] See further, Ricketson and Richardson, above n 489, 448–9.

The compulsory licensing system is of significance not only to the creators and performers of musical works, but most importantly to the operation of certain industries, for example, the recording industry.[1132] Countries like the UK with strongly established recording industries played a critical role in formulating the compulsory licensing provisions in the Berne Convention.[1133] On one hand, the performers 'would have access to any songs they wanted to "cover" by making their own recordings at a reasonable price'.[1134] Apart from the effort to overcome high transaction costs of private negotiation, another reason for such a legislative arrangement might be that 'the users – the performers and record companies involved in making new versions of older works – also contributed creatively to the pool of available versions of songs'.[1135] On the other hand, the compulsory licensing system enables the production of sound recordings to be in adequate competition and thus eliminates 'the monopolization of music by the sound recording industry'.[1136] The structure of the mechanical license for the use of musical works to make sound recordings may vary from country to country;[1137] nonetheless, generally speaking, it allows the production of another version of a song despite the prior release of the song by other performers and record companies. Therefore, it makes it possible that there are different versions of music available to the public. The music could be performed by different performers and produced by various companies.

Even more significantly, the compulsory licensing permits downstream creators 'some leeway to arrange the music (technically, the making of a derivative

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[1132] Ibid 447.

[1133] Ibid 515.

[1134] Michael Botein and Edward Samuels, 'Compulsory Licensing v Private Negotiations in Peer-to-Peer File Sharing' in Eli M Noam and Lorenzo Maria Pupillo (eds), *Peer-to-Peer Video: The Economics, Policy, and Culture of Today's New Mass Medium* (2008) 233, 235.

[1135] Ibid. See also, Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, above n 23, 55-8.

[1136] Ibid.

[1137] See further, Goldstein, *International Copyright: Principles, Law, and Practice*, above n 1123, 311-12.

work)',[1138] and in this way, recreation instead of copying is encouraged. It is because the licence does not allow the licensee to simply duplicate a pre-existing recording; instead, it must 'produce an independent sound recording with its own musical performers and arrangement'.[1139]

Nevertheless, compared to other permitted acts under the doctrine of fair use for the needs of education, research, or criticism, the same cannot be said with respect to the compulsory licences for the recording of musical works. As Ricketson pointed out, it is 'an instance where the rights of authors have had to be reconciled with the private interests of another powerful group, those of record manufacturers'.[1140] Compulsory licensing could be regarded as a kind of 'halfway house, which accommodated both the interests of authors and record manufacturers'.[1141]

The same driving force arose in the latter case of broadcasting of works and cable system's retransmission of programs broadcasted by TV stations. Once again, the authors' exclusive rights had to be harmonised with the private interests of the then-emerging broadcasting and cable industries. The broadcasters obviously wished to have unimpeded access to copyright works for their business; meanwhile, a greater public interest concern appeared to support the broadcasters' argument. The educational and informatory role of broadcasting also favoured flexibility in copyright control. Consequently, compulsory licensing for broadcasting, cable retransmission and satellite retransmissions of copyright works were gradually recognised by international and national legislations.[1142]

[1138] Gorman and Ginsburg, above n 307, 46.

[1139] Ibid.

[1140] Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 513.

[1141] Ibid.

[1142] See further, ibid, 522-32. See also, Goldstein, *International Copyright: Principles, Law, and Practice*, above n 1123, 318-19; Botein and Samuels, above n 1134, 233-50.

Today, similar pressures have also spawned with the growth of the economic significance of the emergent web-based industries. Given the worldwide recognition of a broader communication right, copyright owners' rights to control the access to their works are dramatically and comprehensively extended to the digital environment. But the striking extension of copyright into the Internet-related media age is obviously not a sound solution. There is no reason why the Internet-related media should not be brought in from the 'copyright cold' in this digital age.

In order to reconcile the competing interests of the music industries and the public's right to take advantage of technology, Bennett Lincoff, the former Director of Legal Affairs for New Media at ASCAP, suggests to create an online transmission right for musical works and sound recordings, replacing the existing reproduction, performance and distribution rights in these works for online purposes only, but making this new right subject to a statutory license and to the administration of a new collecting society.[1143]

In his 2008 book, *Remix*, Professor Lessig also supports the introduction of a collective licensing scheme for online music.[1144] It is argued that:

> [the US] Congress needs to decriminalize file sharing, either by authorizing at least noncommercial file sharing with taxes to cover a reasonable royalty to the artists whose work is shared, or by authorizing a simple blanket licensing procedure, whereby users could, for a low fee, buy the right to freely file-share.[1145]

[1143] See generally Bennett Lincoff, *A Full, Fair And Feasible Solution To The Dilemma of Online Music Licensing* <http://www.google.com.au/url?sa=t&source=web&ct=res&cd=1&ved=0CAYQFjAA&url=http%3A%2F%2Fwww.bennettlincoff.com%2Fmusic.pdf&ei=oIiAS8bmKMuGkAWNkLWVCQ&usg=AFQjCNGulbIrXmH6CRDor1FvDzhLgMzqww&sig2=8hShpxfYg14hbCHx67BpbA> at 21 February 2010.

[1144] See further, Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, above n 124, 271 -75.

[1145] Ibid 271.

Steven Page, singer and guitarist, proposes to consider an ISP-based licensing model, but the US Register of Copyrights, Marybeth Peters, calls this a bad idea.[1146] In the Europe, Proffessor Alexander Roßnagel, scientific director of the Institute of European Media Law (EML) and vice-president of Kassel University, proposes that the minimum requirements for a 'culture flat-rate' should include: (i) a legal licence permitting private individuals to exchange copyright works for non-commercial purposes; (ii) a levy, possibly collected by the ISPs, flat, possibly differentiated by access speed; and (iii) a collective management, ie a mechanism for collecting the money and distributing it fairly.[1147]

B. Oppositions to Compulsory Licensing

The Recording Industry Association of America (RIAA) strongly opposes the introduction of a compulsory licence or any similar non-voluntary scheme. David Sutphen, vice president of government relations for the RIAA argues that these types of compulsory licenses are 'not a wise or logical thing to do'.[1148] Matthew Oppenheim, former senior vice president of legal and business affairs for the RIAA has also denounced such proposals: 'With compulsory licensing, the government sets price controls rather than the market. I'm against price setting. This is a free market.'[1149]

[1146] 'Here's the idea: compulsory licenses allow anyone to take advantage of whatever works are covered by the license without obtaining the permissions that would otherwise be required. It is essentially an exception made to copyright law that takes away a person's right to control how copies of their material are handled. This doesn't mean a compulsory license is free, though, only that the rate is determined by statute.' See further, Nate Anderson, *Barenaked Ladies: If I had a Compulsory Blanket Music License* (2007) Ars Technica <http://arstechnica.com/old/content/2007/04/barenaked-ladies-if-i-had-a-compulsory-blanket-music-license.ars> at 21 February 2010.

