

**COPYRIGHT LAW, DIGITAL
CONTENT AND THE
INTERNET IN THE ASIA-PACIFIC**

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SYDNEY UNIVERSITY PRESS

Published by
Sydney University Press
Fisher Library F03
University of Sydney
NSW, 2006 Australia
<http://www.sup.usyd.edu.au>

Publication date: March 2008

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The Material in this publication is based on papers presented at the First International Forum on the Content Industry: Legal and Policy Framework for the Digital Content Industry collaboratively held by the East China University of Political Science and Law (<http://www.ecupl.edu.cn>) and the Queensland University of Technology (<http://www.qut.edu.au>) in Shanghai, People's Republic of China, May 2007. This publication is an output of the ARC Centre of Excellence for Creative Industries and Innovation (<http://www.cci.edu.au>) Queensland University of Technology.

Unless otherwise stated, the law as it appears in this book is current as at December 2007. Note the text of some of the chapters has been slightly modified as a result of translations.

ISBN 978-1920898-72-4 soft cover edition
ISBN 978-1920899-06-6 hard cover edition

The digital version of this book is also available electronically through the Sydney eScholarship Repository (<http://ses.library.usyd.edu.au>) and The Queensland University of Technology ePrints Repository at: (<http://eprints.qut.edu.au>).

PREFACE

In 2006 East China University of Political Science and Law (ECUPL) and the Queensland University of Technology (QUT) established the ECUPL-QUT Sino-Australian Intellectual Property Law Research Collaboration Program. The Program jointly hosted by Professor Fuping Gao (Dean of Intellectual Property School, ECUPL) and Professor Brian Fitzgerald (Director of Intellectual Property Law Research Program, QUT) aims to develop stronger research links between the two universities in the area of intellectual property law and is one of the first collaborations of its kind in China and Australia.

In particular, the Program will investigate:

- the role of Australian and Chinese copyright law in the digital environment;
- the implementation of the proposed Australia-China Free Trade Agreement in regard to intellectual property law;
- intellectual property law issues for the digital content industry in China and Australia;
- patent law issues relating to new technologies under Australian and Chinese law; and
- trade marks and domain names under Australian and Chinese law.

The chapters which appear in this book are a result of the First Forum of the ECUPL-QUT Sino-Australian Intellectual Property Law Research Collaboration Program, “Legal and Policy Framework for the Digital Content Industry”, held in Shanghai, People’s Republic of China, 28-29 May 2007.

The editor’s acknowledge the generous support of both ECUPL and QUT, in particular ECUPL President, Professor Qinhua He, and General Secretary, Professor Zhichun Du and QUT Vice-Chancellor Professor Peter Coaldrake and University Registrar Dr Carol Dickenson, who all participated in the conference. The editor’s are also very grateful to the International Cooperation and Exchange Centre at ECUPL for their assistance, in particular Professor Xiaohong Liu and Ms Fei Xia.

The editor's also thank all of the speakers and participants at the "Legal and Policy Framework for the Digital Content Industry Forum", who helped to make it a tremendously successful event. The Conference which featured a number high profile speakers, led by Chief Justice Zhipei Jiang, Chief Justice of the Supreme Court of the People's Republic of China, attracted over 100 participants from Australia, China, Singapore, Hong Kong, Taiwan, Japan, the United States, the United Kingdom, France, Germany and the Netherlands. We are particularly grateful to all the speakers who participated in the Conference, particularly Chief Justice Zhipei Jiang, Chief Justice of the Supreme Court of the People's Republic of China and Chao Xu, Director of Copyright Department, National Copyright Administration of the People's Republic of China.

The editor's also acknowledge the generous support of conference sponsor's, the Australian Research Centre of Excellence for Creative Industries and Innovation (CCi) hosted by QUT, QUT's Institute of Creative Industries and Innovation (iCi), Tencent QQ.com, Shanda Interactive Entertainment, TransAsia Lawyers and Shanghai De Qin Law Firm.

The editor's are also particularly grateful for the tremendous assistance in organising and running the conference provided by Conference Secretariat Qian Sun, Nina Shen, Weifen Fu, Min Li and all of the ECUPL student volunteers. The editors also owe thanks to Celeste Bennett for her assistance in the preparation of the chapters which appear in this book.

December 2007

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FOREWORD

Intellectual property law and its application to new digital technologies has rapidly become one of the most important areas of the law. The development of new technologies over the past few years, such as the Internet and the vast array of digital content which is now available, have created many difficult challenges for the law and the Courts. These challenges can be no better appreciated, than in my experiences as a Judge in this area, with there being 17,769 intellectual property cases before the courts of the People's Republic of China in 2006. Among these cases are 2,277 criminal cases, with 3,508 individual offenders punished.

Intellectual property plays a key role in the development of the national economy of the People's Republic of China. Hu Jintao, Secretary General of the CPC Central Committee, in an effort to strengthen the intellectual property system of the People's Republic of China, delivered an important speech in the Politburo's 31st Collective Study on 26 May 2006 in which he said "We should give full play to the intellectual property system in strengthening national economic, scientific and technological capabilities, as well as our international competitiveness and safeguarding national interests and economic security, so that it can provide a strong backbone for China to enter the ranks of innovation-oriented countries."

Intellectual property law is an integral area of the law for any society. As a general principle, it refers to the various rights, which the law and courts accord for the protection of investment in creative effort. Intellectual property laws also aim to strike a careful balance in providing incentives for innovation. If there is too little protection, investment in intellectual property dependent industries will be jeopardised. While too much protection, is likely to disadvantage society and encourage monopolies.

This collection of scholarly papers will prove to be a valuable resource for students, practitioners, judges and anyone interested in understanding some of the challenging issues, which new technologies have created for the law. It brings together a wide range of experts in

their respective fields from across the Asia-Pacific region, which helps to make it a truly unique and diverse collection. I trust you will enjoy the book.

Chief Justice Zhipei Jiang

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November 2007

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PART 1 – THE NEW DIGITAL ENVIRONMENT

FROM MOUSTACHES TO MY SPACES

John Howkins

In 1919 Marcel Duchamp pencilled a moustache on a postcard sized image of the 'Mona Lisa'. Many people were outraged, including a few artists, but others were amused. Was it art? Was it sacrilege? Could it be both? Today, millions of people are making digital sounds and pictures, often using and parodying existing material, and distributing the results on the Web. Is it art? Few people care.

Two year's earlier Duchamp had taken a men's urinal manufactured by the New York J L Mott Ironworks, signed it R Mutt and sent it to a gallery. The original urinal has been lost but later, authentic copies sell for about \$1.5 million.

It is possible that the postcard is not a postcard at all, but Duchamp's own original likeness.¹ If so, it is not a copy but part of the parody. These are deep waters.

As far as I know, nobody ever sued Duchamp for infringing their copyright or design rights.

Fast forward 90 years. In January 2007 the Chinese Government found itself in the kind of dilemma that is typical worldwide as all governments seek to formulate a sensible intellectual property (IP) policy for the modern world. When is parody permissible? Is it acceptable to make a spoof, which an innocent person might mistake for the original, or is it morally and commercially unacceptable?

¹ For many years, it was thought that Duchamp had bought a postcard and drawn on it. Then it was suggested that Duchamp had drawn a copy of the Mona Lisa to imitate a postcard, and then drawn on that.

One Beijing Ministry made a robust statement that China's intellectual property laws would follow 'international norms'. Another Ministry declared that anyone making egao (恶搞) and showing it online must get approval from the Government. Strictly speaking, of course a Government can do this under WIPO's international legal norms. But international social norms would suggest a more open attitude. Hu Ge's Steamed Bun and the Bus series are a traditional form of fun all around the world, from naughty schoolboys to the artistic avant garde.

Where do we draw the line between freedom and infringement? What should be governed by social norms and what by copyright laws? And what, indeed, by rules on confidentiality and privacy?

It is notable that, when Duchamp was working, copyright terms in both France and America were relatively short and the rights owners did not pursue their infringements. Today, terms are longer. The copies of *Urinal* are still in copyright. The parody of the *Mona Lisa* is protected by French copyright law until 2038, 70 years after his death.

The public debate on copyright in China really consists of two debates. There is a high-level, practical debate about enforcement. In this, China is fulfilling worldwide, World Trade Organisation (WTO) based priorities to enforce IP rights. America, Japan and the European Union (EU) are equally focussed on enforcing the law in cases where the legitimate rights owner is suffering economic damage.

There is another debate about what the laws should be. This debate addresses the costs and benefits of IP, where a private gain to the rights-holder is less than the social cost to the public. This is the most important debate, although the discussions are more muted.

Both debates are important. IP laws cover the relationship between free creativity and restricted property: how we get access to ideas, how we have ideas, how we share ideas and how we make money out of ideas. Beijing's inclusion of IP in the city's 11th Five Year Plan is welcome.

Over 45% of America's assets are in intellectual property. Over 60% of new jobs in America require the employee to exercise his or her creativity in ways that qualify for intellectual property. This is the reality of what I call the creative economy.

Since I first visited Shanghai in 1979, China's growth has been astonishing, averaging 9.4% annual GDP growth. In 1979, it accounted for under 1% of the world's economy. Last year, it accounted for 4%. Foreign trade has jumped from \$20.6 billion to \$851 billion. Five centuries ago, China's economy was the world's largest. Nothing is certain but many observers predict China's own forecasts for 2050 are too modest and that China may become the world's biggest economy again.

It is interesting to ask, what should China's policy be on the restricted ownership of intellectual assets?

I believe we need a new approach, taking account of both cultural and economic principles. You will not be surprised to hear that I believe the way forward lies through a better understanding of creativity and innovation. In the past 10 years we have learnt a great deal about creativity. ITR has developed some principles about the creative process and a policy audit.²

We have also developed the Adelphi Charter on Creativity, Innovation and Intellectual Property.³

The importance of the creative economy is not limited to the core industries, or indeed to any one single group of industries. It is based on a way of working that is found in almost all industries. Likewise, intellectual property law is not unique to any particular industries, but is applicable to every industry and indeed to everyone in society.

The growth of the creative economy has meant IP laws have moved centre stage of the global economy. In the 1980s, IP was a marginal factor in most economies and of little concern to most policy-makers. 20 years later, it is a central and important factor in almost all economic activity.

But the politicians are only just beginning to grasp this. Many are still ignorant of the basic principles of IP. This lack of understanding is a problem, not only because IP is now economically very important but

² The ITR Creative Consultants Ltd is a London-based consulting company.

³ See the Adelphi Charter website <<http://www.adelphicharter.org>> at 12 November 2007.

because IP deals with the very stuff of politics: the boundary line between what is public and what is private. What is being fought over is how we live and work together, how we get access to knowledge and how we gain rewards.

The battles around this line can be vigorous. On the one hand, there are increasing demands for more IP rights, more patentability and stricter enforcement (led by the American and Japanese Governments). On the other hand, there are substantial trends in the opposite direction: towards more open access, more collaboration and more relaxed licensing, led by developing countries in alliance with many artists, scientists and Internet groups worldwide. Ironically, while the American Government is the most active advocate of stronger IP, American academia and activists are the strongest advocates of the public domain. Europe lies in the middle. Each group (the defenders of private property and the defenders of the public domain) get daily more passionate and more entrenched in their views.

These debates are fundamentally about the role of public regulation. IP is law but it operates as a means of regulating private ownership.

Let me illustrate the problem with some examples. The Internet which is one of the most remarkable tools the world has ever known for sharing information and knowledge, and for allowing us to make contact with other people and with what they are saying, writing and making. It is continually offering up new possibilities, new ideas, new friendships, new networks and new businesses.

But it presents a challenge. The Internet is a massive copying machine. It works because it allows us to upload and download, copy and share, on a massive scale. If we apply the laws that regulate, say, copying printed books to copying Web files, then we will strangle the Web.

The nature of the Web means it is a major threat to businesses that depend on restricted access and restricted copying. The music recording industry has been worst hit and has made some pessimistic forecasts about the effect of on-line copying on profitability. Sales of recorded music are falling fast. The Internet is not the only reason why this is happening (sales of classical music have also plummeted) but it is undeniably part of the reason.

I suspect nobody knows the Internet's real impact on these industries but it is possible to make some comments.

One, the possibility of infringement is immense but, two, it is increasingly accepted (for example, by Time Warner's recent activities in China) that the best solution, alongside sensible laws sensibly enforced, is better business models. Meanwhile, companies should be moderate in their use of Digital Rights Management (DRM).

I believe the quantity and quality of music being composed and performed will not decline (although the quantity of music being recorded may decrease). The nature of musical forms, compositions and performances, and the way we listen to music, will change but not by much. Most companies will survive. Some will decline to be replaced by others. My feeling is that these outcomes are evolutionary rather than revolutionary and I would be hard pressed to say if they are positive or negative.

From a policy-makers' perspective, we must take the long view and base our policies on the public interest. It is vital at this stage to protect the Internet's essential freedoms. We must also enable people to be rewarded for their work and investment. What is the right balance between freedom and enforcement? How do we answer that question?

Another topical Internet issue is webcasting. I have to admit to a special interest: I was recently chairman of a London webcasting company. I believe that the proposed World Intellectual Property Organisation (WIPO) Treaty on webcasting is not only against the interest of webcasters, it is against the interests of the public. In the words of James Love, Executive Director of the US-based Knowledge Ecology International, the proposal is 'an effort to radically change the ownership of information and knowledge goods, based upon who transmits information, rather than who creates the work.'

If we extend this logic further, he asks, 'should we grant an intellectual property right to Amazon Books because it makes books available to the public?' The webcasting treaty would extend protection over distribution systems like the Internet which merely transmit other people's material – including material in the public domain. That must be wrong. Again, how do we decide?

The WIPO standing committee on copyright (SCCR) has met over several years to discuss if, and how, a treaty should be formulated. Typically, with IP policy-making the discussion of 'how' has tended to overwhelm the 'if'. The SCCR's June 2007 meeting failed to reach a resolution which, given the profound differences of opinion, and the absence of hard evidence, is probably a welcome result. The Knowledge Ecology International blog said the 'The negotiation over the broadcast treaty has mirrored and sometimes driven the larger changes in the culture at WIPO. When the negotiations began, it was simply about responding to demands from a powerful right-owner group, the broadcasters, for expanded commercial rights. As the discussions continued, civil society NGOs criticised the treaty for its potential harm to the Internet. Several country delegations began to ask deeper questions about the rationale for the treaty, and examined ways to limit the scope and nature of the treaty. In the end, the broadcasters demanded too much, and made too few concessions, for the treaty to move forward. Delegates at WIPO were no longer willing to ignore issues of access to knowledge, or the control of anti-competitive practices.'⁴

These examples all turn on the balance of rights-holders' exclusive rights and public access.

I have a proposal. I always believe that you have to ask the right question to get the right answer. If you ask the wrong question, you never get the right answer.

The question I want to ask is this: Is the system of IP that we had in place at the end of the 20th century the right one, the most appropriate one, for the 21st century? What is the right way to regulate ideas in the 21st century?

To answer this we have to ask the most critical question of all: what is IP for? This question seldom gets asked. There is a phrase, 'the elephant in the room', indicating something very big and very important but also very embarrassing which everyone pretends isn't there. 'What is the purpose of IP?' is a very big question that is too often ignored.

⁴ See <http://www.keionline.org/index.php?option=com_jd-wp&Itemid=39&p=71> at 13 November 2007.

What is the answer? IP laws provide a means to establish and protect one's exclusive rights. We need them to provide incentives and rewards which, as everyone knows, are an essential part of the economic value chain. We need them to ensure our business contracts are solid and robust. When I licence a film on DVD, both I and the licensee need to have a common understanding which underpins what is being licensed and how the licence will be enforced.

There is a second purpose which is built-in to every IP law but which some observers find counter-intuitive and secondary. This is that the laws enable people to have access to what has been created. For example, all patent systems require the patent to be published so that others can see what has been invented and how it works. All copyrights come with limitations and exceptions that, from society's point of view, are just as important as the rights themselves. All patents and copyrights have limited terms, although some American copyright terms are now practically infinite.

But these two objectives – linking incentives, rewards and access – are not the whole answer to the question, 'What is IP for?' There is another level, which can be described as the politics of IP. Why do we need these things – incentives, rewards, access? And, when they are in conflict, as they often are, how do we decide what to do? Which should predominate? Is there a public interest involved? Faced with formulating the right copyright policy for, say, digital media, how do we ensure the public interest is served?

This question elicits some interesting answers. Many people, especially those responsible for major investments have a simple ideology. It is based on the belief that we have a basic, absolute right to our ideas, to the output of our brain, to our expressions and that we have a right to charge others compensation if they want to use our ideas. In this world, incentives and rewards must always take priority, must always trump access.

This argument has a sound economic base. As I have shown, an increasing percentage of global business depends on IP. The evidence is compelling not only in the companies' revenue figures in their profit-and-loss accounts but in their asset figures in their balance sheets. It is understandable that governments, who are keen to make their

economies more competitive and protect jobs, believe these intellectual assets must be protected as much as possible and at all costs. This attitude can be summed up in the phrase, 'the more IP the better' (that is, the stronger the rights, the stronger the economy).

But there is another approach which puts access over and above incentives and rewards. This approach is based on three arguments. First, access to existing data, ideas and knowledge is the starting point of all new ideas. Second, Europe, US and Japan industrialised successfully in the 19th and 20th centuries when their copyright and patent laws were weak, and many developing countries claim, as they industrialise, that they would also benefit from similarly weak laws. Third, many major initiatives continue to benefit from either weak laws or open licences: for example, Free and Open Source Software, the World Wide Web, the Global Positioning System (GPS) and the map of the human genome.

The argument here is that IP certainly offers incentives and rewards but does so at the cost of slowing down and inhibiting other work. The reluctance of the US not to adopt the Rome Convention's related rights for broadcasting, or to follow the European model for protecting databases, provides provocative evidence for this argument.

These points have implications for all countries, large and small, because creativity and the creative industries are inherently international in scope and so every government faces the same issue. Ideas are born nomads.

So, what is the best way forward? I want to suggest a new answer to the question, What is IP for? It is based on what we know about the creative economy.

The phrase, creative economy, emphasises creativity's economic and financial aspects. But it is equally a cultural and social phenomenon. The social and economic work hand in hand.

How did the creative economy come about? Its origins lie in the arts and culture and in their recent promotion of their economic worth. Technology is certainly a major factor, especially TV, the computer and the Internet. Equally important, I believe, are some fundamental demographic trends, such as increased population sizes, increased levels of immigration, the spread of open, liberal societies, globalisation, free

speech, the spread of mass education, and the growth in people's disposable income which has created new markets for art and design.

What has emerged is a new freedom for the individual to have, share and enjoy new ideas. A freedom to make their ideas central to their lives. To use their ideas to build up their own personality and identity. To build up their own status. To build up their earning power. And to turn these assets into their own creative capital.

It is risky to generalise about creative people but it is probably true to say they are usually independent thinkers, and often immersed in the personal and subjective. They are empirical and curious about novelty. They are often determined; at least if they're successful.

They are sometimes criticised in the same manner as the Confucians described the Taoists for being 'irresponsible hermits' (a description that was not intended to be a compliment). Are they irresponsible? I am reminded of W B Yeats' remark, 'In dreams begins responsibility'. He meant, I believe, that only when we explore dreams and fantasies at a deep, private, personal, level, and when we know what is possible, can we really assume responsibility for our choices. Creative people need to fantasise, need to be aware of all possibilities. And, yes, creative people do like to break the rules. They have to break the rules. Without rule-breaking, nothing new happens. Hermits? Sometimes. Equally, they can be very sociable and gregarious when they want to be.

Of course, these things have always been true. Some people have always been creative, such as professional artists, writers and composers, and have flourished in some places, such as cultural institutions. So what has changed?

The point is this. Creativity is no longer restricted to such people or to such special, dedicated places. It is now the favoured activity of millions of people and can be found almost everywhere: at home, at work, in schools, in small groups, on the street and, of course, in cyberspace. The numbers of people thinking about and using other people's ideas and creating their own ideas – ideas that may be copyrightable or patentable – can no longer be counted in thousands but in many millions. Creativity is now part of daily life for millions of people.

We can see the emergence of three concentric spheres of creativity. First, the business of producing and distributing commercial work (such books, films, TV programmes), which often requires large financial investments.

Then, alongside and overlapping, are two new spheres: a sphere of people, often working collaboratively, who are willing for others to use their work for non-commercial purposes; and an even larger group of countless people who are exploring ideas, sounds and images, and creating work with little thought of its commercial value or, to be more precise, of claiming any exclusive rights over it.

These three spheres, together, must be the basis for IP in the 21st century. We need to recognise each spheres' characteristics – and their differences. Each must accept each other. Professionals must accept users not merely as consumers but as people with basic rights and inclinations to create. We need a system which maximises access, which is everyone's interest, and which also enables rights holders to have a reasonable reward from their work.

I am therefore proposing that we use IP law as a means of regulating the creative economy. We can see some immediate implications.

Laws on intellectual property should not be seen as ends in themselves but as means of achieving social, cultural and economic goals.

Governments should place creativity and innovation as the objective of all IP laws. All laws should be tested against this objective, and the tests should be open, rigorous and independent. All laws should be required to be shown to support people's basic rights and economic well-being. Intellectual property protection should not be extended over abstract ideas, facts and data.