[1147] See further, Grassmuck, above n 533.

[1148] Dean, *The Answer to Piracy: Five Bucks?*, above n 1101.

[1149] Executive Perspective, *Compulsory Licensing: A Palatable Compromise?* (2003) ISP-Planet <http://www.isp-planet.com/perspectives/2003/p2p_sidebar.html> at 31 August 2009.

Professor Merges admits that compulsory licensing supposedly addresses the 'market failure' of high transaction costs.[1150] 'But', he argues, 'markets for digitized works do not suffer from market failure', and furthermore, 'the Internet has reduced the transaction costs that once served as a key rationale for [this system]'.[1151] Conclusively, he argues that property rights, contracts and markets are very likely the best choices in the Internet setting, and compulsory licensing which has led to price stagnation is just no solution.[1152]

Other commentators are doubtful about the practicality of the compulsory licensing approach. After a brief review of the history of the compulsory licensing in the US, Botein and Samuels argue that compulsory licenses have been less than successful in implementing public policy goals.[1153] It has also been argued that the introduction of the proposed statutory licence would not comply with the first two steps of the three-step test as included in several intellectual property treaties, such as the Trade-Related Aspects of Intellectual Property Rights (TRIPs).[1154]

C. Articulating a 'Relational Blanket Licensing' System for Online Communication

This thesis proposes to establish a 'relational blanket licensing' system, at least in the case of online transmission and communication. The relational blanket licence is statutory, but also market-oriented. The relational system should be a backup system and administrated by a reliable and independent authority. The principal proposals are as below:

[1150] See further, Merges, above n 99.

[1151] Ibid.

[1152] Ibid.

[1153] See further, Botein and Samuels, above n 1134, 233-50.

[1154] See generally Bob Rietjens, 'Copyright and the Three-Step Test: Are Broadband Levies too Good to be True?' (2006) 20(3) *International Review of Law, Computers & Technology* 323.

i. Usage transparency as a precondition (Responsibility of Key Internet-based Intermediaries): Apart from user privacy concerns, under the condition that usage transparency can be evidenced and maintained, a 'relational blanket licensing' system should be created and be made available to online business operators (Internet-based Intermediaries). Usage transparency means the usage of the protected content can be traced and recorded by the licensees. By this means, a number of online distribution channels would have the chance to become legitimate even in the case of lack of intention or possibility of authorisation on the side of the copyright owners.

ii. Licence Registration and Administration Authority: A non-profit and independent licence registration and administration authority should be established with mandates from the government or international organisations such as WIPO. The commercial use of any protected works under the 'relational blanket licences' should be registered with this authority.

iii. Relational blanket licence granted case by case: The relational blanket licence for making the protected contents available online should be granted case by case based on the evidence of usage transparency.

iv. Determination of royalty subject to private negotiation or the decision of an arbitral body: The Internet-based intermediaries and copyright owners are able to privately negotiate for royalties, but where they fail to do so, the licence registration and administration authority would act as an arbitral body to determine the royalties. The royalties can be based on a prescribed rate or on the future revenue to be generated.

The proposed 'relational blanket licensing' system is statutory, but also contains voluntary and market elements. In the case when voluntary licensing for the use of protected works can be made, the voluntary licence should prevail. Furthermore, the relational blanket licensing scheme gives priority to private negotiation for the determination of royalties. The relational blanket licensing system is activated and

applied ‘by default’ only if private negotiations for the use and royalties are impossible to take place.

If widely and properly implemented, the abovementioned relational licensing system should enable the copyright owners and the players of the emerging industries, such as Google, YouTube, P2P service providers and digital libraries, to develop new business models, new market, and new technologies to deliver the creative contents. In addition, a variety of distribution channels and associated revenue streams would be spawned too. Individual end users would be allowed to download, upload, communicate, and share their beloved works on the web and through various network applications. For example, digital libraries would be able to offer access to knowledge online, taking advantages of the Internet; people would be free to create their own versions of the protected works and share them on YouTube, P2P services, technologies and platform providers would also be able to survive and grow, and the users could also make full use of the most advanced networks.

There would be no way to monopolise distribution at all. A large variety of distribution channels would be available to the users and customers and these distributors would compete against each other under fair conditions. The revenue stream generated from each channels would remunerate the authors and other copyright owners ‘much more’ than the current copyright regime can offer. Today it is suggested that 80%-90% of the peer to peer file sharing market is beyond the reach of the recording industry.[1155]

[1155] IFPI, *Digital Music Report 2009* (2009) <http://www.ifpi.org/content/library/DMR2009.pdf> at 23 February 2010. ‘If someone is making money directly from the “darknet” then it certainly is not the recording industry, although they may be gaining rewards from associated services or products. Apple’s iTunes is held out as the leader of the authorised mp3 market yet it is supposedly tapping into only 2% of the market. Hence the area of online music creates a space where people should be incentivised to explore new distribution models.’ See, Brian Fitzgerald and Sampsung Xiaoxiang Shi, *Reconceptualising Copyright Law for the Creative Economy through the Lens of Evolutionary Economics* (forthcoming, 2010).