There are obvious inclinations for international governance within WIPO, WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Some of these principles are taken from the new Adelphi Charter on Creativity, Innovation and Intellectual Property which was drawn up in 2005. The Charter was prepared by an international commission of artists, scientists, lawyers, Internet experts, consumer representatives and

business people (including musician Gilberto Gil who is Brazil's Minister of Culture; Nobel laureate Sir John Sulston; and Lawrence Lessig, Chair of Creative Commons). It sets out principles for the public regulation of IP in the public interest, based firmly on creativity and innovation.

Duchamp's genius was to take ordinary objects and create an art object or art experience. He wanted art that was not 'retinal' (his word for art that was purely visual) but had its own life and its own history. He called it ready-made art although he never quite fixed his definition of ready-made. He enjoyed ambiguity.

The opposite of Duchamp's ready-made art are those words and pictures that people stick on fridges. They have no life and no history. But the phrases and lines that result are equally creative, even if they do not score as art.

The words and pictures on MySpace are in the same spirit. Everything is original, and qualifies as copyright material. Nothing is original in the sense of being *sui generis*. Yet, there are occasions, even here, where moral rights are useful and where financial benefits may be available.

All these lines, objects and images are caught by copyright although few people want to protect their work. If someone likes it, that's a cause for celebration. 'Come in' sounds nicer than 'keep out'.

This creativity, intertwined with rewards, is the core of the creative economy. How they work together affect how we use our creative imagination, and how each country will develop, socially and economically, in the coming years.

THE JUDICIAL PROTECTION OF COPYRIGHT ON THE INTERNET IN THE PEOPLE'S REPUBLIC OF CHINA

Zhipei Jiang CJ

INTRODUCTION

The legal system for copyright protection on the Internet has been established for years, although the *Regulation on the Protection of the Right of Communication through Information Networks (Communication Right Regulation)* was only issued in 2006.¹ Since the late 1990s we have gained approximately ten years experience in dealing with cases involving Internet intellectual property disputes. In this chapter, I would like to briefly introduce and then discuss the development of judicial protection for Internet digital copyright in China.

THE ESTABLISHMENT OF THE DIGITAL COPYRIGHT PROTECTION SYSTEM IN CHINESE COURTS

The Internet and Copyright Judicial Protection

The development of the Internet industries has brought opportunities for the copyright industry as well as new challenges for the judicial protection for copyright

The Internet information industries became popular in the early 1990s, and gave rise to a variety of institutional problems in the mid 1990s. The

¹ It was made by the State Council as Decree No 468 and took effect on 1 July 2006.

issue of copyright protection on the Internet is a prominent one. It is an opportunity for, as well as a challenge to, the judicial practices of the Chinese courts. For instance, after several writers' works had been uploaded and disseminated over the Internet, they commenced a legal action for remedies;² however, there was no statutory provision the writers could rely on to bring the action.

The Increase of Cases Involving Internet Copyright Disputes since the Mid 1990s

Since the mid 1990s the Internet copyright issue has become extremely serious, with numerous disputes, brought about by the growing information industry in China, flooding the courts. Fortunately, due to the tremendous efforts of our experts and international communications, digital copyright theories have gradually been established. The research on ISP liability, the communication right, Internet copyright, exploitation of digital copyright and debates on the European Union or the United States approaches have paved the way for the development and establishment of Internet copyright theories, and served as the theoretical basis for the courts to deal with the relevant disputes.

The Development and Establishment of Internet Copyright Theories has Laid the Foundation for Legislation and Judicial Practices

The Supreme Court has paid close attention to the judicial practices of intermediary courts and district courts, in regards to their digital copyright dispute cases. From 1997 to 1999, the Supreme Court sent various judges overseas for study and research purposes: I was sent to visit the John Marshall Law School in Chicago to conduct research on the United States digital copyright laws.

It is unrealistic to expect the People's Republic of China's *Copyright Law*, which was issued in 1990, to provide all the answers to the digital copyright challenge. However, on the other hand, our endeavour to find

² *Wang Meng and ors v Beijing Cenpok Intecom Technology Co Ltd*. See the Civil Judgment (1999) *Hai Zhi Chu Zi No 57*, made by the Beijing Haidian District People's Court.

solutions through judicial interpretation, has, at times, been rather controversial.

In fact, exploitation through the Internet is just a new way to use copyright. It is quite controversial to regard the reproduction of copyright works on the Internet, as an act infringing on copyright; however the common ground, that copyright needs protection even on the Internet, has been reached. The Supreme Court made this clear in the late 1990s, through the publication of relevant judgments in the *Bulletin of the Supreme People's Court of PRC*.

The Release and Enforcement of the Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes Relating to Computer Networks

In December 2000, two years after the United States *Digital Millennium Copyright Act* came into effect, the Supreme Court issued the *Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright (Networks Copyright Interpretation)*.³ At that time, the *Copyright Law* had not yet been amended.⁴

The *Networks Copyright Interpretation* resolves issues such as jurisdiction, the copyright owner's communication right,⁵ on-line republishing and excerpting, and ISP liability. The *Networks Copyright Interpretation* initially granted newspaper publishers increased freedom by deciding that newspaper republishing and excerpting exceptions applied to the Internet,⁶ while also stating that copyright law will apply to the Internet.

³ It was passed by the Adjudication Committee of the Supreme People's Court on 22 November 2000, and amended on 23 December 2003 and 20 November 2006.

⁴ The current *Copyright Law 1990 of PRC* was issued in 1990 and amended in 2001.

⁵ The copyright still belongs to the copyright owner of the original work after the work has been digitised. It will be regarded as copyright infringement if anyone uploads, spreads or reproduces the work without permission. The infringed party can either commence litigation or seek an injunction.

⁶ The newspaper republishing and excerpting exceptions were initially provided by the *Copyright Law of PRC 1990 (Amended 2001)* article 22 which states: '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: ... (4) reprinting by newspapers or periodicals, or

However the rules in relation to on-line republishing and excerpting have been changed in the second amendment of the *Networks Copyright Interpretation* and will be detailed below.

THE AMENDMENT OF THE *COPYRIGHT LAW* AND THE *NETWORKS COPYRIGHT INTERPRETATION*

The *Networks Copyright Interpretation*, issued in 2000, contains 10 provisions. In addition to a series of significant issues mentioned above, it provides that in cases where the actual amount of damages is indeterminable, the scope of compensation for infringing copyright on the Internet will range from RMB 500 to RMB 500 000.

China amended the *Copyright Law* in 2001 and introduced the “right of communication via information networks” as a new exclusive right for copyright owners. This new right acknowledges that communication via networks is a new way of exploiting copyright, and authorises the State Council to articulate specific regulations.

However, the amendment only contains three general provisions on Internet copyright and does not provide guidance for the courts on issues of applying the law to Internet copyright disputes. Among the three provisions, Article 58 provides that “[r]egulations for the protection of computer software and the right of communication of information on [a] network shall be established separately by the State Council.”

Based on the amended *Copyright Law* and judicial practices, the Supreme Court made “the decision on amending ‘*the Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright*’” in December 2003. This involved re-issuing the *Networks Copyright Interpretation* and completing the judicial protection system for Internet copyright. However, the amended *Networks Copyright*

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’.

Interpretation only stipulates that the maximum amount of compensation available for copyright infringement is RMB 500 000 and deletes the minimum compensation requirements. Moreover, it also provides civil liability for circumventing Technological Protection Measures (TPMs). As a result, after provisions that have been covered by the *Copyright Law* have been deleted, the *Networks Copyright Interpretation* covers nine issues.

In December 2004, the Supreme People's Court and the Supreme People's Procuratorate jointly released the *Interpretations on Several Specific Issues Concerning the Applicable Laws for Handling Criminal Cases relating to Copyright Infringement (Criminal Cases Interpretations)*. The *Criminal Cases Interpretations* has broadened the range of copyright infringements that result in criminal punishment, by providing that the communication of copyrighted works via the Internet shall be regarded as "Illegal Publishing and Distributing", as stipulated by Article 217 of the *Criminal Code of PRC*. At that time the communication right was not protected by the *Criminal Code*, because it did not contain provisions on the "Crime of Network Dissemination".

Although the communication right had been established by the *Copyright Law* as a new exclusive right, and a new way of exploiting copyrighted works, there was no corresponding provision in the *Criminal Code*. Accordingly, we treated the unauthorised dissemination of copyright materials as "illegal publishing and distributing" which is punishable under the "Crime of Illegal Publishing and Distributing" provisions. This was a compromise due to the specific background of that era; however, whether it complies with the spirit of "legally prescribed punishment for a specified crime" remains controversial. Criminal punishment for infringing on the communication right should be further researched, before deciding whether the *Criminal Code* should be modified. However, since the release of the *Criminal Cases Interpretations*, in judicial practice infringement on the Communication Right can now be criminally punished.

THE 2ND AMENDMENT OF THE “*NETWORKS COPYRIGHT INTERPRETATION*” UPON THE RELEASE OF THE “*COMMUNICATION RIGHT REGULATION*”

The second modification of the *Networks Copyright Interpretation* focused on the statutory licensing of “online republishing of works that have been published by previous newspapers and periodicals”.⁷ As a result, the provisions on “online republishing” was deleted.

The previous provisions of the *Networks Copyright Interpretation* provided that: “[w]orks that are in compliance with the re-publishing rules⁸ of the *Copyright Law* can be republished/reprinted by any other paper-based newspapers and periodicals, or Internet-based Web Pages without permission from copyright owners provided remuneration has been paid, unless the copyright owners require otherwise.” However, the *Communication Right Regulation* does not make the statutory licensing applicable to communication through networks. The Supreme Court was considering whether to delete the provisions on “online republishing” and sought advice from the relevant department of the National People’s Congress (NPC). However the Legal Committee of the NPC was silent on the conflict between the administrative and judicial organs.

As a result, the Supreme Court deleted the previous provisions on “online republishing” after investigating whether the “Regulations” were authorised by the *Constitution* and the *Copyright Law*. Since the “Regulations” have provided a clear answer to the “online republishing” issues, the *Judicial Interpretation* had to be changed correspondingly. The application of law by the Supreme Court has been strictly in compliance with the *Constitution* and the *Law of Legislation*.

According to the amended *Networks Copyright Interpretation*, online republishing and excerpting of works (excluding software, films and

⁷ “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.” See Article 32 of *Copyright Law of PRC*.

⁸ *Ibid.*

novels), before 1 July 2006, shall not be regarded as copyright infringement, provided remuneration has been paid and the author's name and the origin of the works has been indicated. However, after 1 July 2006, online republishing and excerpting without the permission of copyright owners will amount to an infringement, even if remuneration is paid.

THE APPLICATION OF LAW INVOLVING NETWORK COPYRIGHT PROTECTION AFTER THE *COMMUNICATION RIGHT REGULATION*

It is clear in the rules made by the Supreme Court, that the explicit provisions addressed by the *Communication Right Regulation* shall be strictly applied to any Internet copyright disputes. This is because the *Communication Right Regulation* contains specific provisions on Internet copyright, such as the liability of search engines and linking services. However, the *Communication Right Regulation* is too specific to cover all issues arising from a given complicated case.

Given the fact that not all issues are fully covered by the *Communication Right Regulation*, the amended *Networks Copyright Interpretation* and other relevant judicial interpretations should be applied to those remaining issues, including for instance, jurisdiction, aspects of ISP liability and the various forms of civil liability. The term "ISP" in this context refers to all service providers such as Internet Connection Service Providers and Internet Content Providers. The issues concerning service providers are rather complex and one issue is whether service providers should be categorised on the basis of the services they provide, or, on the entities themselves.

The Extensive Internet Torts and Application of Law

While making the *Copyright Law* and the judicial interpretations, the copyright owners' 'Communication Right' was given a very specific meaning to comply with the international treaties to which China is a party. Article 9(12) provides, that the "[r]ight of Communication via Networks is the 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". As

a result, we have not adopted the United States concept of “reproduction and distribution”, nor have we completely accepted the European Union’s stance either. The connotation of “infringement on the communication right” is based on the above mentioned concept.

However, to make the concept of initial infringement on the communication right so extensive that it includes linking and searching as communication via networks, is inconsistent with the original concept of the “communication right”. The essential element of acts that amount to copyright infringement is “copy”, and this concept is broadened when “linking and searching” is incorporated into “communicating via networks”. However, the acts of providing “linking and searching” are punishable, provided certain other factors are made out. That is to say, that such acts, together with the primary copyright infringement acts, would constitute joint torts. Relevant factors include whether the infringer knew, or should have known, that the copyright infringement was occurring. This is viewed by legislatures and judiciaries internationally, in relation to Internet copyright infringement, as commonsense.

Determination of Infringement and Relevant Factors

Under Article 3 of the new *Networks Copyright Interpretation*, acts of an ISP, such as participating in someone else’s copyright infringement, or aiding or abetting someone else to commit copyright infringement through networks, shall be made liable for joint torts together with the primary infringer, according to Article 130 of the *General Principles of the Civil Law of the People’s Republic of China*.

Therefore, it is irrelevant that limiting the primary infringement to “communication via networks” would allow for some types of acts to escape liability. As the *Networks Copyright Interpretation* has clearly stated, any acts of participating in torts through information networks shall be regarded as “to have known or should have known of the infringing acts.” It is immaterial whether the person involved is an Internet Connection Service Provider, or an Internet Content Service Provider, anyone who is involved in committing an infringement through information networks, and who knows or should know of the infringement, should be liable. This principle complies with the general

civil law theory and also acts as a limitation on establishing Internet copyright infringement and the scope of its liability.

For instance, issues including p2p liability (which has been discussed in Europe and the United States), search engine liability and deep link liability are all covered by the *Networks Copyright Interpretation*. In cases where a domestic infringer has committed acts against a website located outside of China, this will be actionable under the current *Networks Copyright Interpretation*, even though there is no apparent connection with the website. The approach adopted by the *Networks Copyright Interpretation* is to determine all cases involving Internet copyright disputes.

SOME SPECIFIC ISSUES ON THE APPLICATION OF LAWS

ISPs' Liability

Taking the liability of Internet Facility Providers as an example: should hardware providers be liable for copyright infringement? Or should Internet Connection Providers be liable? In the case of *Music Copyright Society of China v Guangzhou Netease Computer System Inc and China Mobile Inc (Beijing)*,⁹ a Beijing court made a judgment in favour of the defendant on the grounds that the defendant merely provided facilities and a platform for transmitting and receiving information, and was unable to control the content transmitted. This case illustrates that Internet Facility Providers are not responsible for content transmitted, unless the content is provided by them or their affiliated operators.

Liability of Internet Search Engine Providers

In 2001, Sohu.com was sued by a writer for copyright infringement.¹⁰ The defendant, a search engine provider, disconnected the two links the

⁹ See Beijing No. 2 Intermediary People's Court, Civil Judgment (2002) *Er Zhong Min Chu No. 03119*, issued on 20 September 2002.

¹⁰ *Ye Yanbin v. Sohu Aitexin Information Technology Ltd., Inc. (Beijing)* (Sohu.com Inc.) (2001); the first trial court was Beijing Haidian District People's Court and the appellate court was Beijing No. 2 People's Court. See the case summary written by Wanbin, the lawyer representing the defendant's, at <<http://www.shouxinlvshi.com/shownews.asp?id=60>> at 25 January 2008.

plaintiff complained of, and thus avoided further copyright infringement occurring on other websites. The court held that the defendant had fulfilled all of its obligations by not incurring other liability. The court's ruling in this case has been adopted as a rule by the *Communication Right Regulation*. That is, taking down a link, after receiving a notice of the link is the only thing the law requires, provided the links were not deliberately offered by the defendant.

In another case, an E-commerce company sued Yahoo Music for copyright infringement.¹¹ As the plaintiff's "notice" did not contain specific information on the URLs, the defendant had no way of knowing which links to disconnect. Due to this the court held that the defendant was not liable for copyright infringement.

Deep Link Issues

A network company sued a software company regarding foreign exchange trends software.¹² The plaintiff claimed that because the defendant had linked directly to the plaintiff's trend graph, instead of the plaintiff's front page, this was a deep link and should be regarded as a copyright infringement.

The court held that, while the defendant had not committed a copyright infringement, the deep link should be regarded as unfair competition since it undermined the potential benefit of the plaintiff's front page advertisement. Issues regarding deep linking are comparatively complicated because they are relevant to the commercial benefits generated from advertisements, but are irrelevant to copyright infringement. There is no direct causation between deep linking and copyright infringement. The *Robots Exclusion Protocol* can prohibit search engines from capturing certain pages and the plaintiff can use the *Protocol* to prevent its page from being linked.

¹¹ See Beijing No. 2 Intermediary People's Court, *Civil Judgement (2006) Er Zhong Chu Zi No. 07905*, issued on 15 December 2006.

¹² *Beijing Financial City Network Company v. Chengcai Caizhi Software Co. Limited*, see further, Shen Rengan, *Digital Technology and Copyright* (2004, Law Press, China).

Issues Regarding P2P

Shanghai Push Sound Music & Entertainment Co Ltd sued Beijing Feixing Music Software Co Ltd in October 2005.¹³ The defendant was accused of authorising the dissemination of music files, as a result of providing selected links to music files, and enabling users to search, download, and even burn music onto CDs or DVDs. The court found that the defendant had facilitated the users' copyright infringement, and along with the primary infringers, should be held jointly liable for the copyright infringement.

Issues Regarding Website Name

Sinoprojects.net complained that another website used a website name similar to its own.¹⁴ The court held that only renowned names could be protected, and there was no evidence that the two website names were similar enough to cause confusion. As a result, the behaviour of the other site could not be regarded as unfair competition.

However, there have been cases where the courts have held that unfair competition has occurred. These cases have involved an unauthorised modification of "Windows registration information" for an end-user's computer and malicious software.

CONCLUSION

This overview highlights the growing complexity of copyright law in China as it adapts to meet the challenges of the digital environment.

¹³ See Beijing No. 2 Intermediary People's Court, Civil Judgment (2005) *Er Zhong Min Chu No. 13739*, issued on 19 December 2006.

¹⁴ See Beijing High People's Court, Civil Judgment (2001) *Gao Zhi Zhong Zi No. 109*.

PART 2 – DIGITAL CONTENT
POLICY AND THE
NETWORKED INFORMATION
ECONOMY

CHAPTER THREE

A LEGAL FRAMEWORK FOR THE DEVELOPMENT OF THE CONTENT INDUSTRY IN THE PEOPLE'S REPUBLIC OF CHINA

Fuping Gao

INTRODUCTION

Developing the digital content industry is ranked as a key part of the Chinese informationisation strategy and an important strategic measure necessary to build a creative nation. The distribution activities related to network cultural products can be grouped into two categories, with one category subject to private laws such as copyright or contract laws, and the other related to public or regulatory laws. Therefore the digital content industry requires two types of order: copyright order and regulatory order. However a favourable industry order is hard to achieve given the many challenges present. Both digital works and network communication challenge the copyright order. Network communication is also a new media and the convergence of networks challenges the regulatory order. This chapter highlights that the focus of the modern copyright regime is to seek a balance between the interests of the copyright owners and the public. A feasible copyright order should rationally assign rights and responsibilities among the stakeholders to construct a trade or market mechanism that is capable of inspiring creators whilst facilitating the distribution and consumption of digital content products. As for the regulatory order, innovations in regime and policies are required to cater for any new particulars of network media.

This chapter proposes three principles for regulating the digital content industry: 1) Separating the regulation of content from the network to

ensure the openness of networks and communication channels, specifically the openness of industry entrance. 2) Adopting a register-approval instead of a licence-based system for market entrance. 3) Abandoning or removing the application based preconditions for network content by setting up enforceable standards for content legality. These principles will change subject-orientated regulations on the digital content industry to behaviour-oriented regulations.

As the digital content industry is an integrated and inclusive industry, it is necessary to coordinate or merge the current framework of disparate government functions. The Chinese government may find this challenging, because the development of the digital content industry heavily depends on forces operating inside the industry itself. It is not only impractical but also impossible to solely rely on the government to control cyberspace and its social intermediaries - industry self-discipline should come into effect. A dual governance mode combining government regulation with industry self-regulation will have significant consequences for the digital content industry.

CONCEPTS AND THE ROLE OF THE DIGITAL CONTENT INDUSTRY

Digital Content Industry

The content industry takes information resources as an object of labour and provides cultural products and services. Some countries rephrase the content industry as the creative industry, cultural industry, copyright industry, or even entertainment industry because of its characteristics of creativeness and culture. The 'content' is a general description of the cultural products, wares or cultural services that the content industry provides. As content is actually made up of cultural products, the content industry can be classified as the cultural industry, with the cultural products being disseminated through the media. In a broad sense publishing, film, radio and television are the direct distributors of cultural products, and libraries, schools and research institutions are the indirect distributors.

In the past, the content industry was dispersed in the production, distribution and exchange of information, and through regulations with the multiple administrative sectors. Through the application of the information and communication technologies (ICTs), all categories of work can now be digitised. Along with the advance of network technologies, the Internet, cable networks and telecommunication networks are converging and ICTs are becoming a communication standard. The networks are not only an integrator of the content industry but are also a catalyst for an emerging industry - the 'digital content industry'.

The digital content industry is the digitised and networked content industry. The term 'digital' emphasises the digital technology measures that were adopted in a specific phase that occurred while the information content was being processed.

Digital Content Products

The notion of "digital content products" is at the core of the digital content industry, because all the activities in the digital content industry centre on digital products. While there is no international classification of digital content products, according to the practices in China digital products can be roughly classified as:

- (1) Digital audio and video, including CD/VCD/DVD, online music and digital TV;
- (2) Digital publishing and archiving, such as e-books, databases and digital advertising;
- (3) Digital learning, including development tools for learning content, developing services and educational products;
- (4) Digital games, for example television and personal computer games;
- (5) Computer animation, such as 2D/3D animation and FLASH; and

- (6) Digital application products, which include entertainment products and services, information services, system integration products and services.

The Chinese digital content industry mainly consists of the production, distribution and trade of those six classes of digital content products. The content industry consists of the traditional content industry which includes book publishing, newspapers and magazines and the digital content industry which is also known as the network cultural industry or network content industry.

The *Interim Provisions on the Administration of Internet Culture* published by the Ministry of Culture in 2003 (*Culture Provisions*) puts forward an Internet cultural industry which is virtually a counterpart of the digital content industry identified in this chapter. The second paragraph in the *Culture Provisions* defines the Internet cultural industry as: ‘The Internet cultural product means those cultural products that are produced, disseminated and circulated via the Internet. They mainly include: (1) network audio and video (for example VOD, DV) specialised for Internet dissemination, network games, network performance scripts or menus, network art works, network cartoons and animations; (2) traditional audio and video digitised products, games, performance scripts and art works. These digitised products are then duplicated and communicated through the Internet.’¹

Activities that involve providing these cultural products or services to the public through the Internet are considered to be network cultural activities according to the *Culture Provisions* or digital content activities according to this chapter. Network cultural activities mainly include: (1) creating, duplicating, importing, trading, leasing and playing Internet cultural products; (2) publishing cultural products on the Internet, or transferring them through the Internet to personal computers, telephones, mobiles, radio receivers, televisions, game players or other terminals for users to browse, read, watch, use or download. (3) exhibiting or completing activities for Internet cultural products. Persons

¹ See the *Interim Provisions on the Administration of Internet Culture*, which were examined and adopted at the ministerial affairs meeting of the Ministry of Culture on March 4, 2003, and came into force on July 1, 2003.

or entities providing Internet cultural activities are called *Internet information service providers*.

Digital Content Industry as a part of a National Informationisation Strategy

The digital content industry is related to the computer network, which first became popular in the 1990s. The term 'Informationisation' is used to represent the process of ICTs applying to the information society.

Informationisation means fully utilising ICTs in business, government or social activities.² The 'National Informationisation Development Strategies in the Year 2006-2020' (*Informationisation Strategies*) presents a systematic and scientific definition of Informationisation as: a historical progress that fully exploits ICTs, develops and utilises information resources to promote information communication and knowledge sharing, improves the growth quality of the economy and promotes an economic and social development transformation.³

A report from a trade and development meeting of the United Nations in September 2003⁴ emphasised that network-based ICTs will be the main driver for the productivity of a nation. Information society has been a key concept for modern society, because despite how a country develops, an information society is a sane target of development.

² According to Li Boxi, *New type of road to industrialisation* <<http://www.cas.ac.cn/html/Dir/2003/08/19/9471.htm>> at 15 January 2007, one typical definition of informationisation is that informationisation is a process of widely applying information technologies and electronic information devices in economic and social activities, effectively developing and utilising information resources to promote economical development and social advancement, and increasing the rate of information contribution to the Gross National Product. Informationisation includes information infrastructure, information technologies, information industry and information application and service.

³ On 3 November 2005, Premier Wen Jiabao convened the Fifth Session of the State Informationization Leading Group, discussing and approving in principle the *National Informationization Development Strategy 2006-2020*. For the Chinese version of the *Informationization Development Strategy*, see http://news.xinhuanet.com/newscenter/2006-05/08/content_4522878.htm.

⁴ See UN Conference on Trade and Development, '*Provisional Agenda and Annotations*' <http://www.unctad.org/en/docs/c3d57_en.pdf> at 14 November 2007.

Obviously informationisation is closely related to the information industry. The information industry generally includes all trades that engage in the research, development and application of information resources, or are involved in the collection, creation, process, communication, and storage and trade activities of information as a result of ICTs. The information industry is ranked as the fourth most important industry in developed countries.

In China the information industry was initially only associated with ICTs and the manufacture of related devices, for instance the information technology industry.⁵ However the extent of the information industry has been greatly expanded and now the *Informationisation Strategies* arranges the digital content industry within the realm of the information industry. Developing the digital content industry has become an important part of the Chinese informationisation strategies.

Digital content industry as a key strategy of a creative nation

A report from the Sixteenth National Congress of the Communist Party of China⁶ declares that informationisation is the inevitable choice in industrialising and modernising China. We should insist on a new industrialising road with informationisation being the driver for industrialisation and industrialisation being the accelerator for informationisation. This new industrialising road emphasises the innovation in science and technology and the role of informationisation in constructing a creative nation.

President Hu Jintao presented a blueprint of the creative nation at the national 2003 conference on science and technology. Generally a creative nation ranks scientific and technological innovations as a fundamental development strategy, and maintains strong competitive advantages by greatly improving its innovation ability in both science and technology.

⁵ The information industry with respect to information technologies has four main categories of trade: manufacture, software, communication and IT services.

⁶ See *Resolution of the Sixteenth National Congress of the Communist Party of China on the Report of the Fifteenth Central Committee of the Communist Party of China*, Adopted by the Sixteenth National Congress of the Communist Party of China on 14 November 2002, <<http://www.cctb.net/wjig/wxb/wxbkycg/200310230011.htm>> at 14 November 2007.

Innovation is closely related to the abilities of information processing. In this area ICTs greatly accelerate the access, process, storage, distribution and sharing of information. Information is the source of innovation, especially considering that the activities of information distribution and information services, specifically the digital content industry, are directly related to innovation. Practices and experiences from other nations have revealed that the three key factors to promote innovation are the: digital content industry and its exploitation of information resources, information and communication networks and ICTs.

CHALLENGES OF LEGAL ORDER FOR THE DIGITAL CONTENT INDUSTRY

As networks are becoming the predominant media for digital content, industry order in some sense is the order of network media. There are two basic facets to the order of network media: firstly, copyright order, which is in the realm of private laws, determines the rules for network content dissemination; secondly regulatory order which regulates trade and parties' behaviours, mainly involves market entrance and content inspection.

Challenges of the Copyright Order

Digitised works and digital works

All works can be digitised. Multimedia works cover the whole spectrum of cultural products.

ICTs can be used not only to digitise works but also to create digital works directly. A piece of digital work may integrate text, audio and video into a kind of multimedia product, and it may also change an existing work in traditional expression format into a series of binary numbers with the help of computers. Digitised works differentiate from the original work in expression, storage and communication. Pure digitisation does not mean producing a derivative work but rather duplicating that work. For this reason digitisation becomes the exclusive right of the copyright owner.

Four basic characteristics of digital works (used as a collective term for both digital works and digitised works in the following text of this chapter) are that they are: (1) easy to duplicate exactly; (2) easy to modify or edit; (3) not self-displayed (an electronic system is required to display the content); and (4) easy to communicate through networks.

Network communication

In terms of the delivery method, communication of information on the Internet can be divided into:

- (1) Uploading works that did not previously reside in cyberspace to a network server (website or BBS) for other people to download or browse.
- (2) Copying works from one network server to another network server for other people to download or browse.
- (3) Uploading works that did not reside in cyberspace to a hard disk to communicate to other people by email.
- (4) Setting up links to works on other network servers.

The network communication of digital works cannot be separated from replication. This differentiates network communication from traditional media; where works communicated through mediums such as radio or television leave no imprint in the receivers. However digital works have to be temporarily or permanently replicated as soon as the information is cached, stored or accessed.

Network communication does not need physical duplicates, however the network communication audience may possess electronic or digital duplicates. The particulars of network communication rest with its two effects of carrier-based replication and distribution, even though it is a non-carrier communication.

Network communication makes it more convenient and efficient to disseminate and use digital products. However, it also incurs more risks of copyright infringement. Issues in network communication have raised challenges to traditional copyright rules.

The Copyright Law has established a new kind of right - the right of network communication⁷ to maintain the order of network communication. This right provides the copyright owner with an exclusive right to upload and use works on the Internet by himself or herself, or licence or prohibit others from doing the same. The right of network communication is a right that is independent from the right of replication and the right of distribution and it presents the copyright owner with the ability to control communication of works to the public via the Internet.

Network communication of digital works challenges the copyright law

To encourage the production of works, the copyright law provides authors with exclusive property rights in a specific time period, while various limitations and exceptions to the copyright are legally preserved for the benefit of public interests; these include the limitation period, fair use, compulsory licensing system and the exhaustion principle.

Digital technologies make the replication and communication of digital works easy and inexpensive, with unlimited reproductions available of duplicates that are identical to the digital work. Once the digital works are transferred to the network, each person has the potential to distribute or sell the digital works to possibly numerous clients. Technological measures are in place to protect copyright by preventing unauthorised access or replication of digital works, with copyright laws of other nations acknowledging the legal validity of these measures. The abuse of such technological measures will, however, result in the privatisation of public information and the excessive control on the private activities and choices of technology users, with their privacy, property and other rights attacked.

Providing as many possible channels through which to access digital works, while maintaining an adequate control over their replication, is a challenge to the *Copyright Law* in this digital age. In the digital content industry, the regulation of the right of network communication is of a

⁷ On 27 October 2001, the Standing Committee of the National People's Congress passed the decision to modify the copyright law. The *Copyright Law* art 12 (1) formally defines the 'right of communication on information networks' as the right to provide works 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.

primary order. In this order there may be a long information communication chain (the length of which may vary) between the copyright owner and the final users or consumers. The roles of all the stakeholders involved in the chain, such as the author, distributor, communicator and the consumer may alter, overlap or even converge. These facts complicate the settlement of interests.

In 2006 China issued the *Regulations on the Protection of the Right of Communication through the Information Network* to accommodate the network situation. This Regulation tries to protect the reasonable interests of the author, distributor, communicator and the public. However the Regulation needs to fully understand the network communication process and the business models involved. In this area it remains possible to improve the Regulations on network communication.

Challenges to the order of industry or media regulation

The Internet acts as a medium of communication for digital works and through this the Internet raises a few special issues and new problems for media regulations.

Network medium

Media allows for the dissemination of information or culture, and in practice it is often considered as any means of mass communication.

For the convenience of discussion, information activities that occur on networks will be divided into two types: the communication type such as email service and online trade platform and the media type such as database services and audio and video downloading services. The information activities of the communication type target functional information that has no commercial value, whereas the information activities of the media type target product information that has commercial value. Networks function as traditional media when they are used to communicate product information and so they will be regulated as media only when they are communicating digital works or cultural products.

Any network service that engages in media type information activities belongs to the digital content industry. The Chinese content industry is

transforming from the political to the industry realm. This transformation has not yet been completely implemented, with the framework of policies and regulations adapted for the content industry still being established. The process of transformation is aggravated by the rapid emergence of network media because the existing rules and regulations of the media industry are challenged by the open and interactive nature of network media.

Characteristic of network media

Network media has its own distinction, which provides network media with both advantages and disadvantages.

(1) Openness and subject uncertainty. Anyone may become the host of media, for example every website is capable of communicating information to the public. Any website owner can be a media (person) if there is no qualification restriction imposed. The network media is not a traditional means of communication by regulated entities to the public; instead network media is socialised mass communication.

(2) Huge volume of multimedia information. Theoretically, network media has unlimited storage and communication capacity (although it has a limited communication bandwidth) and an unprecedented capability to search content. Network media can also accommodate any digitised information irrespective of what form the digitised information was originally in.

(3) Fast spread speed without a time limit. The spread speed of network media goes beyond any other media making it easy to broadcast live, play back and play on demand.

(4) Almost infinite extent of network dissemination. Cyberspace has no national boundaries and is only limited by the physical distribution of network access points or devices.

(5) Interaction. Network media is media of users and allows any user to be an active host. Because of this the Internet has changed how the right to speech is distributed.

Interaction and openness are the two essential characteristics of network media. These two characteristics turn network media into a media of users, or an audience communicating their own works and ideas to the

public, alongside those few media operators that communicate or provide content to the public. The user-generated communication mode has some disadvantages: when any person can freely publish or communicate news, ideas or personal works, this allows for information of low credibility or low quality to freely surge over our society.

Network challenges media regulations

In the current regime of media regulation, the media operators' qualification, communication behaviour and communication content are all under control or inspection. Such a regulatory regime cannot be directly applied to network media for various reasons:

- (1) How to ensure the authenticity and politics of network news? The regulation that operated for news with traditional media does not apply to network media.
- (2) How to censor the works of network media?
- (3) How to control network publishing? China has a harsh regime for traditional publishing which includes: an examination-approval system, obligations on administrative agencies and liability for compensation afterwards. In the network environment, publishing activities are greatly expanded on a longer spectrum (for example databases, e-journals, e-publishing, e-libraries). Whether all these activities can be regulated and how the regulations should be implemented are issues that should be studied further.

The Challenges of the convergence of networks to media regulation

The emerging broadband industry provides opportunities and incentives for the voice, data and video networks, or more specifically the telecommunication, Internet and CATV networks to converge. Broadband applications in areas including business, entertainment, and personal use are demanding more diversified multimedia content. The possible convergence of networks would be a convergence of business rather than technologies.

First, services from operators of traditional telecommunication networks have expanded from providing voice or data telecommunication to providing broadband Internet service and have further expanded with the provision of content services. With the advance in communication

technologies, the point-to-point telecommunication business model has evolved to a large-scale content communication model. Second, the business scope of broadcasting and television providers has expanded from video broadcasting to broadband data and voice services. The broadband information network and its technologies provide a fast, large-scale communication platform for voice, data, video and image together. Because there is no separate public internet in China and the computer network and telecommunication network are both under the administration of the Ministry of Information Industry, the convergence of the three networks essentially involves only the convergence of the telecommunication and CATV network.

As the Internet rapidly advances, there are at least three promising trends: (1) the convergence of user created content and professional content; (2) the convergence of global browsing through the network with global gaming through video; (3) the convergence of the Internet and television.

The convergence of network technologies and business models challenges the regulation regime for the Chinese digital content industry. In terms of the government regulatory body, the telecommunication trade and the radio and television trade are under the Administration of the Ministry of Information Industry (AMII) and the State Administration of Radio Film and Television (SARFT) respectively. With regard to the regulations, the economic regulation on communication and the network infrastructure is the key regulation for telecommunication, while the provision of healthy content and ideological issues has more emphasis for the radio and television administration. The separate administration regimes are frustrated by the convergence of networks and business, which require a coordinated or innovative regulation system. As a result network operators will be required to have innovative business models and content provisions to cater for the broadband applications.

POLICIES AND LAWS FOR DEVELOPING THE DIGITAL CONTENT INDUSTRY

Copyright law

The copyright order is the basic order of the digital content industry. How we apply copyright law to network communication in a way that balances the interests of the authors, the public and other subjects involved in network communication is an important legal issue in developing the network content industry.

Network content products can be categorised into copyrightable works and non-copyrightable information products. Non-copyrightable information agreements are a common occurrence in the network environment. These agreements are founded on the convenience of others obtaining information from the information collector, producer or creator. While these agreements are beneficial to Internet prosperity, they may have their legal validity challenged in certain cases, especially considering that contract laws and unfair competition laws affect the non-copyrightable information trade.

Copyrightable works, which are a dominant part of the network content industry, are subject to copyright laws. To promote the development of network media, copyright laws should be adapted to the network environment. The fundamental reasons for doing so are:

- (1) Protecting copyright will boost production for the network content industry;
- (2) To protect the interests of information collectors, for example database owners;
- (3) For the reasonable allotment of liabilities among publishers, communicators or distributors and media intermediaries (for example search engines); and
- (4) Establishing fundamental regulatory policies for network media to improve the authenticity, reliability and quality of information.

Regulations on digital content industry and market entrance

Separated regulations on content and converged networks

Under the traditional system, the administrative agencies responsible for the content industry and the cultural industry have been the Department of Culture, the State Administration of Radio, Film and Television and the General Administration of Press and Publication. These agencies are responsible for the administration of both media and content. Due to the integration of business and the convergence of networks, networks can carry and disseminate various types of content. However the communication methods can no longer differentiate between the different types of trade and so only the content or service will be diversified. This will cause conflicts between the administrative authorities if the original administrative agencies intend to control different content within the same network. For example, the Department of Culture in the *Culture Provisions* defines the domain it controls by network cultural activities or cultural products. As cultural products cover the audio and video programs of television or film, the jurisdiction of the Department of Culture conflicts with the jurisdiction of the State Administration of Radio, Film and Television.

Establishing a regulatory regime for advanced information and network technologies is critical for the smooth convergence of the three networks listed in the 'Eleventh Five-Year Plan for National Economy and Social Development'.⁸ In order for the three networks to smoothly converge it is necessary to create a regulation regime suitable for advanced information and network technologies, in terms of the regulation target and content, the regulatory agency and the policy and implementation measures. Zhou Hongren, an expert with the national informationisation consulting committee, proposed three constructive suggestions:⁹

- (1) Adopt a 'generalised telecommunication' policy to set up a common regulatory system for all telecommunication signals,

⁸ See the Outline of the *11th-Five-Year Plan for National Economic & Social Development of PRC* <http://ghs.ndrc.gov.cn/15ghgy/t20060529_70793.htm> at 12 November 2007.

⁹ See Zhou Hongren, *On the Promotion of Digital Convergence*

<<http://digi.it.sohu.com/20061224/n247228150.shtml>> at 12 November 2007.

like the Federal Communication Committee (FCC) of America and OFCOM in the United Kingdom, in order to replace the original classification of telecommunication networks on the basis of physical attributes or business attributes.

- (2) Adopt an open market policy to ensure the telecommunication and CATV market are open to each other. Examples of this are the *Telecommunications Act* of America and the strategies of the European Union in the 'Road to Information Society' and the 'Directive on a Common Regulatory Framework for Electronic Communications Networks and Services'.
- (3) Adopt separate regulations for carriers and content policy to improve the efficiency and validity of the administration.

These policies appear to agree with the development trends of network media. Separating the network (carrier) regulation and the content regulation may have future significance. The convergence of networks and business will result in the convergence of trades and traditional trade-based regulations may not adapt to the advanced technologies, or the evolving markets and the requirements necessary for efficient administration. A possible solution in China may be a new independent regulations regime. The CATV and telecommunication networks could have a common regulatory framework of communication, with content regulation still being administered by the State Administration of Radio, Film and Television, the General Administration of Press and Publication and the Department of Culture. A common, independent communication regulation system will benefit the construction of network infrastructure and the economic efficiency of the networks.

Regulations on the market subjects

As an open network the Internet forms a virtual space of self-organisation in a sociological sense, which contradicts the traditional subject-oriented media regulation system. Media subjects are rigidly approved under the traditional media regulatory framework. For example a publishing company before it can commence operating, is strictly examined before it is approved. A specific administrative agency will then be in charge of the publishing activities of the company. Both the administrative licensing system and the charge system operate together to implement strict administration on media subjects, so it is

possible to regulate the few media subjects using the strict market entrance system.

However such a regulatory philosophy will damage the self-organisation and openness of the network media and as a result its development. It has been widely recognised that regulations on network media demand innovation to meet its requirements. In the report 'Digital Tornado: The Internet and Telecommunication Policy' issued by the FCC in March 1997,¹⁰ two opinions were given after a comparative analysis between network media and traditional media: (1) Government policies should avoid unnecessary regulations; and (2) Traditional media regulations would not fully complement network media.

One question to be considered is who is qualified to engage in traditional media activities through the use of websites? Is a strict entrance system still practical? The *Culture Provisions* imposes different regulations on commercial Internet cultural activities and non-commercial activities. A commercial Internet cultural entity (information service provider) has to obtain two subject licences – the 'Value-added telecommunication business licence' and the 'Network culture business licence' from the Telecommunication Administrative Agency and the Culture Administrative Agency respectively – before it can commence operations. A non-commercial Internet cultural entity only needs to be entered into a record maintained by a provincial cultural administrative agency. The implementation effects of such policies are not yet clearly understood. In an instinctive sense, such a strict market entrance system may not be applicable. An approval mechanism may be a more effective means of entering the digital content industry. Any entity that satisfies certain qualifications may enter the market, after which they will be subject to the 'win-lose' rule of the market mechanism.

Another question is whether all or certain network cultural activities should be authorised or licensed if all entities (of some qualification) are allowed to enter the market? One way to maintain the market order in such a situation is to clearly stipulate the activities the subjects cannot

¹⁰ Office of Plans and Policy (OPP), *Working Paper Series 29: Digital Tornado: The Internet and Telecommunications Policy* (1997) <http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29pdf.html> at 14 November 2007.

broadcast. Such activity - or behaviour-oriented regulations – will be difficult for administrative agencies to manage because they are used to subject-oriented regulations.