The ‘dark market’ sacrifices opportunities of the copyright owners, the users and the emerging industries. If the copyright owners want to harness the current and the emergent markets, they must change their approaches that they have taken to chase the individual end users directly or indirectly; instead, they must seek and create collaborations with these internet-based intermediaries. As it has been argued:

> No one begrudges content creators being given the money they are owed for their work. But when ASCAP (the American Society of Composers, Authors and Publishers) starts abusing its position of authority and asking ordinary users to cough up, well most of us start to question what the hell is going on.[1156]

In addition, making requests to the Internet Service Providers (ISPs) and requiring them to police the Internet is not a rational and acceptable plan either. In a recent decision, *Roadshow v iiNet*, the court refused to make iiNet, an Australian ISP, responsible for illegal file-sharing by iiNet’s customers.[1157]

Indeed, the proposed ‘relational blanket licensing’ scheme comprises certain non-voluntary elements, and shares a few similarities with the existing compulsory licensing system. But this won’t affect the modalities of and acceptability of its application. In fact, compulsory licensing should not be incompatible with market mechanism and the scheme proposed above is not totally against possible voluntary initiatives at all. A carefully tailored and well-functioning compulsory licensing

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[1156] Dave Parrack, *ASCAP Video Embedding License Scam | Claims Copyright Infringement off Jason Calacanis Ignoring YouTube ToS & DMCA* (2009) Web TV Wire <http://www.webtvwire.com/ascap-wants-you-to-pay-for-embedding-youtube-videos-surely-that-cant-be-right/> at 23 February 2010.

[1157] *Roadshow Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24. For further comments on the decision, see Nic Suzor, *iiNet: What of the Safe Harbours?* (2010) nic.suzor.com <http://nic.suzor.com/2010/02/05/iinet-what-of-the-safe-harbours/> at 23 February 2010. See also, Andrew Colley and Mitchell Bingemann, *ISP iiNet Beats Studios in Movie Piracy Case* (2010) The Australian IT <http://www.theaustralian.com.au/australian-it/iinet-wins-court-case-against-hollywood-heavyweights/story-e6frgakx-1225826637560> at 23 February 2010.

scheme can be regarded as a backup system and as an incentive for the parties concerned to seek market-based solution. For instance, a compulsory licensing system for making and distributing phonorecords is set out under the US Code Title 17 §115; however, license agreements voluntarily negotiated should be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges.[1158] Likewise, in Australia, the determination of a royalty, under a statutory licence scheme and other non-voluntary schemes, is left for 'the parties to agree between themselves but, where they fail to do so, provisions is made for determination by an independent arbitral body, the Copyright Tribunal'.[1159] In practice, the compulsory licence for mechanical reproduction, as commentators have argued, 'does not appear that is has been necessary to activate these provisions (perhaps the fact that they exist is sufficient)'.[1160]

Additionally, it appears that such a carefully balanced relational blanket licensing system is in compliance with the 'three-step' test under the international conventions.[1161] The test requires that a limitation on copyright is acceptable only

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[1158] See, *US Code Title 17* §115(c)(3)(E)(i). It states as below:
License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges. Subject to clause (ii), the royalty rates determined pursuant to subparagraph [1] (C) and (D) shall be given effect as to digital phonorecord deliveries in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

[1159] Ricketson and Richardson, above n 489, 502-3.

[1160] Ibid 448. It is pointed out further that '[i]n practice, what happens is that the bulk of commercial record manufacture is governed by the terms of an agreement between the Australian Music Publishers Association Ltd (AMPAL) , the Australian Mechanical Copyright Owners Society Ltd (AMCOS) and the Australian Record Industry Association (ARIA), which modifies certain aspects of the statutory scheme and sets a rate which is an adjusted percentage from the statutory rate calculated on a sales-tax-free base (the 'Published Price to Dealers or PPD')." See, ibid 449.

[1161] For further discussion on the three-step test, see s 3.2.1 above of this thesis.

under the conditions that it applies 'in certain special cases', 'does not conflict with a normal exploitation of the work', and 'does not unreasonably prejudice the legitimate interests of the author'.[1162] According to the report of the Main Committee I of the Stockholm conference of the Berne Convention:

> [A]n 'unreasonable prejudice' to the 'legitimate interests of the author' can be avoided by introducing an obligation for those who use the work – on the basis of a statutory limitation of the right of reproduction, without authorization by the author – to pay an appropriate remuneration.[1163]

7.3.4 RECOMMENDATION #I.C: EXHAUSTION OF RIGHTS IN THE DIGITAL AGE

A. Exhaustion of Distribution Right under the US Law

Under the US copyright law as discussed in s 4.1.1 of this thesis, the distribution right is fully extended to the digital environment; consequently, the application of the first-sale doctrine, in the US, is particularly controversial. The US Copyright Office acknowledges: 'In a sense, the only reason the issue of first sale arises in the US is because we chose to implement the making available right through, *inter alia*, the distribution right. Elsewhere, online transmissions are considered communications to the public, and the first sale doctrine simply does not apply.'[1164]

[1162] See, *Berne Convention for the Protection of Literary and Artistic Works,* opened for signature 9 September 1886, 1 BDIEL 715, art 9(2) (entered into force 6 June 1982).

[1163] See further, Ficsor, *The Law of Copyright and the Internet*, above n 308, 288.

[1164] US Copyright Office, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act* (2001) 94-5 <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> at 2 February 2010.

In the US, the first-sale doctrine was recognised by the Supreme Court in *Bobbs-Merrill Co v Straus*[1165] and subsequently codified in the *Copyright Act of 1976.*[1166] In 2001, the US Copyright Office assessed the impact of electronic commerce and technological protection measures on the first-sale doctrine in its 'DMCA Section 104 Report'. It was concluded that it is too soon to say what the effects of e-commerce and encryption would be on the doctrine and thus suggested a 'wait and see' approach.[1167]

B. First-Sale Doctrine at International Level

At the international level, the distribution right contained is merely applicable to material embodiments of works, films, sound recordings and performances fixed in phonograms. It is actually a right of 'first distribution' or a right of 'putting into circulation' and it is exhausted with the first sale of copies.[1168]

According to the WCT Agreed statement concerning art 6, the distribution right is limited to physical copies of works and has no application to electronic copies of works. As a result, it appears that the first-sale doctrine or the doctrine of exhaustion

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[1165] 210 US 339 (1908). This doctrine was confirmed by the courts in many other cases including, for example, *Precious Moments vs La Infantil* (DPR) 971 F Supp 66 (1997); *Quality King Distributors, Inc v L'anza Research International, Inc*, 523 US 135 (1998); *Softman Prods Co v Adobe Sys Inc*, 171 F Supp 2d 1075 (CD Cal 2001).