Implementation issues of regulations on network media

All cultural products can be distributed through networks and this may create confusion in the traditional order of cultural dissemination with the existing regulations on cultural industry. With broadband becoming more popular and networks converging, network media is becoming a media of text, video and audio. Establishing a new order for the network cultural industry is becoming a critical legal issue in developing the content industry and promoting innovation. Key problems in this area include how to commence regulating network content, regulating the network communication of digital products and regulating network media.

Regulations on network content

As previously noted, the network is a mass media of interaction and openness, because of this it is necessary for a country to adequately control the dissemination of speech and news through mass media, to regulate the social order.

The network is content neutral, but it helps to widely distribute and quickly disseminate information of positive value or negative value (for example pornography or slander). Constructing a healthy and positive cultural network environment is required for the development of the network content industry. A positive and flourishing network culture implies that there is an advocated network civilisation, enforced network morals and behaviour criteria, thriving network cultural production and practices, self-consciousness and awareness of damaging content and a move away from network abuse.

It is necessary to correctly conduct relations between freedom of speech and regulating the network. Pervasive, interactive and open networks have an unprecedented potential for sharing and publishing the speech and ideas of individuals, and this allows networks to become self-media. However because the network is prone to abuse, regulations on network content and speech are inevitable and necessary. These regulations should have regard to freedom of information and the independence,

pluralism and diversification of media. Administrators should be wary of stifling freedom of network speech with content regulations that are too strict. A more effective approach might require people to self-regulate their own network information activities.

To achieve these objectives legislation should prohibit and punish activities that involve distributing information which is damaging national safety, youth health and social ethics. However it is also necessary to enhance the education of network morals and behaviour criteria in order to avoid the abusive use of ICTs. Any website that provides an information service is still subject to the *Regulation on Internet Information Service of the People's Republic of China* which was released by the State Council in 2000.¹¹

President Hu Jintao put forward five proposals for enhancing the construction and administration of the network culture. One proposal is to build an Internet information distribution order through the self-discipline of the industry, synchronised legal regulations and social surveillance.

As the network content industry in China has started to grow, the regulations on content should be oriented to foster the market and facilitate the development of the industry.

Regulations on network communication

When traditional cultural products are digitised and communicated through the network, are the original regulations on the cultural products still applicable? Here network videos and audios are taken as examples.

Currently, there are two departmental regulations related to network videos and audios:

- (1) The *Management Measures for Transmitting A/V Programs over the Internet and Other Information Networks* was released in July 2004 by the State Administration of Radio, Film and Television. This regulation, which covers all kinds of communication methods over digital networks, states that qualified entities should obtain

¹¹ See Internet Information Services Management Regulations <<http://www.usembassy-china.org.cn/sandt/netreg2000.html>> at 14 January 2008.

a licence from the administrative agency before commencing any A/V program business through the information networks.

- (2) *Some Opinions on the Development and Administration of Network Music* was issued by the Ministry of Culture in November 2006. Key points in this regulation are the strict licensing system for market entrance and strengthening content censoring. The underlying reasons for such a strict regulation system include the low quality of network music products, serious copying infringement and piracy.

Some important problems arising from the current practices used to regulate the network content industry include:

- (1) The division of responsibilities in the administration of network culture. Digital cultural products tend to have the same appearance, which may confuse and blur the domains of the culture, news and publication, or radio, film and television administrative bureaus.
- (2) The feasibility of administrative measures for network culture. Digital products are infinitely reproductive, rapidly updated, numerous and diversified. They can be distributed through different alternative communication channels, they have a large number of subjects and their subject roles are commutable and changeable. These factors challenge the feasibility of a specific regulatory measure.

CONCLUSION

In summary, the rise of network communication culture and creativity (as this chapter highlights) demands a re-assessment of the current copyright law and regulatory structure covering the dissemination of digital content in order to promote the potential of digital innovation.

INTERNET CONTENT POLICY AND REGULATION IN AUSTRALIA

Peter Coroneos

INTRODUCTION

It can generally be observed that the propensity for creating new internet content regulation within a country results from the interaction of three forces. Firstly, there are the cultural values and institutions within a country. 'Institutions' include the traditional media who have historically acted as drivers of the debate about the harms of being online. Sometimes they are more sensationalist than is justified. In any event, these values and institutions shape the political debate and determine the enthusiasm with which legislatures bring forth new laws, in response, as it were, to public concern.

In Australia, the traditional media have been very active in pointing out the 'dangers' of the internet. To a large degree they have played on the fears of a public which is still coming to terms with the internet revolution. Although the number of Australians online has progressively grown over the last 10 years, from a minority of mainly young, affluent early adopters, to today where the internet is effectively a mainstream medium with almost three quarters of the population online,¹ still the depth of user experience remains thin enough that we see the occasional headline proclaiming the menace of some new internet threat or other.

This is enough to fuel minority groups with their own agendas, to proclaim the internet a risk to traditional values/our children's safety/national security/the future of their business model or whatever

¹ Australian Bureau of Statistics, *Report 8153.0 - Internet Activity* (2007)
<<http://www.abs.gov.au>>.

cause suits them. This may play all the way through to the political level where we eventually see new laws proposed. This dynamic is certainly not unique to Australia, but we have nevertheless seen the mechanism operate here with sometimes startling results.

A variant on this dynamic also applies. Politicians sometimes announce policy positions in response to what they anticipate are popular concerns. The results are the same – new laws, sometimes of questionable utility, but supported for their symbolic and political value. Regrettably, opposition to these policies which are advanced on ‘motherhood’ grounds is portrayed as a dereliction to duty to children. This tactic has been used to stifle debate and ensure greater cross party support than the problem actually justifies.

A classic example of this process is seen in the lead-up to new legal provisions enacted in 2007.² These changes were prompted primarily by a media storm in 2006 centring around the Big Brother so-called ‘reality’ television show and its related website.

The website streamed content considered more risqué than that which could be broadcast over television. In one now infamous episode, two of the show’s participants engaged in behaviour of a nature which many would find offensive, though it fell well short of the kind of typical graphic sexual content available online. The ensuing media sensationalism moved politicians to promise tougher laws to ensure that no future conduct of the nature complained about could be made accessible to minors.

The irony in all this was that there was no evidence that minors had actually accessed the site. By all accounts since it was streamed in the middle of the night, it seems that almost no one saw it live – excerpts were endlessly replayed on television (by competing networks presumably to raise community ire). The lack of demonstrable and widespread public harm did not stop a knee-jerk reaction, made worse by the impending election.

Secondly, the ease with which legislation can actually be enacted in various legal systems will determine the extent to which political activity

² *Communications Legislation Amendment (Content Services) Act 2007* (No 124, 2007), <http://www.austlii.edu.au/au/legis/cth/num_act/clasa2007544/> at 14 January 2008.

translates into actual laws. Some legislative systems, such as the US are, by design, resistant to lawmaking. Presidential vetoes, layered committee structures and referral processes serve as a brake on precipitative action, just as the constitutional drafters would have intended.

In other systems, such as Australia's however, the chance outcome of elections and ultimate balance of numbers in the legislature can give a Bill clear passage with only perfunctory scrutiny and debate. That has certainly been our experience in the last three years, and before that deals struck with balance of power interests in the Senate essentially delivered similar outcomes.

Thirdly, constitutional considerations such as guaranteed freedom of expression act as a check on whether, and to what degree, new laws can come into effect, or survive legal challenge. Again, comparing Australia to the US, we have seen examples of laws which have passed in the former only to be struck down on First Amendment grounds.³

In Australia's case, no constitutional guarantee for free speech exists, other than that implied by the courts (and confined, in our case, to political discourse). Thus, there is little to be done once a law is passed other than to consider its implementation and its enforcement.

As a result of the interplay of these forces, Australia has been saddled with comparatively strict laws relating to internet content and its access. The following analysis considers why and how these laws have arisen and how they have been implemented in practice.

THE BROADCASTING SERVICES ACT

In Australia, the principal legislation covering internet content is the *Broadcasting Services Act* ('Act'). Originally enacted in 1992 to manage issues such as television broadcasting, license conditions and the creation of a statutory regulator the *Australian Broadcasting Authority* (now called the *Australian Communications and Media Authority or ACMA*⁴), the

³ See for example *Reno, Attorney General of the United States, et al v American Civil Liberties Union et al* 521 U.S. 844 (1996) <<http://supreme.justia.com/us/521/844/case.html>> at 25 January 2008.

⁴ For the remainder of this chapter, the acronym 'ACMA' will be used.

Act has been expanded over time to cover an ever increasing range of content across converging media platforms.

The 1999 amendments to the *Act* extended the powers of the regulator to oversee the transmission and hosting of internet content in Australia.

In large part, the legislation followed the framework outlined by the Federal government in 1997 which articulated the principles ('the Principles')⁵ by which online content should be regulated, and was designed as the government's response to a perception that the community, and particularly, Australian children, needed protection from content which was likely to harm them.

The Explanatory Memorandum to the *Act* stated:

Concern has been expressed both within the community and at government level about the nature of material that may be accessed by means of online services, specifically in relation to the perceived ease of access to material that is either pornographic or otherwise unsuitable for children...

The objective of further proposals is to ensure that the regulatory framework is commensurate with community concerns about online content, particularly that the range of material to be controlled is consistent with the range controlled in conventional media. The Government also considers that the complaints process proposed in 1997 should be revisited to ensure that an unreasonable onus is not placed on service providers and to provide for more timely and efficient handling of complaints to prevent access to material that is of serious concern.

The amendments expanded the Objects of the Act⁶ to give voice to three additional purposes:

- (a) to provide a means for addressing complaints about certain Internet content; and

⁵ See <<http://www.anu.edu.au/mail-archives/link/link9707/0114.html>> at 25 January 2008.

⁶ Under the Objects clause in s 3 (1) of the *Act*.

- (b) to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- (c) to protect children from exposure to Internet content that is unsuitable for children.

The attainment of these aims was not absolute, but was qualified according to the following proviso which was also inserted in a new subsection 4 (3) of the *Act*:

The Parliament also intends that Internet content hosted in Australia, and Internet carriage services supplied to end-users in Australia, be regulated in a manner that, in the opinion of the ACMA:

- (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on Internet content hosts and Internet service providers; and
- (b) will readily accommodate technological change; and
- (c) encourages:
 - (i) the development of Internet technologies and their application; and
 - (ii) the provision of services made practicable by those technologies to the Australian community.

These words essentially vested a discretion to the ACMA that allowed it to perform a balancing exercise, something industry later relied upon when seeking to have codes of practice registered.

While it recognised that the internet was difficult to regulate, the government believed that this should not prevent an attempt. There was a view that developing technologies would eventually make this easier, but for now, industry should do all that was feasible.

However, in a significant departure from the 1997 Principles which had recognised that ‘on-line service providers ... [could not] be held responsible in every case for material they have not created’, the

legislation raised the bar to create a default obligation upon ISPs to use *all reasonable efforts to prevent access to content hosted offshore*. This would occur in circumstances where ISPs were notified of the existence of content which the government deemed to be unsuitable for domestic consumption.

For the industry's part, this requirement represented a potential threat to its very existence. ISPs argued that any requirement for them to block offshore hosted content would be expensive and would potentially slow down the Net and the development of the e-commerce in Australia. The availability of circumvention technologies and the inaccuracies of current filter products were also cited as reasons why the legislation would prove ineffective.

Free speech advocates bemoaned the censorship of the only medium that could otherwise guarantee the free flow of expression and political ideas. To them this was a dangerous precedent and triggered swift and vocal international condemnation across the Net. Others found it offensive that one of the Principles articulated by Ministers in 1997 that 'on-line services should not be subject to a more onerous regulatory framework than "off-line" material such as books, videos, films and computer games' should be so wantonly abandoned.

The *default* provisions of the legislation vested in the ACMA the right to issue notices, and to direct ISPs and content hosts to comply with industry standards that would be devised to respond to content of which the ACMA becomes aware. The scheme is complaints driven by design, that is to say, the ACMA would not normally undertake own-motion investigations, but only responds to complaints about Internet content reported to it. It has a discretion to disregard complaints that are in its opinion frivolous, vexatious or 'likely to undermine the administrative processes' of the regime.

The ACMA was also given the power to have content evaluated by an independent body, the Classification Board, and to form views as to whether or not the content ought to be prohibited on that basis.

WHAT TYPES OF CONTENT ARE REGULATED?

Two classes of content are proscribed by the Act: ‘Prohibited’ and ‘Potential Prohibited’ content. The first comprises material which is Refused Classification (RC), or is classified X or, in the case of domestically hosted content, is classified R *and* is not also subject to age verification measures.⁷ ‘Potential prohibited’ content is content that has not been classified but were it to be, gives rise to a substantial likelihood that the content would be Prohibited content. This alternative was included to provide the ACMA with the opportunity to undertake quick action, in particular where obviously illegal content (for example child pornography) is reported to it.⁸

Decisions of the ACMA are subject to Administrative Appeal Tribunal merits review, and ‘interim’ takedown notices in respect of domestically hosted content are reversible where not subsequently found by the Classification Board to be prohibited.

The *Act* defines ‘internet content’ to include information that:

- (a) is kept on a data storage device; and
- (b) is accessed, or available for access, using an Internet carriage service;

⁷ Further amendments to the *Act* in 1997 have extended Prohibited Content to include MA15+ content where it is provided in the form of video as part of a commercial content service (other than news or current affairs) and not subject to a restricted access system to prevent persons under the age of 15 years from accessing it.

⁸ The following categories of Internet content are prohibited for hosting on servers within Australia:

Content which is (or would be) classified RC or X by the Classification Board. Such content includes: material containing detailed instruction in crime, violence or drug use; child pornography; bestiality; excessively violent or sexually violent material, real depictions of actual sexual activity; and Content hosted in Australia which is classified R *and is not subject to a restricted access (eg. age verification) system* which complies with criteria determined by the ACMA. Content classified R is not considered suitable for minors and includes: material containing excessive and/or strong violence or sexual violence; material containing implied or simulated sexual activity; or material which deals with issues or contains depictions which require an adult perspective.

but does not include information that is transmitted in the form of a broadcasting service.

This appears to be a very broad definition; however it was circumscribed by the exclusion of email, live (ephemeral) content, newsgroups and FTP traffic.

The justification for these carve outs related to either the private nature of communications, in the case of email and FTP traffic, or the temporary nature of the content in the case of live streams, chat, and posts to newsgroups. Since neither private nor temporary content is really that conducive to the complaints-based approach taken in the *Act*, the government conceded that inclusion of these elements would add little to the scheme beyond making it harder to enforce.

IMPLEMENTING THE BROADCASTING SERVICES ACT

The preceding analysis might suggest that the legislation would be in practice as draconian as some have feared. But in the period since its implementation, events have proved otherwise. The key elements which ameliorate the least workable aspects of the legislation are to be found in the concessions to industry secured by last minute amendments negotiated primarily by the IIA on behalf of the industry, and supported by both the Government and the Opposition in the Senate.

Most important of all are the provisions in the *Act* which allowed for the development of an alternative scheme which substitutes for externally imposed regulatory action, particularly in regard to blocking of content hosted offshore. The legislation allowed for industry to develop so-called 'alternative access prevention arrangements' though registered codes of practice. As a result, the ACMA's role has been largely limited to domestic content, with industry's own approach determining the practical day-to-day obligations of ISPs. The modified regime does not require any form of self-censorship or pre-emptive action on the part of ISPs.

R-rated content is allowed to be hosted in Australia, provided it is behind some form of age verification mechanism. The ACMA settled on

a combination of credit card details and the use of a PIN to constitute a *de facto* age barrier. The latter is issuable upon provision of sufficient personal information by the user to allow the issuer (that is, the adult content provider), a reasonable degree of confidence about age.

While this is consistent with the practice of adult sites operating overseas, in our view the exercise has become somewhat academic since the small amount of adult content which was previously hosted in Australia has largely moved to the constitutionally protected hosting sites in the US, or other jurisdictions.⁹

CO-REGULATION AND THE INTERNET INDUSTRY ASSOCIATION CODES OF PRACTICE

How they do these industry codes, which now form such a central part of Australia's online content regulatory regime, actually work?

To answer this question, it is first necessary to understand the concept of co-regulation as it applies in Australia. Under our co-regulatory model, which arose from the 1991 deregulation of the telecommunications sector, industry first develops codified rules to address known consumer risks. In some cases consumer representatives form part of the code-making process, sometimes not. In any event, a public consultation process follows the publication of draft codes, after which time the relevant government regulator evaluates them to ensure they provide adequate community safeguards and have addressed issues raised during the consultation. Once the regulator approves the codes, they become enforceable as if they were law. There are substantial penalties for non-compliance, brought by the regulator and enforceable usually in the Federal Court of Australia.

The IIA took advantage of the degree of self determination afforded by the legislation under the doctrine of co-regulation to develop three

⁹ According to figures provided by the ACMA to the Australian Senate Estimates Hearings in November 2000 for example, after almost a year after the operation of the scheme, only 99 items of content had been ordered off Australian-based servers where they had been hosted.

content Codes of Practice.¹⁰ These were registered with the ACMA in December 1999, after the requisite consultation with the public and with NetAlert, the community advisory body established under the *Act*.

In broad terms, we sought to achieve the primary objective of protecting children by requiring industry to make available to end-users the means of controlling content.¹¹ The Codes operate as the *de facto* standards by which industry meets its obligations under the online content laws. They are co-regulatory in nature because they are developed by industry and enforced by government.

We described the approach taken within the Code as ‘industry facilitated user empowerment’. The solution is designed to achieve the broad objectives of the legislation without any significant burden on or damage to the industry. The key elements of our approach include:

- legal assessments and determinations to be made by authorities experienced and resourced to do so
- education of and responsibility by parents, supported by industry
- encouraging the use of technological tools such as content filters and labelling.

It is important to note that the Codes do not impose any requirement for ISPs to engage in universal blocking of content which the ACMA deems prohibited. Rather, they require that ISPs provide end users with tools by which means they can control the access to content in the home. Schedule 1 of the Code, which was compiled after the completion of an independent evaluation of available options, identifies a range of access prevention technologies from which ISPs can select to satisfy the requirements of the Code. ISPs are not expected to absorb the costs associated with meeting this obligation. Market forces determine how

¹⁰ Available at <www.iaa.net.au>. There are three industry codes because the *Act* stipulated that up to three codes could be developed, one for ISPs providing access to offshore content, one for ISPs providing access to locally hosted content, and one for internet content hosts. These distinctions are somewhat academic given the crossover areas of activity involved. Code and Codes are used interchangeably here because the three Codes are really three codes in one.

much, if any, of the costs are passed on to end users. However, a later iteration of the Codes in 2002 introduced a further requirement that filters be supplied to users on a cost recovery basis, to keep costs to a minimum.

The suppliers of the alternative access prevention technologies (for example, filter products) who in most cases are *not* the ISPs themselves, are required to update their products and services to filter any additional material which the ACMA has classified as prohibited. The providers of the technologies are also expected to support those technologies through the provision of help lines, online FAQ's and the like. It was not the intention of the IIA in developing the Codes, that ISPs be burdened with that task, unless ISPs themselves choose to develop and have accredited access control measures for use with their own (applicable) customer base.

The registration of the IIA Codes ensures that ISPs in Australia are not required to respond to 'access prevention notices' as provided for by the default provisions of the *Act*. Indeed, such notices have not seen the light of day, precisely because the alternative (Code) scheme is in place.

In cases where material of an obviously serious nature (such as child pornography) is referred to the ACMA, the Authority will independently inform relevant law enforcement agencies in the host country through the appropriate channels. Apart from that, the industry developed Code alternatives have entirely bypassed the need for ACMA to act in respect of internationally hosted content.

For content hosts, the Code requirement of most significance is that they remove, upon notification by the ACMA, prohibited or potential prohibited content which they host in Australia. This reflects the default obligation in the legislation.¹² As is the case for ISPs, content hosts do not have to act pre-emptively, for example in vetting content for suitability, and under the legislation are protected from civil liability when acting in accordance with a takedown notice.¹³ This protection accords with the IIA's long-argued view of the need for safe-harbour for

¹² See generally Clause 37 of Schedule 5 of the amending legislation.

¹³ This is provided for under subclause 88(3) of the Schedule; ISPs are protected under subclause 88(1) where they deal with content in accordance with a registered code's procedures in relation to content.

responsible industry behaviour, and reflects similar approaches in the US.¹⁴

Other empowerment strategies, prescribed by the legislation and embodied in the Codes, involve the provision of information to end users by ISPs and hosts. The Codes stipulate the information that must be provided and contain deeming provisions, whereby ISPs and hosts can comply simply by hyperlinking their sites to an online resource created for the purpose by the IIA.¹⁵

In 2002, to further promote the empowerment solutions central to the Codes, the IIA introduced the Family Friendly ISP scheme. This licensed-based scheme entitles Code-compliant ISPs to display a 'ladybird' seal on their sites, signifying to families their entitlement to the kind of protection and assistance that the Codes mandate. Clicking on the seal takes the user to a page where they can find out about options for online safety and, if desired, obtain a filter. In the three years since the scheme commenced, over 75% of Australian internet users are now serviced by ISPs bearing the Ladybird, and that number continues to grow. The scheme is supported and promoted by NetAlert which continues in its role as a community advisory body funded by government, and since 2007 has become part of ACMA. This collaboration ensures a consistency of message to end users about options available to them.

THE 2005 AMENDMENTS TO THE IIA CODES: ADDRESSING MOBILITY AND CONVERGENCE

In late May 2005, the ACMA approved further iterations to the IIA Codes which for the first time saw an industry-wide response to the emerging issue of mobile internet content.

The changes were in response to the IIA's monitoring of the convergence of mobile and internet technologies for the previous 18 months, along with local and international market trends and increasing

¹⁴ For example, ISP acts done in accordance with the *Digital Millennium Copyright Act* 1998.

¹⁵ The relevant resource can be found at <www.iaa.net.au/guideuser.html>.

interest by regulators in the emerging risks. Accordingly, the IIA determined it was timely to develop a proactive, workable industry response to the question of children's access to multimedia and internet content via mobile devices.

The new provisions within the Codes require mobile content providers to assess content that is to be hosted within Australia to ensure that it complies with appropriate classification standards. Content which would likely be rated MA (for mature audiences) or stronger must be subject to restricted access systems which require age verification and opting in by customers wishing to access this content.¹⁶

In addition, the Family Friendly Scheme was extended to cover internet content hosts and mobile carriers who are Code-compliant. Filter companies whose solutions pass an independent testing process are also entitled to display the Ladybird seal, and to designate their products as 'Family Friendly Filters', thus tying all elements of the scheme together into a coherent and recognisable symbol of family protection.

RECENT CHANGES TO THE LAW

Further amendments in 2007 to the *Act* however, have expanded the range of subject matter to be regulated to include content accessible via mobile devices, and removed the exemption for live content by seeking to regulate live content *services*.

¹⁶ It should be noted that pursuant to a Ministerial direction in 2004, the Australian Communications Authority on 29 June 2005 issued the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No 1). This instrument applies to both carriage service providers and content providers due to the respective roles in delivering mobile content to users. There is some crossover with the *Broadcasting Services Act* and IIA Codes, but being both aware and involved in the industry response during the development of the determination the IIA ensured that the Codes registered by the ACMA were not inconsistent with the requirements of the determination – so as not to expose industry to an incompatible set of requirements. In view of the subsequent merger of the ACMA and the ACA and the passage of the *Content Services Act* amendments in 2007, it is our expectation that there will be a rationalisation of the two regimes within the next few months to simplify the regulatory landscape under which the mobile content industry now operates in Australia.

Age verification was extended to content rated MA15+ - that is, content suitable for persons aged 15 years and older. This applies to commercial content services and video services with an 'Australian connection' (that is, hosted or originating in Australia).

Again, exemptions for certain classes of content were introduced to limit the application of the *Act*. These included (as with the 1999 amendments) broadcasting services, as well as news and current affairs services; search engines, user-based content services, online trading services, voice and video calls with other end-users, SMS services, data storage and back-up services, and services specified in the regulations (giving the Minister the power to declare additional exempt classes of content or services).

A commercial nexus test which was introduced to bring certain activities into the ambit of the *Act* was reformulated during the drafting process (following pressure from industry) to exclude advertising based business models and billing relationships – so that effectively only subscription based or fee-for-content services are caught.

Mobile devices are not amenable to filtering at the device level. Most proprietary content for premium mobile services is hosted in Australia (generally developed by third party providers and supplied under contract to mobile carriers). This proprietary content is hosted within a 'walled garden' and available only to users of a particular mobile phone service.

This distinguishes the content from that which is generally available over the internet, and accessible via mobiles. For this, there is no current regulation other than takedown if that content is deemed to be prohibited content by the regulator *and* hosted in Australia.

Because of the degree of control that mobile carriers have over the content held within their own walled gardens, it was realised that the lack of filtering could be overcome by a generalised obligation to pre-classify content and take down content which might be subsequently complained about.

This is the case in relation to MA15+ content. The measures were codified in the Mobile Premium Services Initiative (which responded to

the Mobile Premium Services Determination which had been pronounced by the Australian Communications Authority).

There remain some residual challenges with the new laws which were not addressed in the amendments. In particular, user generated content potentially presents a liability for content hosts where they do not determine the content, and where no age verification is in place. This is made more complex by the requirement for age verification for MA15+ content. In the absence of a uniform age identifier, it is difficult to see how this can be achieved. Industry is proposing a number of surrogate measures to give effect to the policy intent while still allowing services to operate without disadvantage when compared to overseas counterparts. It remains to be seen if these are accepted by ACMA.

NEW DEVELOPMENTS

In spite of the continuous efforts by industry to ward off obligations for mandatory server level filtering, recent political developments suggest that some form of server based filtering will become mandated in Australia in the near future. Australia is currently preparing for a general election to be held in late November 2007.

Depending which political party wins the election, ISPs will be required to either:

- Offer the option of a filtered service to users; or
- Filter all content prior to access by users, with 'adult' content available on an opt-in basis.

These policies are not clearly defined, suggesting that the Parties may be prepared to compromise on the basis of technical and practical concerns which are likely to emerge once the election is over and the time comes for implementation.

For its part, the present Government has announced a suite of policies of which ISP filtering is only a small part. The major initiative is in fact the free distribution of client side (that is, PC based) filters for installation by end users at home which has been funded to the tune of some AU\$89 million, making it the largest empowerment measure of its kind in the world. The intent is to provide families with appropriate

technology to assist in limiting the inadvertent access by children to unsuitable material.¹⁷ Industry generally supports these measures, particularly since the cost is entirely borne by the government and there is no impact on the network.

The Opposition party has a policy which is more far-reaching. Based on the Cleanfeed project announced in the UK in 2004, the intention is for all content to be filtered by ISPs according to a list prepared by the government regulator.

There is hostility to this policy from industry and free speech advocates, the former concerned about effect on network performance and unintended consequences, and the latter concerned about the lack of transparency inherent in the process of list formation and disclosure. While the intent seems to be for child abuse images to be filtered, consistent with regulation and industry practice in Europe and Scandinavia, there are some indications that the content categories could be broader. Specifically, the Shadow Minister has suggested in policy statements that *all* adult content should be blocked by default, and only made accessible on request to the ISP by an adult account holder.

CONCLUSION

The history of internet content regulation in Australia is testimony to the highly politicised nature of the issues. On the one hand we have seen more and more restrictions being legislated. Concurrent with this has been the unprecedented rise in the dependence on the internet by ever increasing numbers of Australians. While successive ministries have sought to respond to community concern by being ‘tough on internet pornography’ and have campaigned using slogans like ‘cleaning up the Net’ the reality for most Australians is that they can access the same range of content that they always could. What has really changed are the profile and availability of empowerment tools for families. This suggests that the politicians are more interested in the symbolic power of regulation and it has been left to industry working with the regulator to translate tough laws into workable solutions. In spite of this, more

¹⁷ More information about this scheme is available at <www.netalert.gov.au>.

recent developments suggest a more interventionist approach to ISP responsibility, following events such as Cleanfeed in the UK, and ISPs in other European jurisdictions now voluntarily filtering child abuse images.

It will become clearer in coming months whether Australia is truly moving to greater reliance on intermediaries (that is the connectivity providers) to protect internet users from the perceived harms of the internet, or whether the focus will remain on end user empowerment and education. Ultimately, it is hard to avoid the conclusion that we will be left with a mix of these elements, signalling that the traditional role of common carriers and mere conduits may be drawing to an end.¹⁸

¹⁸ For further online references see *Broadcasting Services Act 1992* (Cth) <http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/> at 25 January 2008; Australian Communications and Media Authority (formerly ABA) <<http://www.acma.gov.au>>; Classification Board <<http://www.classification.gov.au/special.html>> at 25 January 2008; IIA Content Codes of Practice <http://www.iaa.net.au/index.php?option=com_content&task=category§ionid=3&id=19&Itemid=33> at 25 January 2008; IIA Guide for ISPs <<http://www.iaa.net.au/guide.html>> at 25 January 2008; IIA Guide for Families (including information about the Family Friendly Scheme) <<http://www.iaa.net.au/guideuser.html>> at 25 January 2008; NetAlert <<http://www.netalert.gov.au>>; Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No 1) <<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/all/search/CD4F1D276DF634C0CA25702F0009DAC0>> at 25 January 2008.

REGULATION OF THE INTERACTIVE DIGITAL MEDIA INDUSTRY IN SINGAPORE

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INTRODUCTION

The latest “buzz” in Singapore is interactive digital media (IDM), a diverse industry that includes technologies such as video games and interactive advertisements. In January this year, the Singapore government announced that it would target the IDM sector as one of the key growth areas for the future, and provide the infrastructure for Singapore to be educated in and exposed to this new technology.¹ The Singapore government has openly committed to setting aside S\$500 million over the next five years to develop this industry.² And to deal with the social, technical, legal and regulatory implications of this industry, on 1 April 2007, the Singapore government also set up a high level advisory council which will make recommendations to the

^{*} This paper arose in part from my oral contributions to the First Forum of the ECUPL-QUT Sino-Australian Intellectual Property Collaboration Program on Legal + Policy Framework for the Digital Content Industry, a conference held in Shanghai on 28/29 May 2007. I am grateful to Professor Brian Fitzgerald, Faculty of Law, Queensland University of Technology and Professor Gao Fuping, Intellectual Property School, East China University of Political Science and Law, for encouraging me to write this paper, for reviewing its contents and for so kindly consenting to publish it in their monograph. I am also indebted to my dear wife for serving as an intellectual partner in the constant refinement of my views in this paper and her constant support and encouragement.

¹ Alfred Siew, “Digital media: Singapore to fund research in 3 niche areas”, *Straits Times*, 11 January 2007.

² Alfred Siew, “Digital media: Singapore to fund research in 3 niche areas”, *Straits Times*, 11 January 2007.

government on how these issues will be managed while keeping pace with the development of this industry in Singapore.³ While the Advisory Council on the Impact of New Media on Society⁴ studies and deliberates on the issues, the existing legal and regulatory framework that continues to apply to new media has been described as based on a “light touch” approach. This paper seeks to summarise the existing position in Singapore, and tries to describe the policies and philosophies behind the “light touch” approach as elucidated from the laws and regulations in Singapore.

THE OVERARCHING LEGISLATIVE FRAMEWORK – THE BROADCASTING ACT

There is currently no separate legislation to deal with new media in Singapore. The existing framework to deal with new media has largely evolved out of existing legislation.⁵ This evolution is not necessarily erroneous or bad, since new media has turned out to be quite a chameleon, as it is capable of taking on various forms, ranging from digital broadcasting to digitized films, from electronic newsrooms and portals to digital publications. In fact, if at all, the regulatory model is characterised by the use of an all-encompassing piece of legislation that seeks to place all Internet transmissions under the purview of the regulator, the then Singapore Broadcasting Authority (SBA) (subsequently reconstituted as the Media Development Authority (MDA)). As the then Minister for Information and the Arts, BG George Yeo explained, when he moved the second reading of the Singapore Broadcasting Authority Bill:

³ Ministry of Information, Communications and the Arts, “High Level Advisory Council Will Study Implications Of IDM Sector” (Press Release, 26 March 2007) <http://www.mica.gov.sg/pressroom/press_0703261.htm> at 27 July 2007.

⁴ Ministry of Information, Communications and the Arts, “High Level Advisory Council Will Study Implications Of IDM Sector” (Press Release, 26 March 2007) <http://www.mica.gov.sg/pressroom/press_0703261.htm> at 27 July 2007.

⁵ For a general review of the legal and regulatory framework in Singapore see: Jane Ittogi and Suhaimi Lazim, “Media and Telecommunications: Singapore Law and Regulatory Framework” (October 2004) *Law Gazette*.

The SBA Act spells out the regulatory framework for the broadcasting industry. Broadcasting plays an important role in informing, educating and entertaining the public. While we want the regulatory environment to be conducive to broadcasters, we must also ensure that the public interest is protected. A good framework will enable us to do both. We want foreign broadcasters to operate here and to use Singapore as a regional broadcasting hub. But we also want Singapore to remain a wholesome society.

We must take into account rapid technological developments. Conventional methods of regulating television and radio based on modes of transmission are no longer adequate. For this reason, many countries are moving towards a broader definition of broadcasting. We will do the same. In the SBA Act, broadcasting is defined in terms of programme transmission to all or part of the public without reference to the particular means used.

This wider definition enables SBA to regulate broadcast content in the face of new technological realities. It enables SBA to regulate not only nationwide radio and television services, but also in-house movie systems in hotels, private clubs and condominiums, video-on-demand services, audiotext services and computer information services. Such breadth is necessary to catch new forms of ‘narrowcast’ programme dissemination.⁶

Thus “broadcast” receives a broad definition in the Broadcasting Act as “a service whereby signs or signals transmitted ... comprise... any [visual, sound or visual and sound] programme capable of being received”⁷. But the type of communications which actually constitutes a “broadcast” is never actually defined in the legislation, leading the National Internet Advisory Committee (NIAC), a government advisory body, to define it as “the transmission of signals to a wide audience (all or part of the public) where the information broadcast is uniform and

⁶ Singapore, *Second Reading, Singapore Broadcasting Authority Bill*, 26 August 1994 (BG George Yong-Boon Yeo - Minister for Information and the Arts), Parliament No 8, Session 2, Vol 63, Sitting No 6, Hansard Cols 563-4.

⁷ Singapore *Broadcasting Authority Act 1994* s 2(1) (definition of “broadcasting service”); Singapore *Broadcasting Act* (Cap 28, 2003 Revised Edition), s 2(1) (definition of “broadcasting service”).

everyone receives the same information, whether or not at the same time.”⁸ This broad definition, coupled with the definition of a “programme” as “any matter the primary purpose of which is to entertain, educate or inform all or part of the public; or ... any advertising or sponsorship matter, whether or not of a commercial kind”⁹ means that a person who provides any “licensable broadcasting service in or from Singapore” requires a broadcasting licence granted by the SBA/MDA.¹⁰

Application to the Internet

How does this definition apply to the Internet? Although the Internet is not specifically referred to in the Broadcasting Act, the Internet as a platform does serve as a means of “broadcasting”. Websites, as collections of web pages, images, videos and other digital assets which are generally publicly accessible (although some require a subscription) to users and visitors¹¹ seem to be uncontroversially classified by the SBA/MDA as “broadcasts”¹² even though the traditional TV and radio broadcasts are based on a “push” model where content is propagated from the source, whereas users “pull” digital information from websites.

Some websites and services such as Internet radio¹³ and TV simulcasts¹⁴ are clearly broadcasts, although these are more accurately described as “webcasts”¹⁵ in Internet parlance. Other sites may use technologies such

⁸ National Internet Advisory Committee (NIAC), *7th National Internet Advisory Committee Annual Report 2003*, [4.10] at <http://www.mda.gov.sg/wms.file/mobj/mobj.552.Report_NIAC_2003.pdf> at 2 August 2007. This report will hereafter be referred to as the *NIAC 2003 Report*.

⁹ Singapore *Broadcasting Authority Act 1994* s 2(1) (definition of “programme”); Singapore *Broadcasting Act* (Cap 28, 2003 Revised Edition) s 2(1) (definition of “programme”).

¹⁰ Singapore *Broadcasting Authority Act 1994* s 20(1); Singapore *Broadcasting Act* (Cap 28, 2003 revised edition), s 8(1).

¹¹ “Website” *Wikipedia* <<http://en.wikipedia.org/wiki/Website>> at 31 July 2007.

¹² See for example SBA’s approach to the Internet <<http://www.sba.gov.sg/work/sba/internet.nsf/ourapproach/1>> at 27 May 1999.

¹³ “Internet radio” *Wikipedia* <http://en.wikipedia.org/wiki/Internet_radio> at 1 August 2007.

¹⁴ “Simulcast” *Wikipedia* <<http://en.wikipedia.org/wiki/Simulcast>> at 1 August 2007.

¹⁵ “Webcast” *Wikipedia* <<http://en.wikipedia.org/wiki/Webcasting>> at 1 August 2007.

as Really Simple Syndication (RSS)¹⁶ or streaming¹⁷ to “push” or “feed”¹⁸ content to users. But nonetheless, the interactive nature of Internet access which requires users to “pull” or “download” content, such as is the case with “podcasts”,¹⁹ and the use of dynamically-generated user content and web pages, especially with the use of server-side scripting languages²⁰ such as Microsoft’s Active Server Pages,²¹ Java Server Pages²² and PHP²³, do change the paradigm of what constitutes a “broadcast”. Content is no longer static and the same uniform content is no longer distributed to many people simultaneously.²⁴ In fact, in this day and age of Internet communications, delivering customizable and highly interactive dynamic content to make every user’s experience different will be what keeps the users coming.

In retrospect, the uncritical regulatory acceptance of Internet content as “broadcast” appears to be based on a 1990s conception of what makes up the Internet. This approach is clearly too narrow and not in keeping with technological advances and user expectations. To bring substantive Internet content under the ambit of a “broadcast” seems to call for alterations to existing paradigms about the very nature of a “broadcast”.

¹⁶ “RSS” *Wikipedia* <http://en.wikipedia.org/wiki/RSS_%28file_format%29> at 1 August 2007.

¹⁷ “Streaming media” *Wikipedia* <http://en.wikipedia.org/wiki/Streaming_media> at 1 August 2007.

¹⁸ RSS is a web feed format – a protocol for automatically serving users with frequently updated content. See “Web feed” *Wikipedia* <http://en.wikipedia.org/wiki/Web_feed> at 1 August 2007.

¹⁹ Even Wikipedia is split in its definition of podcasts. In the entry for “Internet radio” <http://en.wikipedia.org/wiki/Internet_radio> podcasts are described as “not broadcasts”, but in the entry for “podcasting”, it is described both as a “download”, an “automatic mechanism” as well as a “direct download or streaming” of content. See “Podcast” *Wikipedia* <<http://en.wikipedia.org/wiki/Podcast>> at 1 August 2007.

²⁰ “Server-side” *Wikipedia* <<http://en.wikipedia.org/wiki/Server-side>> at 1 August 2007.

²¹ “Active Server Pages” *Wikipedia* <http://en.wikipedia.org/wiki/Active_Server_Pages> at 1 August 2007.

²² “JavaServer Pages” *Wikipedia* <http://en.wikipedia.org/wiki/Java_Server_Pages> at 1 August 2007.

²³ “PHP” *Wikipedia* <<http://en.wikipedia.org/wiki/PHP>> at 1 August 2007.

²⁴ Cf *NLAC 2003 Report* [4.10].

Private Communications

However, a broadcast is ultimately about communicating to the public. The Broadcasting Act defines a “broadcast programme” as “any matter the primary purpose of which is to entertain, educate or inform all or part of the public” or “any advertising or sponsorship matter” and also defines “part of the public” to include communications between “residents in a particular place, employees of any firm, company or organisation, occupiers of a particular building or part thereof and members of any profession, club or society”.²⁵ This definition is potentially over-reaching as it ostensibly covers all forms of communications, of which broadcasting is but only one species. Since the focus of the Broadcasting Act is in protecting the public communications, a specific exception to exclude private, domestic, intra-business, Government or organization communications as “private communications” has to be specifically enacted.²⁶ Thus telephone calls,²⁷ short message system (SMS) messages and fax messages as point-to-point communications would not be regulated as they are private communications or “telecommunications”.²⁸ Likewise, emails will presumably be “private communications” and not be regulated.²⁹ Other Internet resources such as message or bulletin board services (BBS) and Usenet newsgroups³⁰ are not really “broadcasts” but are more

²⁵ Singapore *Broadcasting Authority Act 1994* s 2(2); Singapore *Broadcasting Act* (Cap 28, 2003 Revised Edition) s 2(2).

²⁶ Singapore *Broadcasting Authority Act 1994* s 2(1) (definition of “programme”); Singapore *Broadcasting Act* (Cap 28, 2003 Revised Edition) s 2(1) (definition of “programme”).

²⁷ Cf NIAC, *NLAC 1996-1997 Report* [6] <<http://www.sba.gov.sg/internet.htm>> at 13 June 1999. This report will hereafter be referred to as the *NLAC 1996-1997 Report*.

²⁸ In the Singapore *Telecommunications Act*, a “telecommunication service” is defined as “any service for telecommunications but excludes any broadcasting service”. The term “broadcasting service” is in turn defined with reference to the *Broadcasting Act*. See Singapore *Telecommunications Act* (Cap 323, 2000 Revised Edition) s 2 (definition of “telecommunication service”).

²⁹ *NLAC 2003 Report* [4.12]-[4.13].