[1166] 17 USC § 109.

[1167] US Copyright Office, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act*, above n 1164.

[1168] For historical background of the formulation of the distribution right under the Berne Convention, see Ficsor, *The Law of Copyright and the Internet*, above n 308, 146-51. However, at the international level, the principle of exhaustion is still a contentious and unresolved issue in international law. It is also controversial that the exhaustion is international or national, particularly when it comes with the issue of 'importation right' of copyright owner. See generally Theo Papadopoulos, 'The First-Sale Doctrine in International Intellectual Property Law: Trade in Copyright Related Entertainment Products' (2003) 2(2) *Entertainment Law* 40 <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/papadopoulos.pdf> at 4 February 2010.

of distribution right has no application to the digital network environment. Thus, it is at least in theory that selling a 'second hand' eBook in online flea markets is not allowed unless no extra copies of the eBook can be guaranteed in a given circumstance.

C. The Importance of Exhaustion of Rights in the Digital Age

The second-hand markets have been playing a very important role offering an affordable way for the public to obtain knowledge-related products.[1169] It is highly necessary to reconsider the applicability of the first-sale doctrine in the digital network environment, or to tailor a proper 'exhaustion doctrine' of the communication right (making available right in particular). As Reese argues, 'we should carefully watch two key areas: the affordability and availability of copyrighted works long fostered by the first-sale doctrine'; '[w]e need to ensure that these benefits of the doctrine are not lost in the shift to the digital copyright environment'.[1170]

Nevertheless, given the fact that the sale of a second-hand eBook, digital music, video or software would inevitably result in the exercise of copyright owners' exclusive rights of reproduction or communication, the establishment of a 'digital first-sale doctrine' is very difficult.

7.3.5 RECOMMENDATION #II: BENEFIT-SHARING & PERMISSIVE RULES FOR RE-/CREATION

[1169] For further discussion on books and second hand markets, see H Laurence Miller, 'On Killing off the Market for Used Textbooks and the Relationship between Markets for New and Secondhand Goods' (1974) 82(3) *Journal of Political Economy* 612, 612-19.

[1170] R Anthony Reese, 'The First Sale Doctrine in the Era of Digital Networks' (2003) *University of Texas Law, Public Law Research Paper No 57; and University of Texas Law School, Law and Econ Research Paper No 004* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463620> at 4 February.

Copyright law should allow for greater latitude for creation and recreation, facilitating the rise of participatory culture and everyday creativity. It should not focus its regulatory emphasis on the allocation of resources in a static world, but on the dynamics of the authorial process and on the construction of a well-maintained ecology of knowledge growth, creativity, and cultural innovation.

It is thus recommended that a statutory permissive legal framework for the use and reuse of protected works in light of creation and recreation is desirable in a world of user-led innovation and peer production. However, at the same time, the authors and creative contributors should have the rights to share the benefits generated from the commercial exploitation of the content that are based on the elements borrowed from their works.

A. Implementing 'Benefit-Sharing' in Copyright Law

Based on the relational theory of authorship articulated in chapter 6 of this thesis, it is proposed that creative contributors with various levels of authorship should have various rights to share the benefits generated from their contributions.[1171]

The rights of the various authors and users articulated in s 6.3.3 of this thesis, by their very nature, are reflections of the 'natural rights' acquired by the authors through their labour and creativity and enjoyed by the users as human rights of cultural participation. These rights are implemented under the current copyright law through granting the first authors a set of exclusive rights, such as the right of public dissemination, the right of adaptation, the right to make derivatives, and the right of (literal and non-literal) reproduction.

[1171] For a relational notion of authorship, see ch 6 above of this thesis.

This established regulatory framework merely focuses its emphasis on the allocation of resources in a static world, not on the dynamic relationship between the authors and the downstream authors, the users and the public. As a result, the future authors (such as the derivative authors, the affiliated authors and the related authors) must appear in front of the first authors (the copyright owner) and ask for permission to recreate. In this case, the future authors are mere users of the protected works of the first authors.

In this world of peer production, this regulatory regime is too restrictive, and is unrealistic more than ever. Therefore, it is suggested that a number of approaches should be taken to create a more relaxing legal framework for creation and recreation. The new legal framework should focus its regulatory emphasis on the dynamics of authorial creation, and on the relations and interactions between the authors, the future authors, the users, the public and the culture.

B. Statutory Permissive Framework of Recreation

The remixers, sampling and mashup artists, infringers under current copyright law, are 'less morally culpable' than infringers of 10 years ago.[1172] With the popularity of the social computing environment, anyone with a digital device can make modifications, add their own spin to that work, create their own version of that work, and distribute it to the world without any significant cost. Instrumental dexterity, as David Sanjek points out, is no longer a prerequisite for musical creation.[1173] However, the established regime of copyright, by default, forbid anyone to modify and 're-write' the culture, and read-only is what this regime allows for.

[1172] As Michael Katz argues, 'Historically, the primary infringers were large-scale criminal enterprises that profited by duplicating, as perfectly as possible, the works of others in large volumes for resale.' See Katz, above n 1107, 61.

[1173] Sanjek, above n 931, 608-9.

The established rules should be adjusted to keep pace with the technological, social and economic changes. It is suggested that copyright law should set out a statutory permissive regime to allow for a relaxing regulatory environment for creation and recreation in this digital age.

Therefore, the following approaches are recommended to implement the benefit-sharing requirement with a reconfigured statutory permissive legal framework:

(i) General Principle of Fair Use (Transformative Use)

It is suggested to consider a general open-ended principle of fair use at both international and domestic levels, accepting transformative use as one of the parameters to be considered in determining whether a particular use is fair.

As mentioned in chapter 3, the term 'fair use' cannot be found in the copyright law of any other countries other than the US (and Israel);[1174] the equivalent expression exists as 'fair dealing' in the UK, Canada, Australia and Hong Kong, and can be found as 'limitation on or exception to copyright' in civil law jurisdictions including China. It is notable that the different expressions comprise significantly different meanings and provisions under the domestic legislation of these countries. For instance, 'fair use' is the only open-ended concept; both 'fair dealing' and 'limitation and exception' adopt a close-ended approach, enumerating the circumstances in which free use of the protected works is permitted.[1175]

[1174] In November 2007, Israel passed a new Copyright Law that included a US style fair use exception. The law took effect in May 2008. For further information on the fair use doctrine in Israel, see generally Neil W Netanel, 'Israeli Fair Use from an American Perspective' in Michael Birnhack and Guy Pessach (eds), *Creating Rights: Readings In Copyright Law* (2009); also available in the University of California, Los Angeles, School of Law Research Paper No 09-03, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327906> at 22 February 2010.