³⁰ SBA, *SBA Industry Guidelines on SBA's Internet Policy* (1997) [18], [23] and [24] <<http://www.sba.gov.sg/work/sba/internet.nsf/91af552ca4d2e5>> at 13 June 1999. These Guidelines will hereafter be referred to as the *SBA Industry Guidelines 1997*; MDA, *Internet Industry Guidelines* (2004) <http://www.mda.gov.sg/wms.file/mobj/mobj.980.internet_industry_guide.pdf> at 2 August 2007. These Guidelines will hereafter be referred to as the *MDA Internet Industry Guidelines 2004*].

appropriately analogized as multiparty conversations, which could explain why the NIAC felt uncomfortable bringing them under the ambit of SBA/MDA.³¹ It would not have been appropriate for the heavy hand of government regulation to reach into private communications. This point was not lost on SBA. In its Industry Guidelines on SBA's Internet Policy, SBA explained:

SBA's purview only covers the provision of material to the public. We are not concerned with what individuals receive, whether in the privacy of their own homes or at their workplace. Corporate Internet access for business use is also outside the scope of our regulations, as is private communications e.g. electronic mail and Internet Relay Chat (IRC).³²

However, this in turn exposes one fundamental weakness in this regulatory model – whether or not content is regulated depends on the nature of the communications, rather than on the parties to the communications. What constitutes a regulable communication turns on a valid but arbitrarily difficult distinction between public and private communications. Certainly, private parties are more likely than not to engage in private communications. But the power of modern communications tools makes it just as easy for private communications to be multiplied and sent to a much larger audience. Emails can be circulated via mailing lists or “spammed”,³³ SMSes can be widely circulated,³⁴ and even unsolicited faxes can litter fax machine inboxes. The line as to when an individual ceases to be engaging in “private or domestic” communications and starts to require a broadcasting licence

³¹ *NLAC 1996-1997 Report* [6(c)]. No reason was offered as to why individual mail and sites and newsgroup discussions should be “kept out of the purview of SBA's regulations”.

³² *SBA Industry Guidelines 1997* [para 3(c)]; *MDA Internet Industry Guidelines 2004* [3(c)].

³³ *SBA Industry Guidelines 1997* [para 3(c)]; *MDA Internet Industry Guidelines 2004* [3(c)]. Witness the notorious incident involving an obscene email circulated by Norton Rose lawyers that eventually achieved world-wide circulation. See also ‘Obscene email puts lawyers in trouble’, *BBC News* 15 December 2000

<<http://news.bbc.co.uk/1/hi/uk/1073244.stm>> at 30 July 2007.

³⁴ SMS post on bomb (retrieve).

for providing “broadcast data services” is simply unclear, if not non-existent.³⁵

For instance, a company may maintain, as part of its content and knowledge management system, an electronic repository of digital resources, of which the critical portions are accessible only by company staff. The company intranet is built on exactly the same concepts and technologies of the Internet.³⁶ Would the intranet be regulated in the same manner as the company’s Internet resources? What about extranets³⁷ in which the otherwise private versions of the intranet are made accessible by the company for business purposes to its suppliers, customers and other approved parties? Are these considered “private” or “public” communications? Likewise, on the Internet, an individual can just as easily engage in public communications *e.g.* by having a Facebook entry of themselves (or their characters or avatars), by maintaining a publicly-accessible blog, or by posting their video blog onto one of many video aggregation websites such as YouTube. They may in turn limit access to his entry through closed user lists or entries which are password protected. Would this have the effect of converting his public communications which would otherwise fall within the province of the broadcasting regulations into the realm of private communications?

The SBA/MDA appears to be cognizant of this issue. In its Industry Guidelines, the SBA drew a similar distinction between postings available on websites for the public to access, which are regulated, and

³⁵ See for example the statement by Dr Balaji Sadasivan, Singapore, Parliamentary Sitting, Question 424 for Oral Answer and Response from the Senior Minister of State for Information, Communications and the Arts, Parliament No 10, Session No 2, Volume 81, Sitting 11, 3 April 2006, that emails and SMSes “within the realm of private communication [for which] the Government has no wish to intrude into people’s privacy. However, if [an individual] is still seeking to use mass email and mass SMS as tools to influence people or to affect the outcome of an election he should realise that he is still governed by the laws of the land, and this includes libel. They should not assume the fact that emailing or SMSing information gives them the licence to say anything they want. So the laws of the land apply, but SMSes and emails are generally considered as private communication, and we do not want to intrude on it.”

³⁶ “Intranet” *Wikipedia* <<http://en.wikipedia.org/wiki/Intranet>> at 1 August 2007.

³⁷ “Extranet” *Wikipedia* at <<http://en.wikipedia.org/wiki/Extranet>> at 1 August 2007.

business or professional closed user-group discussions, which are not.³⁸ But other distinctions that are drawn in the Guidelines are hard to explain. For instance, Usenet newsgroups do not seem to be regulated, even though they are publicly accessible.³⁹ Conversely, chat groups, which appear to be principally private, appear to fall on the wrong side of the line,⁴⁰ because the same Industry Guidelines call for their regulation. The public/private distinction is a crucial one because it *prima facie* represents the divide between government regulated content and personal content. Unfortunately, this arbitrariness in the public/private sphere detracts from the “light touch” approach encapsulated in the Internet regulatory regime.

The Class Licence Regime

In its actual application, the Broadcasting Act does not appear to draw such a nuanced distinction. Based on the definition of “broadcasting” elucidated above, the Broadcasting (Class Licence) Notification was promulgated which provides that “computer on-line services that are provided by Internet Content Providers (ICPs) and Internet Service Providers (ISPs)” are licensable broadcasting services which are subject to a licence from the SBA/MDA.⁴¹ An ISP is an entity that is licensed to provide Internet access services pursuant to a telecommunications licence, or who provides Internet services to all or part of the public.⁴² An ICP is defined as:

- a. any individual in Singapore who provides any programme, for business, political or religious purposes, on the World Wide Web through the Internet; or
- b. any corporation or group of individuals (including any association, business, club, company, society, organisation or partnership, whether registrable or incorporated under the laws of Singapore or not) who provides any programme on the World Wide Web

³⁸ *SBA Industry Guidelines 1997* [23].

³⁹ *SBA Industry Guidelines 1997* [18].

⁴⁰ *SBA Industry Guidelines 1997* [24].

⁴¹ Singapore *Broadcasting (Class Licence) Notification* (N1, 2004 Revised Edition) reg 3. This Notification will hereafter be referred to as the *Broadcasting Notification*.

⁴² *Broadcasting Notification* reg 2 (definitions of “Internet Service Provider”, “Localised Internet Service Reseller” and “Non-localised Internet Service Reseller”).

through the Internet, and includes any web publisher and any web server administrator;

Several observations may be made here. Firstly, the Notification applies to all ISPs: as providers of Internet access services, they are classified as Internet Access Service Providers (IASPs) or Internet service “resellers” (ISRs). Singaporeans will be familiar with the three main local IASPs: SingNet, Pacific Internet and Starhub Internet. ISRs include schools, public libraries, cybercafés and other value-added service providers such as Singapore Network Services and National Computer Services.⁴³ ISPs themselves have to be licensed as telecommunications operators under the existing telecommunications licensing regime in the Telecommunications Act as Public Internet Access Services (PIAS) Services-Based Operators (SBOs).⁴⁴ ISPs operating in Singapore thus have to secure both a PIAS licence with the Infocommunications Development Authority of Singapore (IDA) as well as a broadcasting licence with the MDA. This schism in regulatory responsibility is explicable on the basis that the SBO licence is as regards the telecommunications infrastructure or hardware that the ISPs have set up, whereas the MDA broadcast licence is as regards the content that the ISPs deliver.

Secondly, in addition to ISPs, the Notification applies to ICPs as providers of any “programme” on the World Wide Web through the Internet. If the reference to “programme” is the same as “broadcast programme” in the Broadcasting Act,⁴⁵ the rules in the Notification will apply to all ICPs who produce content whose “primary purpose of which is to entertain, educate or inform all or part of the public” as well as “any advertising or sponsorship matter”. This encompasses web authors, web editors, web publishers and web server administrators.⁴⁶ The breadth of the definition of “programme” means that the provider of almost every type of communicable content accessible via the Internet will be an ICP. The only condition appears to be that the

⁴³ *MDA Internet Industry Guidelines 2004* [7].

⁴⁴ See IDA, *Guidelines for Submission of Application for Services-Based Operator Licence* <http://www.ida.gov.sg/doc/Policies%20and%20Regulation/Policies_and_Regulation_Level2/SBOLicence/SBOLic16Apr07.pdf> at 2 August 2007).

⁴⁵ See Singapore *Interpretation Act* (Cap 1, 2002 Revised Edition) s 21.

⁴⁶ *MDA Internet Industry Guidelines 2004* [8].

content has to be accessible via the World Wide Web protocol as a system of interlinked, hypertext documents.⁴⁷ This presumably means that content distributed via other protocols falls outside of the Notification and thus the SBA/MDA regulatory regime. This result contrasts starkly with the technologically neutral definition of “broadcast”.

Thirdly, the ICP is defined to mean “any individual in Singapore” or “any corporation or group of individuals... whether registrable or incorporated under the laws of Singapore or not” who provide any programme on the World Wide Web. As regards the former, it is regrettable that the expression “any individual in Singapore” is bereft of further explication. When is an individual said to be “in Singapore”? Does it mean that the individual is “residing” in Singapore?⁴⁸ Or does it encompass a tourist who happens to be in Singapore temporarily and who sets up a blog on Blogger to chronicle his holiday adventures? What if he happens to describe some political activities in his blog (representing content that requires him to register his blog, as will be explained further)? Perhaps it is with this in mind that only “individuals in Singapore” providing any programme “for business, political or religious purposes” fall within the definition of ICPs. So whether or not an individual’s site falls within the purview of the Notification depends on a characterization of its content. Mr/Mrs Tourist who chronicles his holiday adventures will be in the clear, but Mr/Mrs Tourist who reports on a political gathering while visiting Singapore may not be.

As regards corporations and bodies of individuals, the definition of ICPs under the Notification opens up the possibility that entities outside of Singapore or having no connection with Singapore fall within the purview of the Notification. This is because the definition deliberately

⁴⁷ “World Wide Web” *Wikipedia* <http://en.wikipedia.org/wiki/World_Wide_Web> at 2 August 2007. WWW content is distributed via the Hypertext Transfer Protocol (HTTP). Curiously, this means that content distributed via other protocols such as email (Post Office Protocol or POP, Simple Mail Transfer Protocol or SMTP and Internet Message Access Protocol or IMAP), File Transfer Protocol (FTP) or Usenet (Network News Transfer Protocol or NNTP) would not be WWW content.

⁴⁸ If an expression such as “in Singapore” is intended to mean “residence in Singapore”, a definition such as that used in the Singapore *Copyright Act* s 8, can be used, to distinguish between those individuals resident in Singapore and those who are only in Singapore on a temporary purpose.

removes the Singapore locus requirement for corporations. (At least there is a locus requirement for individuals to be “in Singapore”.) Under international law, a statute generally operates within the territorial limits of the Parliament that enacted it, and is not to be construed to apply to foreigners outside its dominions.⁴⁹ “It is a presumption of a jurisdiction’s territorial sovereignty that its legislation is intended to all persons, things and events within the boundaries of the enacting jurisdiction and is not intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction.”⁵⁰ Although legislative provisions can be framed to cover all acts independently of the harmful consequences in Singapore, and thus evince Parliament’s clear intention to enact provisions with extra-territorial effect,⁵¹ *prima facie* the definition of ICPs does not seem to be clearly expressing Parliament’s intention to impose obligations and liabilities, even upon persons not within its allegiance. Evidence to the contrary can however be found in MDA’s Internet Industry Guide, which emphasizes that its regulatory emphasis is “on issues of concern to Singapore”.⁵² Examples such as the case of racial and religious materials “which may incite racial or religious hatred among the races in Singapore” were cited,⁵³ which presumably include trans-national materials. This in turn suggests that what the regulator actually intended to apply was an “effects-based” approach to encapsulate conduct outside its borders that has consequences within its borders which the state reprimands.⁵⁴ But MDA’s Internet Industry Guide also states that “Internet Content Providers who are not targeting Singapore as their principal market will not be subject to Singapore’s standards unless they are primarily in the business of distributing pornography.”⁵⁵ A statement to this effect suggests that (i) all ICPs who distribute pornography and (ii) all other (non-pornography) ICPs who

⁴⁹ *Public Prosecutor v Tan Cheng Kong* [1998] 2 SLR 410; [1998] SGCA 37.

⁵⁰ Driedger, *Construction of Statutes* (3rd ed, 1994) 334.

⁵¹ See for example Singapore *Prevention of Corruption Act* s 37(1).

⁵² *MDA Internet Industry Guidelines 2004* [3(d)].

⁵³ *MDA Internet Industry Guidelines 2004* [3(d)].

⁵⁴ See *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 38–9; *Treacy v DPP* [1971] AC 537, 562; *United States v Aluminum Co of America*, (1945) 148 Fed Rep 2d 416.

⁵⁵ *MDA Internet Industry Guidelines 2004* [21]. All in, this statement appears to be a statement of administrative indulgence, since curiously, the statement goes on to state that “movie sites which are hosted in Singapore can promote and carry movie clips, even those which do not meet Singapore’s standards.”

target Singapore as their primary market will be subject to the Notification. This appears to contradict the observation above that an “effects-based” approach is adopted. In fact, there is nothing in the Notification which distinguishes between pornography ICPs and other ICPs.

Of course, the removal of the Singapore locus could be intentional, as a reflection of the borderless nature of the World Wide Web. But that notwithstanding, international comity and the rules of international law would certainly strongly encourage a regulator not to abandon the locus requirement completely. And a locus requirement can be chosen to reflect the regulator’s “effects-based” approach to regulatory jurisdiction, whatever the effects that may be prescribed.

The Operation of a Class Licence

Under the Notification, computer on-line services provided by an ISP or ICP are licensable broadcasting services that are subject to a “class licence”. A class licence is a regulatory licence that is “automatically applicable” to a category of licensees. It is “automatically applicable” because the provision of “computer on-line” services is “subject to” such conditions as are prescribed in the class licence.⁵⁶ Thus the conditions of the class licence will apply to the provider of “computer on-line” services as a “licensee” independently of the service provider actually registering with, or applying for and obtaining a licence from the regulator.⁵⁷

Notwithstanding the “automatic” nature of class licences, there are two broad types of licensees: licensees who are required to register with the regulator, and non-registrable licensees. ISPs are registrable licensees, and so are some classes of ICPs. Registration entails registering with the regulator “in such form and manner as the Authority may determine” and providing the regulator “with such particulars and undertakings as the Authority may require in connection with the provision” of such services.⁵⁸ In addition, ISPs are required to pay licence fees of up to S\$1000 per annum for the provision of Internet access services.

⁵⁶ Singapore *Broadcasting Act* s 9.

⁵⁷ *Broadcasting Notification* [3]-[5].

⁵⁸ *Broadcasting Notification* [2] and [6].

Under the Broadcasting Notification, ICPs, even those who are required to register, are not required to pay any licence fees,⁵⁹ which would otherwise constitute an obstacle to free communications, particularly to bloggers engaged in social communications. However, those ICPs who are required to register may be required to identify themselves and be required to provide satisfactory undertakings to the regulator before they can operate.⁶⁰ In particular, two classes of ICPs *are required* to register with the regulator:

- political parties registered in Singapore providing any programme, and bodies of persons engaged in the propagation, promotion or discussion of political issues relating to Singapore, on the World Wide Web through the Internet,⁶¹ and
- bodies of persons engaged in the propagation, promotion or discussion of religious issues relating to Singapore on the World Wide Web through the Internet.⁶²

The Notification identifies three other classes of ICPs who *may be required* by the regulator to register with the regulator.⁶³ These are:

- businesses providing on-line newspapers for a subscription fee or other consideration through the Internet,⁶⁴
- individuals providing any programme for the propagation, promotion or discussion of political issues relating to Singapore, on the World Wide Web through the Internet,⁶⁵ and
- individuals providing any programme for the propagation, promotion or discussion of religious issues relating to Singapore, on the World Wide Web through the Internet.⁶⁶

⁵⁹ There is *per se* no scheme for ICPs to pay any licence fees under the *Broadcasting Notification*.

⁶⁰ *Broadcasting Notification* [6].

⁶¹ *Broadcasting Notification* [3]-[4].

⁶² *Broadcasting Notification* [4].

⁶³ The regulator will make this request in writing, presumably to the administrator or party identified by the regulator to be “providing” the said programme. See *Broadcasting Notification* [5].

⁶⁴ *Broadcasting Notification* [5(a)].

⁶⁵ *Broadcasting Notification* [5(b)].

It is to be acknowledged that the scheme outlined above in the Notification seeks to draw a nuanced distinction between organized “programming” of political and religious Internet content, and similar “programming” by individuals. The former class of ICPs *shall register* with the regulator, whereas the latter class of ICPs only need to register *if required* by the regulator. This presumably seeks to accord individuals who happen to be operating popular sites or discussion groups with political or religious content more leeway than organizations such as political parties, religious bodies and other similar entities.

However, when an individual’s site ceases to become a non-registrable licensee and becomes a registrable one because of the nucleus of political and religious content can itself be a turning point for the site. In one instance, Sintercom (Singapore Internet Community), a popular forum discussion site on politics and current affairs, was shut down by its founder in July 2001 because the Singapore regulator sought to have the website registered as a political website.⁶⁷ Although the founder objected to having the site so registered because he feels that registration would mean that “I have to be responsible for everything posted on the website”,⁶⁸ that did not seem to have stopped another individual from setting up NewSintercom.org, which contains numerous blog entries with political commentaries.⁶⁹ The requirement to register may seem like an attempt on the part of the regulator to censor or control Internet content, or to hold the ICP responsible (even though the regulator imposes only a minimal level of responsibility on the ICP). But the greater objection seems to be that whether an individual’s site is “for political or religious” purposes or “providing any programme, for the propagation, promotion or discussion of political or religious issues relating to Singapore” is often set by the tone and topics selected by the forum contributors, over which the site administrator may have little control or responsibility. And if it is the regulator who decides whether

⁶⁶ *Broadcasting Notification* [5(b)].

⁶⁷ See “Speaking your mind online without fear”, *Computer Times*, 22 August 2001 <<http://www.singapore-window.org/sw01/010822ct.htm>> at 5 August 2007.

⁶⁸ “Speaking your mind online without fear”, *Computer Times*, 22 August 2001 <<http://www.singapore-window.org/sw01/010822ct.htm>> at 5 August 2007.

⁶⁹ It is unclear at the time of writing this paper whether newsintercom.org has been registered with the MDA. But see Sintercom, “About Us” <<http://www.geocities.com/newsintercom/aboutus.html>> at 6 August 2007.

to classify the site as being “for political or religious” purposes under the Notification,⁷⁰ with there being limited room for appeals⁷¹ or judicial review,⁷² concerns may be objectively felt about whether this classification by the regulator is a prelude to its exercise of control or censorship over the contents of the site. When confronted with the requirement to register, ICPs may choose to remove the online forum in order to remove the possible political or religious content or abandon the site completely.⁷³

Obligations of a Class Licensee

As spelt out in the Notification, the main substantive obligation imposed on an ISP or an ICP as a class licensee is to use its “best efforts” to ensure that its services comply with the Internet Code of Practice [the Code],⁷⁴ and that its services are “not used for any purpose, and does not contain any programme, that (i) is against the public interest, public order or national harmony; or (ii) offends against good taste or decency”.⁷⁵ However, not all breaches of its substantive obligations will trigger sanctions. As the regulator, MDA has described its “light-touch” approach towards ISPs and ICPs, which is that “licensees found to be in breach of regulations will be given a chance to rectify the breach before the Authority takes action.”⁷⁶

⁷⁰ *Broadcasting Notification* [5](b).

⁷¹ Appeals to the Minister from any decision of the regulator are possible. But the decision of the Minister is final. See Singapore *Broadcasting Act* s 59.

⁷² This is because the decisions and determinations made by the regulator do not seem to be amenable to judicial review. See Singapore *Media Development Authority of Singapore Act* (Cap 172, 2003 Revised Edition) s 11(3) “Nothing in this section shall be construed as imposing on the Authority, directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which it would not otherwise be subject.” Of course, courts generally take a dim view of ouster clauses and would still seek to apply the *Wednesbury*’s unreasonableness test to such matters within its jurisdiction. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KBD 223.

⁷³ See for example the episode involving the Think Centre website, as documented in Cherian George, *Contentious Journalism and the Internet: Towards Democratic Discourse in Malaysia and Singapore* (2007).

⁷⁴ MDA, *Internet Code of Practice* (1 November 1997 edition) [4]. This Code of Practice will hereafter be referred to as the *Internet Code*.

⁷⁵ *Broadcasting Notification* [13].

⁷⁶ *MDA Internet Industry Guidelines 2004* [3(f)].

The Code contains a further elucidation of what these objectionable materials are. Described as “prohibited material”, it is material “that is objectionable on the grounds of public interest, public morality, public order, public security, national harmony, or is otherwise prohibited by applicable Singapore laws.”⁷⁷ The Code goes on to set out seven factors which are to be taken into account to determine what is prohibited material:

- a) whether the material was calculated to titillate,
- b) whether there was sexual violence, coercion or non-consent,
- c) whether the sexual activity was explicit,
- d) whether the material depicts sexual activity of a minor under 16 years of age,
- e) whether the material advocates homosexuality, lesbianism, incest, paedophilia, bestiality and necrophilia,
- f) whether the material depicts acts of extreme violence or cruelty; or
- g) whether the material glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance.⁷⁸

The Code also requires a further consideration based on the factors of whether the material has intrinsic medical, scientific, artistic or educational value.⁷⁹ A licensee who is in doubt as to whether any content would be considered prohibited may refer such content to the regulator for its decision.⁸⁰ If the ISP or ICP is informed by the regulator that the whole or any part of a programme included in its service breaches the Code as prohibited content or the standards of good taste or decency, it is required to remove or prohibit the broadcast of such programme content.⁸¹ Thus it has been noted in Parliament that MDA had issued take-down notices to ISPs in Singapore to block

⁷⁷ *Internet Code* [4(1)].