[1175] See further, ch 3 above of this thesis.

The expansion of 'fair dealing' or 'limitation and exception' to an open-ended paradigm has been recommended, but denied in a number of countries other than Israel as mentioned above. For example, the Australian Copyright Law Review Committee (CLRC) suggested in its 1998 report *Simplification of the Copyright Act: Part 1* that the fair dealing provisions should be replaced by an open-ended model. In May 2005, the Australian Attorney-General released an Issues Paper, inviting comment on whether the Copyright Act should include a general exception associated with principles of 'fair use' or specific exceptions.[1176] In Canada, the recommendation for an open-ended fair use principle has also been made but rejected on a number of occasions.[1177]

Nevertheless, it is recommended in this thesis that an open-ended concept of fair use should be set up to allow for a more relaxing regulatory regime for creation and recreation, particularly in the online environment. In addition, 'transformative use' should be accepted as one of the factors to be considered in determining whether or not a particular use is fair.[1178] In 2006, the UK Gowers Review suggests in its

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[1176] See, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and other Exceptions in the Digital Age*, Australian Attorney-General Issues Paper (2005).

[1177] See further, Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (2009) Magazines Cananda <http://magazinescanada.ca/files/JOINT_SUBMISSION_FAIR_USE_final.pdf> at 22 February 2010.

[1178] 'Transformative use' was first proposed by Judge Pierre Leval in his 1990 article, 'Toward a Fair Use Standard', he wrote:

'I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original--if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings-- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Recommendation 11 that the EU Directive 2001/29/EC should be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step Test.[1179]

(ii) Non-Commercial Productive Use

In this thesis, the term 'productive use' is defined in a broad sense, referring to any non-literal copying for a culturally useful purpose. This definition is different from the one articulated by the US courts in a number of cases. In a narrow sense, 'productive use' and 'transformative use' is used interchangeably; both mean the use of existing works 'as as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings'.[1180] In *American Geophysical*

> Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.
>
> The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. A biographer or critic of a writer may contend that unlimited quotation enriches the portrait or justifies the criticism. The creator of a derivative work based on the original creation of another may claim absolute entitlement because of the transformation. Nonetheless, extensive takings may impinge on creative incentives. And the secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner."

See, Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1111-12. Also see generally Laura G Lape, 'Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine' (1995) 58(3) *Albany Law Review* 667; Lydia Pallas Loren, 'Redefining the Market Failure Approach to Fair use in an Era of Copyright Permission Systems' (1997) 5(1) *Journal of Intellectual Property Law* 1; Notes, 'The Parody Defense to Copyright Infringement: Productive Fair Use after "Betamax" (1984) 97(6) *Harvard Law Review* 1395; Michael J Madison, 'Rewriting Fair Use and the Future of Copyright Reform' (2005) 23(2) *Cardozo Arts & Entertainment Law Journal* 391; Pierre N Leval, 'Campbell v Acuff-Rose: Justice Souter's Rescue of Fair Use' (1994) 13(1) *Cardozo Arts & Entertainment Law Journal* 19.

[1179] See further, Andrew Gowers, *Gowers Review of Intellectual Property* (2006) 66-8.

[1180] Leval, 'Toward a Fair Use Standard', above n 1178, 1111. Also see generally Leon E Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act* (1978).

Union v Texaco Inc, the court clearly stated that 'productive use' does not mean any copying for a socially useful purpose, but rather copying that produces something new and different from the original.[1181]

Certain productive use may constitute fair use; the rest does not. As Justice Blackmun contended in *Sony v Universal*, 'I do not suggest, of course, that every productive use is a fair use.'[1182] The productive use (non-literal copying) use that cannot fall within the ambit of fair use is contained in this Recommendation. It is proposed that non-commercial productive use should be allowed, particularly in the digital environment.

Non-commercial productive use can extensively be found in the creation of user-generated content such as fan fictions, mashups, remixes etc.[1183] In 2008, the EU commission called for comments on 'Should an exception for user-created

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The term 'productive use' first appeared in *Sony Corp of America v Universal City Studios, Inc*, 464 US 417 (1984).

'The situations in which fair use is most commonly recognized are listed in 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research." The House and Senate Reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a productive use, resulting in some added benefit to the public beyond that produced by the first author's work.'

The term 'transformative use' was first used by the court in *Basic Books, Inc v Kinko'S Graphics Corporation*, 758 F Supp 1522.

'It has been argued that the essence of "character and purpose" is the transformative value, that is, productive use, of the secondary work compared to the original. District Court Judge Leval has noted that, "the use ... must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test.' Leval, 'Toward a Fair Use Standard', above n 1178, 1111 (suggesting a balancing between the justification for and the extent of the taking). 'Kinko's work cannot be categorized as anything other than a mere repackaging.'

[1181] *American Geophysical Union v Texaco Inc* 802 F Supp 1 (SDNY 1992).

[1182] *Sony Corp of America v Universal City Studios, Inc*, 464 US 417 (1984).

[1183] See generally, Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law', (1997) 17(3) *Loyola of Los Angeles Entertainment Law Journal* 657.

content be introduced into the Directive?'[1184] It is argued that non-commercial productive use should be permitted, but must be reconciled with the legal framework of commercial productive use.

(iii) Exclusive Rights of Commercial Productive Use

The commercial use that is productive but fails to pass the fair use test, under the current law, falls within the scope of the exclusive rights of translation, adaptation, cinematographic adaptation as discussed in chapter 5. Given that the making of translation, adaptation and cinematographic contains commercial pursuits in most cases, it is recommended that these exclusive rights should remain.

However, as articulated in the Recommendation #III (see s 7.3.6 of this thesis), the exclusive rights must be renewed five years after the publishing of the protected works. In the case of the failure to make registration and renewal, the exclusivity of these rights would be removed.