⁷⁸ *Internet Code* [4(2)].

⁷⁹ *Internet Code* [4(3)].

⁸⁰ *Internet Code* [4(4)].

⁸¹ *Internet Code* [16].

friday.com and floutboy.com as websites that depict incest and paedophilia.⁸²

Even though strictly speaking, third party content does not constitute an ISP's or ICP's content, that the rules apply to third party content is clear when it is noted that ISPs and ICPs have to exercise their "best efforts" to remove such an offending programme "included in its service".⁸³ It was on this basis that Google's Blogger site removed two blogs that featured racist comments, after MDA received a complaint from a trainee teacher.⁸⁴ Likewise, an ICP that sets up a forum on the World Wide Web has to use its "best efforts" to ensure that contributions by its forum contributors conform to the Internet Code of Practice.⁸⁵

That it may seem too onerous to hold an ISP or ICP liable even for offensive third party content is ameliorated by somewhat by the statement in the Notification that "[i]f any doubt arises as to whether a licensee has used its best efforts in compliance with the conditions of this licence, the licensee shall be treated as having used its best efforts if it satisfies the Authority that it took all reasonable steps in the circumstances."⁸⁶ In other words, the standard of the duty that the Notification holds the ISPs and ICPs to is not a strict-liability but a "best efforts" standard. Even then, a distinction can and should be drawn between the obligations of an ISP and an ICP. An ISP is ultimately more analogous to a common carrier, in which its systems are generally configured to passively retransmit every message that gets sent through it. And to hold ISPs generally liable for all such transmissions will mean implicating each and every ISP owning routers and servers implementing systems that are essential for Internet communications that act without any human intervention beyond the initial setting up of the system.⁸⁷

⁸² Singapore, Oral Answers to Questions, Posting of Lewd Photographs on Blogs, 3 April 2006 (Dr Balaji Sadasivan for the Minister for Information, Communications and the Arts), Parliament No 10, Session 2, Vol 81, Sitting No 11, Hansard Col 1710.

⁸³ *Internet Code* [16].

⁸⁴ "Racist blogs taken offline", *Today*, 25 September 2007, <<http://www.todayonline.com/articles/213129.asp>> at 10 December 2007.

⁸⁵ *Internet Code* [14].

⁸⁶ *Internet Code* [17].

⁸⁷ Statement paraphrased from *Religious Technology v Netcom* (1995) 33 IPR 132, 140 (DC Cal), per Whyte DJ.

As such, the Internet Code of Practice distinguishes between the obligations of an ISP and an ICP. The Code provides that an ISP discharges his obligations:

- if he denies access to sites notified to him by the regulator as containing prohibited material,
- if he refrains from subscribing to any newsgroup that, in his opinion, is likely to contain prohibited material, and
- if he unsubscribes from any newsgroup that the regulator may direct.⁸⁸

The regulator has acknowledged that pursuant to its duty to take a moral position on various issues in Singapore, it has directed ISPs to limit access to 100 high-impact websites which it has identified.⁸⁹ This limitation of access has been variously described as “symbolic”.⁹⁰ In Parliament, the Minister explained that this does not imply that MDA will proactively monitor websites, take objection to them and start investigations. Instead, the Minister has clarified that as part of its “light touch” approach, MDA will act only upon complaints made by “a Singaporean” to the police.⁹¹

The Code also provides that where the ICP as a web publisher or administrator can exercise editorial control over content,⁹² he discharges his obligations:

- if he chooses discussion themes which are not prohibited material for private discussion fora such as chat groups hosted on his service,

⁸⁸ *Internet Code* [3(2)].

⁸⁹ “Regulating the Net: A history”, *Straits Times*, 17 June 2006. The article describes the 100 sites as “pornographic sites” but some tests show that radical and religious extremist sites are also blocked. See Berkman Centre for Internet and Society, “OpenNet Initiative Finds that Singapore’s State Control Over Online Content Blends Legal and Technical Controls” (Press Release, 17 August 2005) <http://cyber.law.harvard.edu/home/newsroom/pressreleases/oni_singapore_report> at 28 August 2007.

⁹⁰ “Regulating the Net: A history”, *Straits Times*, 17 June 2006.

⁹¹ Singapore, Oral Answers to Questions, Posting of Lewd Photographs on Blogs, 3 April 2006 (Dr Balaji Sadasivan for the Minister for Information, Communications and the Arts), Parliament No 10, Session 2, Vol 81, Sitting No 11, Hansard Col 1710.

⁹² *Internet Code* [3(5)].

- if he denies access to any prohibited material contributions by third party contributors that he discovers in the normal course of exercising his editorial duties, or is informed about, and
- if he ensures that all other programmes on his service do not include material that would be considered prohibited material.⁹³

It is interesting to note that the Code states that where the ICP is unable to exercise any editorial control over content, the obligations outlined above do not apply to him.⁹⁴ However, both the Code and the Notification require an ICP to remove or deny access to material notified to him by the regulator which is considered to be prohibited.⁹⁵ Presumably the Code qualifies the obligation of the ICP as regards third party content, because, for the same reasons as explained above in relation to ISPs, an ICP is more culpable for its own content over which it has a greater measure of control than for the content of third parties. However, as the measure of control that an ICP can have over third party content is often a function of how the site is designed and the features chosen, this qualifier in the Code permits ICPs to absolve themselves of liability under the Code by deliberately electing not to exercise any form of editorial control over the contributions by third parties. Since the policies are clearly intended to encourage editorial control or self-regulation of content rather than its total absence, this qualifier should not stand as it is unless there are technical or operational circumstances that make it impractical or infeasible for any form of editorial control to be exercised.

On the same policy of self-regulation, the Internet Code of Practice shifts part of the regulator's burden of "policing" the Internet upon the ISPs and ICPs. Outside of sites and materials identified as prohibited which the regulator will require ISPs and ICPs to deny access, ISPs and ICPs are required to "exercise judgment" as to what newsgroups, discussion themes and third party contributions to allow and what content to deny.⁹⁶ For instance, the Internet Industry Guide talks about

⁹³ *Internet Code* [3(3)].

⁹⁴ *Internet Code* [3(5)].

⁹⁵ *Internet Code* [3(4)]; *Broadcasting Notification* [16].

⁹⁶ See also *Internet Industry Guide* [17]-[18] (newsgroups), [19] (web content) and [22]-[23] (for postings and discussion themes).

ISPs “taking their own initiative against offensive content through their own Acceptable Use Policies”,⁹⁷ which are clearly directed at the ISPs’ subscribers. It also refers to ICPs exercising “editorial judgment”⁹⁸ and taking “discretionary action” against the abusers of chat channels.⁹⁹ Unfortunately, this may give rise to ISPs and ICPs practicing “self-censorship”, in an attempt to limit their possible exposure to liability under the Code. When in doubt, ISPs and ICPs may prefer to deny access to questionable materials, rather than to seek clarification from MDA.¹⁰⁰ This may in turn limit access to content in unpredictable and uncertain ways. For instance, this author has personally experienced the case of an ISP limiting access to websites which have keywords such as “Kazaa” and “Napster” in them, even though these websites are news websites that are reporting developments about such P2P software. Presumably the ISP is seeking to limit its possible exposure to actions for facilitating copyright infringement and thus denying access to any possible Internet material that may lead the user to these P2P software. There is ostensibly no government sanctioned censorship, but arbitrary, capricious, opaque self-censorship of Internet content operating at a private organizational level is possibly worse as this may lead to a denial of access to legitimate information.

Other obligations imposed on ISPs and ICPs include keeping and furnishing to the regulator all relevant information, records, documents, data and other materials concerning its services as the regulator may require.¹⁰¹ In addition, an ISP and an ICP is legally obliged to assist the regulator in any investigation into any breach of its licence or “any alleged violation of *any laws* committed by ... any other person”, and produce all such relevant information as may be required for the investigation.¹⁰² Such wide powers arrogated to the regulator certainly raise concerns relating to possible breaches of privacy and issues of lack of data protection. Even the parent act itself (the Broadcasting Act) affords the regulator the power to requisition information only “for the

⁹⁷ *Internet Industry Guide* [16].

⁹⁸ *Internet Industry Guide* [22].

⁹⁹ *Internet Industry Guide* [23].

¹⁰⁰ Cf *Internet Industry Guide* [19].

¹⁰¹ *Internet Code* [12].

¹⁰² *Internet Code* [9].

purposes of this Act”.¹⁰³ It does not empower the regulator to investigate all and any alleged offence. Even investigative agencies such as the police who are empowered to collect evidence for criminal investigation and prosecution purposes,¹⁰⁴ have investigative powers that are carefully circumscribed by procedural requirements such as requiring the officer to show “reasonable cause”. As such, the wide investigative powers given to the regulator in the regulations seem at odds with public statements issued by the regulator that “[t]he MDA does not monitor or track users' access to any sites on the Internet and does not interfere with what individuals access in the privacy of their homes.”¹⁰⁵

As regards the standards of content censorship that are to be practiced by ISPs and ICPs, when considered with the other prohibited programming spelt out in the Notification, such as games and lotteries, gambling, fortune telling, solicitation of prostitution and other immoral activities, unlicensed professional advice, uncensored films, video recordings and sound recordings, all which are applicable to the traditional data broadcasting services such as audiotext, videotext and teletext, the rules that are applicable to the Internet do seem more liberal.¹⁰⁶ At first glance, the more relaxed rules for Internet content seem like a reflection of the *prima facie* unregulable nature of Internet content, the ease of Internet publication and the difficulty of finding a locus or point of control for such Internet content. However, observance of the content regulation rules in the Notification does not exempt ISPs and ICPs from complying with other legal requirements.¹⁰⁷ This means that while ISPs and ICPs may not be obliged to ensure that their Internet services do not contain such offensive content under the

¹⁰³ *Broadcasting Act* s 50(1).

¹⁰⁴ Singapore *Criminal Procedure Code* (Cap 68, 1985 Revised Edition) s 125A.

¹⁰⁵ MDA, *Policies and Guidelines* (12 July 2007) <http://www.mda.gov.sg/wms.www/1001qns.aspx?sid=165&fid=62&v1=True#HtmlAnchor_Anchor> at 7 August 2007. These Policies and Guidelines will hereafter be referred to as the *MDA Policies and Guidelines*.

¹⁰⁶ *Broadcasting Notification* [15] which sets out the various prohibitions, is not applicable to ISPs and ICPs. See also *Broadcasting Notification* [15] which is only applicable to “licensable broadcasting service referred to in paragraph 3(a) to (e) of this Notification”. Paragraph 3(f), which refers to “computer on-line services provided by ICPs and ISPs”, is not specifically referred to. This is not a deliberate oversight but an intentional omission.

¹⁰⁷ *MDA Policies and Guidelines* [18].

Notification, they may nonetheless be obliged to do so pursuant to the other written laws of Singapore.

In summary of the regulatory framework for ISPs and ICPs, the existing legal regime governing the broadcast of Internet content is governed by the Notification and the Internet Code of Practice. It is a minimal set of rules designed to ensure that users in Singapore continue to have access to all materials available on the Internet, and at the same time recognizing that some controls are necessary to “allay the concerns of parents for children gaining easy access to websites containing pornographic and other potentially harmful content.”¹⁰⁸ According to MDA, the approach that is taken is for the regulator to encourage the industry to assume greater responsibility in managing harmful material, without pre-censoring content on the Internet or requiring ISPs to monitor the Internet.¹⁰⁹

For the sake of completeness, this paper will embark on a non-exhaustive brief review some of these written laws, namely films and censorship laws, election campaigning and reporting, religious and racial matters and copyright. The discussion of other laws, such as newspapers,¹¹⁰ Internet gambling and gaming, cyberterrorism and anti-terrorism measures, the provision of unlicensed professional advice via the Internet and regulated advertising, will be deferred to another paper.

FILMS, PORNOGRAPHY AND CENSORSHIP

The possession of films is regulated under the Films Act. Section 21 of the Films Act provides that any person who possesses, exhibits, distributes or reproduces any film without a valid certificate, approving the exhibition of the film, shall be guilty of an offence. In other words, all films possessed by any person in Singapore have to be submitted for censorship and certified for approval by the Board of Film Censors (BFC).¹¹¹

¹⁰⁸ *MDA Policies and Guidelines*, see footnote 105.

¹⁰⁹ *MDA Policies and Guidelines*, see footnote 102.

¹¹⁰ Newspapers are regulated under the *Newspaper and Printing Presses Act* (Cap 206, 2002 Revised Edition).

¹¹¹ Singapore *Films Act* (Cap 107, 1998 Revised Edition) s 14.

If so, would this mean that it is an offence to watch any movie or film downloaded from a movie clip portal such as YouTube.com or even from news websites such as CNN? And would these foreign companies need a valid licence in order to carry on the business of “importing, making, distributing or exhibiting films” under section 6 of the Films Act? It has been contended that to bring these provisions are archaic and have no relevance to films freely downloadable from the Internet. In the case of *Ng Chye Huay and Anor v PP*,¹¹² the Honourable Chief Justice Yong (as he then was) took the view that the Films Act applied to all films available and freely downloadable on the Internet. “If such an argument were accepted, then everything available on the Internet would be excluded from the BFC’s purview. This could not have been Parliament’s intention in passing the Films Act, as it would render the BFC otiose and allow undesirable films into our society through the back door.”¹¹³

This dictum in *Ng Chye Huay* would have been more persuasive if there had been an analysis of the legislative history of the Films Act, given that the original version of the Films Act was a piece of legislation that predated the Internet. The Films (Amendment) Act 1998¹¹⁴ amended the 1981 Films Act “to address deficiencies in the law arising from technological developments”¹¹⁵ by introducing new definitions of “film”, “electronic transmission”, “supply” and “obscene”. As explained in Parliament by the then Minister for Information and the Arts, when moving the second reading of the Films (Amendment) Bill 1998, electronic transmissions of obscene films or videos sent via email were sought to be brought under the Films Act, to “enable enforcement action to be taken when individuals complain of obscene films sent to them via e-mail”¹¹⁶ and to deal with the transmission, packaging and dissemination of films over the Internet, especially with broadband.¹¹⁷

However, a careful reading of the legislative amendments will raise some doubts as to whether this is a valid conclusion. Under the Films Act, a

¹¹² [2006] 1 SLR 157, [2005] SGHC 193.

¹¹³ *Ng Chye Huay and Anor v PP* [2006] 1 SLR 157, [2005] SGHC 193 [67].

¹¹⁴ No 10 of 1998.

¹¹⁵ Explanatory Statement, Films (Amendment) Bill 1998 (No 2 of 1998).

¹¹⁶ Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 475.

¹¹⁷ Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 476.

licence is required for the “distribution” of a film, and “distribute” is defined in the Films Act to mean “to sell, hire out and supply”. “Supply” is defined in the recently revised Films Act to include “supply not only in its physical form but also by means of the electronic transmission of the contents of the film” and “transferring, reproducing or enabling another to transfer or reproduce by electronic transmission” electronic copies of a film. “Electronic transmission” is in turn defined to “include facsimile transmission, electronic mail or other similar kinds of communication *but excludes broadcasting*.” If an ICP like YouTube or CNN provides videos for downloading or streaming, is it “broadcasting” or is it engaged in “electronic transmission”? If several people are able to receive a distribution of an electronic film online, is that “distribution” and thus “electronic transmission” or is that dissemination via broadcasting and not “distribution”? What is the difference between “electronic transmission” and “broadcasting”? Would it be based on the distinction drawn above between private and public communications? Unfortunately, the Parliamentary debates seem to be focused on the discussions about party political films and do not bear much on this issue of electronic disseminations of films.¹¹⁸ If such online disseminations to the public are indeed considered “broadcasts”, then Parliament has indeed created, albeit inadvertently, a back door via which films can be sent and received over the Internet (email distributions excepted). On the other hand, if online disseminations are not “broadcasts” but “electronic transmissions”, this renders otiose the reference to “broadcasting” in the definition of “electronic transmission”. If the former is indeed Parliament’s intention, then all

¹¹⁸ Cf Singapore, *Second Reading, Singapore Films (Amendment) Bill*, 27 February 1998 (Dr Toh See Kiat), Hansard, Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 494. In his reply, the Minister, BG George Yeo, seemed to confirm that “broadcasts” include TV and radio broadcasts as well as Internet broadcasts. See Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 516-517. But later, the Minister referred to “films and its variants, videos and new mutants on the Internet.” See Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 521. Yet later, the Minister refers to “films, about people coming together for a group exhibition being moved together one way or another”, which suggests that he is not referring to Internet films (which are accessed privately) as such. See, Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 476. In a subsequent part of his speech, the Minister also referred to the freedom for political parties, including opposition parties, to use the Internet as a channel of communications for free speech. See Hansard (27 February 1998) Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 522.

online video distribution sites will need censorship clearance from the BFC, unless it falls within one of three very narrow exceptions in the Films Act:

- any film sponsored by the Government;
- any film, not being an obscene film or a party political film or any feature, commercial, documentary or overseas television serial film, which is made by an individual and is not intended for distribution or public exhibition; or
- any film reproduced from local television programmes and is not intended for distribution or public exhibition.¹¹⁹

Likewise, will a person accessing one of these “uncensored” films provided by an ICP be deemed to be “importing” a film,¹²⁰ or be found liable for having in his “possession” any film without a valid certificate¹²¹?

Ultimately, which is the correct interpretation will depend on the government’s express policy of whether to regulate online films and video clips, especially those emanating from foreign sites and foreign ICPs, in the same way as cinematographic films made in the traditional way involving the use of physical media. It will be impractical to subject electronic media to BFC censorship, particularly since online films and video clips are so easily accessible without the need for intermediaries such as film distributors and cinemas to exhibit these films. The advent of modern electronics such as personal camcorders, cameras and even video-enabled cellphones has turned every one into his own movie director, cinematographer and producer,¹²² and the Internet has made

¹¹⁹ *Films Act* s 40(1).

¹²⁰ *Films Act* s 6(1) (an offence to carry on any business, whether or not the business is carried on for profit, of importing films).

¹²¹ *Films Act* s 21(1)(a) (an offence to have in one’s possession, any film without a valid certificate, approving the exhibition of the film). This does not look like an offence of possessing an uncertified film per se; there seems to be a need to “approve of the exhibition of the film” or intent to make it available for exhibition or distribution. This is because all films made by individuals and “not intended for distribution or public exhibition” fall outside of the ambit of the Films Act. See *Films Act* s 41(1)(b).

¹²² See *Films Act* s 12 (films made in Singapore shall, within 7 days after the making of the film, be deposited in a warehouse).

everyone a film distributor and exhibitor. The low cost and easy availability of software such as Adobe Premiere, PowerDirector and VideoStudio has enabled everyone to “rip, mix, burn”.¹²³ Interestingly, as the parent organization for the BFC, MDA seems to acknowledge this. In the Internet Industry Guide 2004, MDA states:

Internet Content Providers who are not targeting Singapore as their principal market will not be subject to Singapore's standards unless they are primarily in the business of distributing pornography. For example, movie sites which are hosted in Singapore can promote and carry movie clips, even those which do not meet Singapore's standards.¹²⁴

Pornography or obscene materials are dealt with in a number of pieces of legislation. The Films Act makes it an offence to make, reproduce, import, distribute or exhibit or have in his possession for the purposes of distributing or exhibition, or advertise for such purposes, an obscene film.¹²⁵ It is also an offence to possess an obscene film.¹²⁶ Where children or young persons are involved in the making, reproduction, possession or other forms of commercial dealings in the film, the penalties are aggravated.¹²⁷ An obscene film is not necessarily a pornographic film. “Obscenity”, in relation to a film,¹²⁸ is defined as a film “the effect of which ... is ... such as to tend to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to see or hear the film.”¹²⁹

The Undesirable Publications Act prevents the importation, distribution or reproduction of “obscene”, “objectionable” and “prohibited” publications as undesirable publications (which could be any publication such as books, sound recordings, pictures, drawings or photographs, but

¹²³ See “List of Apple Inc Slogans” *Wikipedia* <http://en.wikipedia.org/wiki/List_of_Apple_Inc_slogans> at 7 August 2007.

¹²⁴ *MDA Internet Industry Guide 2004* [21].

¹²⁵ Singapore *Films Act* ss 29, 31.

¹²⁶ Singapore *Films Act* s 30.

¹²⁷ Singapore *Films Act* s 32.

¹²⁸ Video games and films accessed and downloaded from the Internet are also considered films. See Singapore *Films Act* s 2 (definition of a “film”).