Put it different, if the copyright owners fail to renew their copyright five years after the publishing of their works, a compulsory licensing system will be activated. In this case, the users would be allowed to use the protected works without authorisation by the copyright owners but equitable remuneration to the copyright owners must be maintained.

7.3.6 RECOMMENDATION #III: RESTORATION OF COPYRIGHT REGISTRATION AND RENEWAL

A. Overview

[1184] See, Commission of the European Communities, *Green Paper: Copyright in the Knowledge Economy* (2008) 19-20.

'Copyright', as Professor Lessig argues in one of his most recent articles, 'is among the least efficient property systems known to man',[1185] and the first change that the current copyright law should make is 'to make this property system more efficient'.[1186]

It should be noted that the inefficiency under scrutiny here lies in the construction of this system rather than the enforcement of the private rights of the authors. Under the TRIPs Agreement, enforcement mechanisms for copyright and other intellectual property have been established. As David Nimmer suggests, 'the most unique innovation in the law of international trade concerning intellectual property is that it has enforcement mechanisms and therefore it embodies "trade with teeth".'[1187] In addition, the Anti-Counterfeiting Trade Agreement (ACTA) that aims to create international standards on the enforcement of intellectual property rights has also been under discussion since 2007.[1188]

B. Historical Development

Today, copyright protection is obtained automatically, and it endures for a term consisting of the life of the author and a certain time period after the author's death.[1189] Official registration with government is not required to secure copyright, but registration is encouraged in some jurisdictions and it may serve as *prima facie* evidence of valid copyright and may also establish certain legal advantages. For

[1185] Lessig, *For the Love of Culture: Google, Copyright, and our Future*, above n 952.

[1186] Ibid.

[1187] See, David Nimmer, 'The End of Copyright' (1995) 48 *Vanderbilt Law Review* 1385, 1392.

[1188] For further information, see Australian Government Department of Foreign Affairs and Trade, *Anti-Counterfeiting Trade Agreement (ACTA)* <http://www.dfat.gov.au/trade/acta/index.html> at 17 February 2010. See also, Electronic Frontier Foundation, *Anti-Counterfeiting Trade Agreement* <http://www.eff.org/issues/acta> at 17 February 2010.

[1189] For instance, the duration for copyright protection today is the lifetime of the author plus 50 years in China, and 70 years in the UK and the US. See, *Copyright Law of China* (adopted in 1990 and amended in 2001) art 21; *Copyright, Designs and Patents Act 1988* (UK) s 12; 17 USC §302.

example, in the US, the *Berne Convention Implementation Act of 1988* substituted the mandatory registration system with a voluntary registration system;[1190] however, several inducements or advantages to encourage copyright owners to make registration remained.[1191] In China, copyright registration is recommended, especially for software; the Copyright Protection Centre of China that is affiliated to the National Copyright Administration provides registration services.[1192] In contrast, there is no government registration system for copyright protection in Australia (and the UK), but there are some private companies that offer registration services.[1193]

In the history, copyright, in regard to registration and other formalities, was a system totally different from the one we have today. For instance, both the UK *1710 Statute of Anne* and the US *Copyright Act of 1790* provided copyright protection for a mere 14 years, renewable for another 14 years if the author was still alive. The duration of copyright protection was gradually extended since then.[1194] Most significantly, the 'x years with renewal for another y years' model was eventually replaced by the 'life plus x years' model.

[1190] *Berne Convention Implementation Act of 1988*, 17 USC 101 note. United States Code Congressional and Administrative News, 100th Congress--Second Session, Volume 2, West Publishing Co, St Paul, Minn, 102 Stat 2853-61.

[1191] See further, US Copyright Office, *Copyright Basics* (2008) <http://www.copyright.gov/circs/circ1.pdf> at 18 February 2010. See also, John B Koegel, 'Bamboozlement: The Repeal of Copyright Registration Incentives' (1994-1995) 13 *Cardozo Arts & Entertainment Law Journal* 529.

[1192] The Copyright Protection Center of China is an institution directly under General Administration of Press and Publication (National Copyright Administration of China). It was established in September 1998 with the approval of the State Commission Office for Public Sector Reform. See, Copyright Protection Center of China, *A Reliable National Copyright Public Service Institution* <http://www.ccopyright.com.cn/cpcc/index_en.jsp> at 18 February 2010.

[1193] See, Australian Copyright Council, *How you Get Copyright* <http://www.copyright.org.au/information/cit020/wp0019> at 18 February 2010.

[1194] For instance, in the US, it was extended to 28 years with the possibility of renewal for another 14 years in 1831, and then to 28 years with renewal for another 28 years in 1909. For further discussion on the copyright term under the 1909 Act and its statutory background, see generally Theodore R Kupferman, 'Renewal of Copyright--Section 23 of the Copyright Act of 1909' (1944) 44(5) *Columbia Law Review* 712.

The 'life plus x years' approach was first introduced into the UK *Copyright Act 1842*, which provided copyright protection for 42 years from the publication of the work, or the lifetime of the author and 7 years thereafter, whichever was the longer. The *Copyright Act 1911* extended the term to the lifetime of the author and 50 years thereafter.[1195] In the US, the duration of protection for works by individual authors finally reached life plus 50 years under the *Copyright Act 1976*.[1196]

C. Reconsidering Registration and Renewal in the Digital Age

The abovementioned abolition of the formalities such as registration and renewal for securing copyright protection is an important shift, but it is also a bizarre'[1197] and 'harmful' one.[1198] The inefficiency of the copyright system today, to a significant extent, is caused by this shift. The abolition of these formalities immediately leads to the problem of orphan works and the difficulty of identification of copyright owners for the purpose of seeking authorisation,[1199] and it creates 'a copyright black hole'.[1200]

[1195] Thereafter, it remained so under the 1956 Act, and the 1988 Act. In 1995, the duration for copyright protection was extended to the lifetime of the author and 70 years thereafter under the *Duration of Copyright and Rights in Performances Regulations 1995* (Statutory Instrument 1995 No 3297).

[1196] The term was extended 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 under the *Sonny Bono Copyright Term Extension Act (Sonny Bono Act)* in 1998.

[1197] See further, Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World* (1st ed, 2001) 250-1.

[1198] See generally, Christopher Jon Sprigman, 'Reform(aliz)ing Copyright' (2004) 57 *Stanford Law Review* 485.

[1199] According to the study of the US Copyright Office, the 'orphan works' problem is pervasive and it disables good-faith users of copyrighted content 'to move forward in cases where they wish to license a use but cannot locate the copyright owner after a diligent search'. See, Marybeth Peters, *The Importance of Orphan Works Legislation* (2008) <http://www.copyright.gov/orphan/> at 17 February 2010. See also, US Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (2006). In 2008, the US Congress considered two Bills that were intended to limit the consequences of using an 'orphan work' without permission, but neither Bill has

The solution suggested by Professor Lessig is somehow to restore the registration and renewal scheme, forcing the rightholders who benefit from copyright to take steps to protect their state-backed benefit.[1201] In a 2010 article, he argues once again that copyright owners should bear 'some of the burden of keeping the copyright system up to date, by establishing an absolute obligation to register their work, at least after a limited time'.[1202]

Taking an economic analysis approach, Landes and Posner advocate for an 'indefinitely renewable copyright' in a 2003 article. Their research shows that 'copyright registration and renewals are indeed highly responsive to economic Incentives'.[1203] They conclude that:

> The shorter the expected life of a copyright and the higher the registration and renewal fees, the less likely are both registration and renewal. This in turn suggests that a

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become law. The Australian Copyright Council gave a summary of the bills and the Australian situation. See, Australian Copyright Council, *Orphan Works* (2008) <http://www.copyright.org.au/information/cit031/wp0130> at 17 February 2010.

[1200] Professor Lessig argues in this book: 'Authors and creators deserve to receive the benefits of their creation. But when those benefits stop, what they create should fall into the public domain. It does not do so now. Every creative act reduced to a tangible medium is protected for upward of 150 years, whether or not the protection benefits the author. This work thus falls into a copyright black hole, unfree for over a century.' See, Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World*, above n 1197, 251.

[1201] He proposes:
'Work that an author "publishes" should be protected for a term of five years once registered, and that registration can be renewed fifteen times. If the registration is not renewed, then the work falls into the public domain. … A change in the copyright term would have no effect on the incentives for authors to produce work today. … But the benefit for creativity from more works falling into the commons would be large. If a copyright isn't worth it to an author to renew for a modest fee, then it isn't worth it to society to support — through an array of criminal and civil statutes — the monopoly protected.'
See, ibid 250-4.

[1202] See, Lessig, 'For the Love of Culture: Google, Copyright, and our Future', above n 952.

[1203] See, William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70(2) *The University of Chicago Law Review* 471, 517-8.

> system of modestly higher registration and renewal fees than at present, a relatively short initial term (twenty years or so), and a right of indefinite renewal would cause a large number of copyrighted works to be returned to the public domain quite soon after they were created.

The proposed restoration of copyright registration and renewal formalities can provide part, but possibly not the whole of the solution.[1204] Indeed, a registration and renewal mechanism would significantly enhance the efficiency of the copyright system. However, the international acceptability of complete removal of the rights that have already been conferred on the authors, even in the case of the failure of registration and renewal, is doubtful. Thus, a solution based on the combination of a 'Relational Licensing' system and 'Relational Registration/Renewal' system is suggested.

D. Relational Licensing upon the Failure of Renewal

The principal ideas of the 'Relational Renewal' system and 'Relational Licensing' scheme proposed in this thesis are as follows:

i. Voluntary Registration Systems should be established at both the international and national levels, and systematic inducements should be created to encourage copyright owners to make registration. The registration systems should be completely digital and online, taking advantages of the advance of the ICTs.
ii. Relational Renewal Formality should be re-introduced; however, the effect of renewal should be reconfigured. It is suggested that copyright should be

[1204] For further information on copyright formalities, see generally, Irwin Karp, 'A Future without Formalities' (1994-1995) 13 *Cardozo Arts and Entertainment Law Journal* 521. See also, Peter B Hirtle, 'Copyright Renewal, Copyright Restoration, and the Difficulty of Determining Copyright Status' (2008) 14(7/8) *D-Lib Magazine* <http://www.dlib.org/dlib/july08/hirtle/07hirtle.html> at 20 February 2010. See also, Koegel, above n 1191, 529.

obtained automatically upon the creation of a work, but five years after the publishing of a work, the copyright owner is required to register their works. In contrast to Professor Lessig's proposal,[1205] it is recommended in this thesis that in the case of failure to register, a relational licensing system will be activated.

iii. Relational Licensing System: This system is significantly different from the 'relational blanket licensing' system for online communication as articulated in s 7.3.3.C of this thesis.

a. *Relational licence granted generally:* This relational licensing should apply to all protected works, upon the failure of copyright registration five years after the publishing of the works. As a result, the use of these works in which the copyright is not renewed as required would be subject to a set of rules prescribed by the relational licence. The users can distribute, communicate the works to the public or produce new contents based on these works without the need to obtain authorisation from the copyright owners, provided the royalty is made available to the copyright owners. Thus the failure of renewal would not lead to the complete removal of the rights of copyright; instead, it merely takes away the exclusivity of these rights.

b. *Licence Registration and Administration Authority:* A non-profit and independent licence registration and administration authority should be established with mandates from the government or international organisations such as WIPO. The commercial use of any protected works under the relational licence should be registered.

c. *Determination of royalty subject to private negotiation or the decision of an arbitral body:* The users and copyright owners are able to

[1205] 'Thus, for example, five years after a work is published, a domestic copyright owner should be required to maintain her copyright by registering the work. Failure to register would mean that the work would pass into the public domain.' See, Lessig, 'For the Love of Culture: Google, Copyright, and our Future', above n 952.

> privately negotiate for royalty, but where they fail to do so, the licence registration and administration authority would act as an arbitral body to determine the royalty.

The recommendation of re-introduction of the copyright registration and renewal formalities aims to make the copyright system 'more efficient', through imposing a reasonable obligation on the copyright owners and making them to take a few sensible steps to preserve their rights. The proposed combination of relational renewal system and licensing scheme is a 'new style' formality, and a similar proposal can be found in professor Springman's 2004 article, *Reform(aliz)ing Copyright*.[1206]

Under art 5(2) of the Berne Convention, it is required that 'the enjoyment and the exercise' of the authors' rights 'shall not be subject to any formality':[1207]

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.[1208]

The Berne's rule against formalities was raised in a certain historical and technological background. The compliance with those formalities used to be difficult, expensive, time-consuming and the inefficiency of the registration and renewal

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[1206] See generally, Sprigman, above n 1198.

[1207] For further discussion on the formalities as to the exercise of rights under the Berne Convention and related historical background, see Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, above n 309, 219-24.

[1208] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1 BDIEL 715, art 5(2) (entered into force 6 June 1982).

system may cause the lost of valuable rights.[1209] However, today the advance of technologies and the ICTs in particular has made these concerns irrelevant. A digital registration and renewal system with fully online operation should not cause any significant costs to the copyright owners.[1210]

In addition, although the exclusive rights conferred on the authors include 'the right to *refuse* to authorize', as Professor Sprigman suggests, the removal of the exclusivity of these rights does not likely deprive the authors of 'any aspect of the "enjoyment and exercise" of the economic rights appertaining to their copyright'.[1211] It is argued further:

> An author who fails to comply with new-style formalities is merely converting an entitlement that is initially protected by a property right (the right to exclude, realized through injunctions and infringement damages) into an entitlement protected by a liability right (the right to recover revenues from use via a default license).[1212]

7.4 SUMMARY

In this networked information society, content holders have certain obligations to make their content accessible and available to the public under fair conditions. This chapter has made a number of proposals and recommendations to reconfigure the exclusive regime of the authors' economic rights, through the imposition of a set of sensible 'tolerance obligations' on the copyright owners.

Private negotiation between copyright owners and commercial distributors and voluntary licensing for the dissemination and use of creative works are always

[1209] See further, Karp, above n 1204, 521.

[1210] Registration fee is another issue. As Landes and Posner argued, the level of the registration and renewal fee is critical to the operation of the system. See generally, Landes and Posner, 'Indefinitely Renewable Copyright', above n 1203.

[1211] Sprigman, above n 1198, 557.

[1212] Ibid.

encouraged. However, in the case of lack of intention and possibility of authorisation on the side of the copyright owners, it is recommended that a 'relational blanket licence' should be made available to the emerging Internet-based intermediaries, on a case by case basis and under the conditions already set forth in copyright law. In addition, it is also recommended to consider the possibility of introducing the exhaustion of communication rights in the online digital environment.

In order to allow for a read/write culture, it is recommended to establish a general principle of fair use at both international and national levels. Furthermore, non-commercial productive use of copyright works should be permitted, provided that the rules of commercial productive use could be maintained.

To this end, it is argued that the establishment of a 'new-style' registration and renewal system could significantly improve the efficiency of the copyright system. It is recommended that under a relational default licence, the law should remove the exclusivity of the economic rights conferred on the authors upon the failure of renewal five years after the publishing of the works. The removal of exclusivity through the default licence appears to be in compliance with the Berne Convention's requirement for 'the enjoyment and the exercise' of the rights granted to the authors.

CHAPTER 8

CONCLUSIONS

This research provides a systematic and theoretical analysis of the digital challenges to the established exclusive regime of the economic rights enjoyed by the initial coyright owners − authors (and related rightholders) − under the law of copyright. Accordingly, this research has developed a relational theory of authorship and a relational approach to copyright, contending that the regulatory emphasis of copyright law should focus on the facilitation of the dynamic relations between the culture, the creators, the future creators, the users and the public, rather than the allocation of resources in a static world.

The social and theoretical background of this research, as suggested in chapter 1, is the resilience of copyright law in the digital online environment, and the growing conflicts between the law and the reality of this networked digital age. The creative destruction raised by the information and communication technologies (ICTs) has profound implications far beyond technological advance and productivity. The consequences are also social, cultural and economic. The prevalence of participatory culture and the rise of everyday creativity have brought revolutionary challenges to copyright law.

The original purpose of copyright is to encourage learning through stimulated creativity and dissemination of writings, and this ultimate aim should remain. However, what are the actual consequences of copyright? Should rivalry in distribution and recreation be restricted or facilitated? The analytical tool offered by the classical or neo-classical economics appears to be inadequate. Therefore, this

research has established an analytical framework contextualised in the evolutionary economics, suggesting a relational approach to the understanding of the authorial process, authorship and copyright in chapter 2. It is found that copyright's intervention in the trajectory of knowledge growth produces significant impacts. Given the importance of the flow of information and the origination of novelties and variations, it is suggested that copyright law should maximise the dissemination of knowledge-based works and the recreation of new works.

In order to assess further the established copyright regime and its impact on the origination, adoption and retention of ideas and knowledge, this research has examined the historical development of authors' exclusive rights and associated limitations, at both international and national levels. In chapters 4 and 5, significant expansions of the author's exclusive rights are identified, and it is suggested that, at least in the networked digital environment, copyright control over the dissemination and utilisation of works has become overwhelmingly excessive more than ever. The excessive copyright control stifles creativity, impedes socially and economically important public use of the creative works, and suppresses the potential that this digital age can offer for public access to knowledge. In this networked digital world, the creative works and contents have become increasingly vital for the people to engage in creativity and cultural innovation, and for the evolution of economy. Furthermore, the technological changes have raised a social matrix which is considerably different from the one within which the law of copyright was invented and maintained. Today, the copyright owners, as content holders, have certain obligations to make their contents accessible and available to the public under fair conditions.

To this end, this thesis has made a number of recommendations for the reform of the current copyright system. First, it is suggested that voluntary blanket licensing for the dissemination and use of works should be encouraged. Second, at least in the online transmission case, if private initiatives would not take place under reasonable

conditions, a default blanket licensing system should be established. The default blanket licence for public dissemination of digital contents should be granted on a case by case basis, and should be administrated by an independent and non-profit authority. Third, it is recommended to consider the exhaustion of the rights of copyright in the digital environment. Fourth, in order to allow for greater latitude for creation and recreation, an open-ended principle of fair use is suggested at both the international and national levels, and non-commercial productive use of the works should be allowed provided that it could be reconciled with commercial productive use. Fifth, it is recommended that the introduction of a 'new-style' copyright registration and renewal system could significantly enhance the efficiency of the current copyright system.

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