¹²⁹ Singapore *Films Act* s 2.

not films)¹³⁰. An “obscene” publication is defined in the same way as an “obscene” film.¹³¹ An “objectionable” publication is one that deals with:

- (a) matters such as sex, horror, crime, cruelty, violence or the consumption of drugs or other intoxicating substances in such a manner that the availability of the publication is likely to be injurious to the public good; or
- (b) matters of race or religion in such a manner that the availability of the publication is likely to cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups.¹³²

A “prohibited” publication is one which the Minister proscribes its importation, sale or circulation as being contrary to the public interest.¹³³ Under the Undesirable Publications Act, it is an offence to import, publish or otherwise commercially deal with any prohibited publication.¹³⁴ Likewise, any person who makes, reproduces, imports, sells, or possesses for the purposes of any commercial dealings, in any obscene or objectionable publication, knowing or having reasonable cause to so believe it is obscene or objectionable contents, commits an offence.¹³⁵ The former attracts a fine of up to \$10,000 and imprisonment of up to 2 years or both, and the latter attracts a fine of up to \$5,000 and imprisonment of up to 12 months or both.¹³⁶

This area of the law has not received substantive legal comments. Aside from the case of Lai Chee Chuen who, in 1996, was fined S\$61,5000 on 62 charges of having obscene films he had downloaded,¹³⁷ several incidents highlighted how easy it would be to trespass these provisions.

¹³⁰ *Undesirable Publications Act* (Cap 338, 1998 Revised Edition) s 2 (definition of “publication”).

¹³¹ *Undesirable Publications Act* s 3 (meaning of “obscene”).

¹³² *Undesirable Publications Act* s 4 (meaning of “objectionable”).

¹³³ *Undesirable Publications Act* s 5 (power to prohibit importation, sale or circulation of publications).

¹³⁴ *Undesirable Publications Act* s 6. The penalty for this offence is a fine of up to \$2,000 or imprisonment for up to 12 months for the first offence, and up to 24 months imprisonment for a subsequent offence.

¹³⁵ *Undesirable Publications Act* ss 11 (offences involving obscene publications), 12 (offences involving objectionable publications).

¹³⁶ *Undesirable Publications Act*.

¹³⁷ “Man who faced 77 charges ‘Quiet and Courteous’”, *Strait Times*, 26 September 1996.

The media regulator SBA/MDA had to issue a public statement that Internet surfers would not be committing an offence if they visited pornographic sites. The CEO of the media regulator said “I would like to assure Netters that we do not interfere with what individuals access on the Internet in the privacy of their homes,”¹³⁸ an assurance which the MDA gave again in 2004.¹³⁹ Unfortunately, the issue is not merely about protecting the privacy of home users, but about how easy it would be to “possess” uncensored, obscene and objectionable publications and films through the Internet, either by way of automatic downloads, viruses, bots, spyware/adware/smutware, pop-ups, hidden windows or simply deliberately misleading hyperlinks.¹⁴⁰ The assurance given by the Police that only “saving pornography on your hard disk” amounts to an unlawful possession of such material¹⁴¹ seems to be an over-simplistic since any access to any pornographic or obscene material, whether intentional or inadvertent, triggers the Internet browser to save the material on the Internet cache on one’s hard disk.

After the completion and submission of the first draft of this Paper, in October 2007, Parliament passed the Penal Code (Amendment) Bill 2007. It revised the archaic section 292 of the Penal Code, which hitherto applied to the sale and commercial dealings in obscene books, and extended it to apply to “any other obscene object”, which “includes data stored in a computer disc, or by other electronic means, that is capable of conversion to images, writing or any other form of representation”.¹⁴² An export of production of an “obscene object” now includes its transmission by electronic means.¹⁴³ While these revisions would bring the existing provision in sync with modern technology, it is to be seen if these provisions truly reflect the observations made by one Member of Parliament that “[Singapore] society is such that the possession of obscene materials is considered morally wrong and the open display of them viewed as socially distasteful. People who do

¹³⁸ “Net Surfers at Ease after Privacy Assurance”, *Straits Times* 29 September 1996.

¹³⁹ “MDA: Surfing porn is not a crime, but...” *Today*, 1 March 2004.

¹⁴⁰ “Teacher’s porn conviction overturned”, *MSNBC* 6 June 2007 <<http://www.msnbc.msn.com/id/19074272/>> at 7 June 2007.

¹⁴¹ “Teacher’s porn conviction overturned”, *MSNBC* 6 June 2007 <<http://www.msnbc.msn.com/id/19074272/>> at 7 June 2007.

¹⁴² Penal Code (Amendment) Bill (Bill No 38/2007), cl 50(d) (introduction of s 292(2)).

¹⁴³ Penal Code (Amendment) Bill, cl 50(b), (c).

possess obscene materials of any kind tend to do so furtively and at their own risk of being found out and shamed.”¹⁴⁴ Yet the same Member of Parliament noted that the Government did not, “in practice, actively raid people’s cupboards for *Playboy* magazines nor conduct spot checks on computer hard disks” also claimed that by not being proactive in enforcing this law against the possession of obscene objects, the Government did not run the risk of making the provision redundant or bring the law into disrepute.¹⁴⁵ It could be observed that this is perhaps another “symbolic” law that is found in Singapore’s law books, but the recent introduction of such a provision misses the opportunity to address the observations made by the court in *Ng Chye Huay* that all accesses to online video content are “importations”.

This area of the law is clearly in need of an overhaul, because the policies pertaining to the regulation of objectionable materials via censorship measures are not practical and realistic in the era of the Internet. In particular, the public/private divide between public broadcasts, which are regulated because of public interest considerations, and private transmissions, which seem to be excluded from the reach of the Internet content regulations, seems to be blurred when it comes to the Films Act and the Undesirable Publications Act. Also, the penal provisions as worded are too broad and fail to take into account the ease with which content can be accessed and downloaded, whether accidentally, surreptitiously or intentionally, onto one’s computer.¹⁴⁶ Even if it could be argued that the recent “obscene objects” provision in the Penal Code would be judiciously enforced through the enlightening exercise of prosecutorial discretion,¹⁴⁷ this would still undermine the private/public

¹⁴⁴ Singapore, *Second Reading, Singapore Penal Code (Amendment) Bill*, 23 October 2007 (Ong Kian Min – Member of Parliament), Parliament No 11, Session 1, Vol 83, Sitting No 14, Hansard.

¹⁴⁵ Singapore, *Second Reading, Singapore Penal Code (Amendment) Bill*, 23 October 2007 (Ong Kian Min – Member of Parliament), Parliament No 11, Session 1, Vol 83, Sitting No 14, Hansard.

¹⁴⁶ See for example Thomas D Sydnor II, John Knight and Lee A Hollaar, “Filesharing Programs and “Technological Features to Induce Users to Share: A Report to the United States Patent and Trademark Office from the Office of International Relations” (November 2006), <http://www.uspto.gov/web/offices/dcom/olia/copyright/oir_report_on_inadvertent_sharing_v1012.pdf>, at 10 December 2007.

¹⁴⁷ On its face, there are two separate offences constituted in s 292(a): the offence of commercial dealings in obscene objects, and the offence of possession of obscene

philosophy that the Government enshrined in its “light touch” approach. Perhaps new regulatory and censorship policies are required, that would both balance the public interests in protecting minors from easy access to undesirable materials, and in ensuring that legitimate access to the Internet remains reasonably unhindered.

VIDEO GAMES

At present, there is no video game classification in Singapore. All MDA does is to issue content guidelines to video game importers disallowing the import of certain video games with content that exploits sex and violence or denigrates a race or religion.¹⁴⁸ An importer who is unsure if the content meets the guidelines should submit the game to MDA’s Licensing Services (Films and Publications) division for a decision.¹⁴⁹ In view of the similarity between films and video games, a video games classification system will be developed by the BFC and will be launched in 2008. In the interim, the existing games rating system developed by the industry will be used. The MDA explained that this classification system will “provide more choice for adults while protecting the young”.¹⁵⁰

Even before its introduction, the game classification system has caused some controversy. MDA initially banned the video game “Mass Effect” on the basis that the game had an “inappropriate” alien lesbian sex scene but subsequently retracted its decision and rated it M18 for release.¹⁵¹

objects. It can be contended that the “possession of obscene objects” offence is a strict liability offence, although the drug trafficking cases in Singapore suggest that there is an operative presumption of knowledge arising from possession. See for example *PP v Lee Ngim Kiat* [1993] 2 SLR 181, [1992] SGHC 335; *Tan Ah Tee & Anor v PP* [1978-1979] SLR 211, [1980] 1 MLJ 49.

¹⁴⁸ Ministry of Information, Communications and the Arts, *Report of the Censorship Review Committee 2003* (July 2003), at 43.

¹⁴⁹ MDA, Video Games, <<http://www.mda.gov.sg/wms.www/devnpolicies.aspx?sid=137>> at 10 December 2007.

¹⁵⁰ MDA, BFC announces interim measure to allow highly-anticipated video games into Singapore (16 November 2007), <<http://www.mda.gov.sg/wms.www/thenewsdesk.aspx?sid=836>> at 10 December 2007.

¹⁵¹ MDA, BFC announces interim measure to allow highly-anticipated video games into Singapore (16 November 2007), <<http://www.mda.gov.sg/wms.www/>

This would have made Singapore the only country to disallow its sale. BFC had previously banned two other video games, *God of War II* for nudity, and *The Darkness*, for violence and vulgarity.¹⁵² Clearly, the absence of a rating system that would have forced the regulator to either allow or ban a video game is hurting the gaming industry and the user community in Singapore. Unlike films, video games cannot be easily “censored” or have their offending portions excised. But it is also telling that moving forward, the MDA has chosen not to rely simply on the existing games rating system already developed by the gaming industry.¹⁵³ It would be interesting to see how the BFC will “review” a computer game (with its “non-linear” format and story-line) and do so independently of declarations about gaming content by the game developers, publishers and distributors. It would also be interesting to see how this review system will apply to online and on-demand video games,¹⁵⁴ which obviates the need for distributors and, in their absence, the necessary representations to the BFC. As on-demand games replace the distribution of games on physical media, the classification system for games may have to be merged into the Class Licence Scheme.

ELECTIONS AND POLITICS

The regulation of political content is quite well addressed in Singapore. Aside from the rules in the Notification and the Internet Code of Practice, it is principally regulated by two pieces of legislation: the Films Act and the Parliamentary Elections Act. The difference between these two legislations is that the latter applies only in the event of elections: it deals with what is permissible and impermissible Internet content during the campaigning period leading to the elections.

thenewsdesk.aspx?sid=836> at 10 December 2007. See also “MDA lifts ban on game with same-sex love scene”, *Straits Times*, 16 November 2007.

¹⁵² “Mass Effect to come: MDA retracts earlier ban of Xbox game; it now gets an M18 rating”, *Today*, 17 November 2007.

¹⁵³ Perhaps MDA was influenced by the episode involving the Hot Coffee mod for the video game *Grand Theft Auto: San Andreas*. See “*Hot Coffee minigame controversy*”, *Wikipedia*, <http://en.wikipedia.org/wiki/Hot_Coffee_mod>, at 10 December 2007.

¹⁵⁴ “Gaming on demand”, *Wikipedia*, <http://en.wikipedia.org/wiki/Gaming_on_demand>, at 10 December 2007.

Section 33 of the Films Act makes it an offence to import, make, distribute or exhibit, or possess for the purposes of distribution and exhibition, any “party political film”. A person found guilty shall be liable on conviction to a fine of up to S\$100,000 or to imprisonment for a term of up to two years. A “party political film” is defined as:

“a film —

- (a) which is an advertisement made by or on behalf of any political party in Singapore or any body whose objects relate wholly or mainly to politics in Singapore, or any branch of such party or body; or
- (b) which is made by any person and directed towards any political end in Singapore;”¹⁵⁵

A film is held to be “directed towards any political end in Singapore” if it:

- contains any matter intended or likely to affect voting in any election or national referendum in Singapore; or
- contains either partisan or biased references to or comments on any political matter, including matters such as:
 - an election or a national referendum in Singapore;
 - a candidate or group of candidates in an election;
 - an issue submitted or otherwise before electors in an election or a national referendum in Singapore;
 - the Government or a previous Government or the opposition to the Government or previous Government;
 - a Member of Parliament;
 - a current policy of the Government or an issue of public controversy in Singapore; or

¹⁵⁵ Singapore *Films Act* s 2 (definition of “party political film”).

- a political party in Singapore or any body whose objects relate wholly or mainly to politics in Singapore, or any branch of such party or body.¹⁵⁶

However, a film made solely for the purpose of reporting of current events or informing or educating persons on election or referendum procedures or polling times is not a party political film.¹⁵⁷ Likewise, any film sponsored by the Government, such as a promotional film by a government ministry, will not be a party political film.¹⁵⁸ In similar vein, a “podcast” as the provision of a mere audio feed will not be a film and does not fall within the prohibitions of a “party political film” in the Films Act.¹⁵⁹

The rationale behind this prohibition arose from a rejected application in July 1996 by an opposition party in Singapore to sell party political video tapes. The reason for this rejection was explained by the Minister for Information and the Arts, BG George Yong-Boon Yeo, as follows:

Government rejected the application because political videos are an undesirable medium for political debate in Singapore. In a political video, political issues can be sensationalised or presented in a manner calculated to evoke emotional rather than rational reactions. Videos also do not allow for effective rebuttals. There is also a risk that political debates on serious matters will be reduced to a contest between advertising agencies, as indeed has already happened in some countries. Our intention is to keep political debates in Singapore serious and not have them become like the selling of soap. The Films Act will therefore include a provision to disallow the distribution and exhibition of party political films in Singapore. The

¹⁵⁶ Singapore *Films Act* s 2(2).

¹⁵⁷ Singapore *Films Act* s 2(3).

¹⁵⁸ Singapore, *Second Reading, Singapore Films (Amendment) Bill*, 27 February 1998, (BG George Yoon-Boon Yeo – Minister for Information and the Arts), Hansard, Parliament No 9, Session 1, Sitting No 4, Col 516 presumably referring to Singapore *Films Act* s 40(1)(a).

¹⁵⁹ Podcasts with political content were allowed in the lead up prior to the 2006 Singapore General Elections. However, they were curbed under the *Parliamentary Elections (Election Advertising) Regulations 2001*. See the subsequent discussion in the text regarding the *Parliamentary Elections (Election Advertising) Regulations 2001*. See also, “Opposition parties slam podcast ban rule”, *Straits Times* 5 April 2006.

penalty for those infringing this provision is set at a maximum of \$100,000.¹⁶⁰

In the Second Reading of the Films (Amendment) Bill, concerns were expressed by various Members of Parliament regarding the width of the prohibition and the possibility that such a prohibition may discourage civic participation, restrict free speech and limit discussions about current events and issues.¹⁶¹ In fact, just last year, this prohibition in the Films Act was exercised and led to the withdrawal of a political film made by a third party film-maker about opposition politician Chee Soon Juan.¹⁶² Nevertheless, the same film is available on YouTube and judging by the number of views it has accumulated, its audience does not seem to have been crimped in any way.¹⁶³ The Minister Mentor Lee Kuan Yew had actually suggested that the prohibition in the Films Act may be reviewed, a position affirmed by the Ministry of Information, Communications and the Arts, “taking into consideration changes in our society, the impact of globalisation, free flow of ideas in an open society, as well as the influences and impact of technology and communications”.¹⁶⁴ In fact, the Internet and its culture of free access to information coupled with the necessity for a discerning attitude towards information may actually be contributing to the maturing of Singapore society and its move towards a more participatory-style of Government that involves more people at all levels in order to create a thinking nation.¹⁶⁵ This may actually not be a bad development at all.

And the growing maturity of Singapore’s political culture and society mean that sites and blogs that contain political satire and commentaries such as mrbrown.com, talkingcock.com, ridzwan.com and

¹⁶⁰ Singapore, *Second Reading, Singapore Films (Amendment) Bill*, 27 February 1998, (BG George Yoon-Boon Yeo – Minister for Information and the Arts), Hansard, Parliament No 9, Session 1, Vol 68, Sitting No 4, Col 477.

¹⁶¹ Singapore, *Second Reading, Singapore Films (Amendment) Bill*, 27 February 1998, (Dr Yaacob Ibrahim) Col 492, (Mr Simon SC Tay - Nominated Member) Cols 487-8, (Dr Toh See Kiat) Col. 498.

¹⁶² “Film-maker let off with warning for Chee film”, *Straits Times*, 8 August 2006.

¹⁶³ YouTube, Singapore Rebel, <http://www.youtube.com/watch?v=f_DRoUOcupo> at 7 August 2007.

¹⁶⁴ “No date set yet for review of Films Act” *Straits Times*, 10 December 2005.

¹⁶⁵ Singapore, *Second Reading, Singapore Films (Amendment) Bill*, 27 February 1998 (Dr Yaacob Ibrahim) Parliament No 9, Session 1, Vol 68, Sitting 4, Hansard Col 492.

thevoiddeck.org have been left alone. Civil society websites such as thinkcentre.org¹⁶⁶ and free flowing newsgroups and discussion fora such as FindSingapore.net,¹⁶⁷ LittleSpeck,¹⁶⁸ RedBeanForum,¹⁶⁹ SammyBoy,¹⁷⁰ SingaporeAlternatives,¹⁷¹ SingaporeReview,¹⁷² SingaporeWindow,¹⁷³ SgForums¹⁷⁴ and SgPolitics¹⁷⁵ also seem to be operating in an unimpeded manner. The existence of these sites is widely reported by the mainstream media such as The Straits Times¹⁷⁶ and ZaoBao¹⁷⁷, and speaks well of the political awareness of Internet-savvy Singapore citizens and the environment in which they operate.

Nonetheless, a different set of rules are in place for Internet content during the sensitive phase of the conduct of parliamentary elections. The Parliamentary Elections Act¹⁷⁸ (PEA) and the Parliamentary Elections

¹⁶⁶ There are suggestions in the Parliamentary debates that Think Centre has been “gazetted as a political site”. See Singapore, *Parliamentary Elections (Amendment No 2) Bill*, 13 August 2001, (Mr Wong Kan Seng – Minister for Home Affairs) Parliament No 9, Session 2, Vol 73, Sitting 17, Hansard Col 2029.

¹⁶⁷ Find Singapore.Net is a forum that hosts various posts about Singapore news <<http://www.findsingapore.net/forum/index.php>> at 6 August 2007.

¹⁶⁸ LittleSpeck is a site that seeks to “contribute to a better-informed society by reporting and explaining major trends” <<http://www.littlespeck.com/>> at 6 August 2007.

¹⁶⁹ Red Bean Forum is a forum “for concerned Singaporeans and friends who are interested in the affairs of Singapore and developments around the world” <<http://redbeanforum.com/portal.php>> at 6 August 2007.

¹⁷⁰ Sammyboy.com’s Alfresco Coffee Shop, a forum discussion about Singapore issues <<http://forums.delphiforums.com/sammyboymod>> at 6 August 2007.

¹⁷¹ Singapore Alternatives is a site to highlight the political struggle of Mr Goh Meng Seng <<http://singaporealternatives.blogspot.com/>> at 6 August 2007.

¹⁷² Singapore Review or Sg_Review is a newsgroup hosted under the Yahoo groups <http://groups.yahoo.com/group/Sg_Review/> at 6 August 2007. Its postings are also mirrored at <<http://www.sgreview.org/>> at 6 August 2007.

¹⁷³ Singapore Window is a site that seeks to “seek, impart and exchange information and analysis about Singapore” <<http://www.singapore-window.org/>> at 6 August 2007.

¹⁷⁴ Singapore’s Online Discussion Network <<http://www.sgforums.com/>> at 6 August 2007.

¹⁷⁵ Singapore Politics or SgPolitics is a news archive database hosted under the Yahoo groups <<http://groups.yahoo.com/group/sgpolitics/>> at 6 August 2007. It is a members’ only site.

¹⁷⁶ “Mocking water ads draw surfers”, *Straits Times*, 31 July 2003.

¹⁷⁷ “与大选相关的网站”, ZaoBao.com, 17 April 2006 <<http://www.zaobao.com/special/singapore/ge2006/pages/ge060417c.html>> at 6 August 2007.

¹⁷⁸ Cap 218, 2007 Revised Edition.

(Election Advertising) Regulations¹⁷⁹ (PEEA Regulations) together set out the rules and restrict the manner in which during the election period,¹⁸⁰ the Internet can be used for election advertising¹⁸¹ and canvassing, on websites, emails, short message system (SMS) messages, chat rooms and discussion fora.¹⁸² The operative principle is that there has to be proper attribution of the political party or candidate as the origin or source for these messages,¹⁸³ and that during the election period, only political parties, their candidates and their election agents may conduct prescribed election advertising activities on the Internet.¹⁸⁴ These are enumerated in what is known as the “positive list” of election advertising, wherein any other type of unspecified advertising is disallowed.¹⁸⁵ The regulations also specify that there is a total election

¹⁷⁹ RG3, 2003 Revised Edition.

¹⁸⁰ *Parliamentary Elections Act* s 78A(3) defines the “election period” as “period beginning with the day the writ of election is issued for an election and ending with the close of all polling stations on polling day at the election.” This means that outside of the election period, the aforesaid rules are not operative. It should be noted that while s 78(1)(a) makes no reference to an “election period” and thus its operation does not seem to be limited to the “election period”, it refers to “election advertising” in s 61(1)(c), which is in turn limited to “the period beginning with the day the writ of election is issued for an election and ending on the eve of polling day at the election.”

¹⁸¹ *Parliamentary Elections Act* s 2(1) (defined to mean “any poster, banner, notice, circular, handbill, illustration, article, advertisement or other material that can reasonably be regarded as intended — (a) to promote or procure the electoral success at any election for one or more identifiable political parties, candidates or groups of candidates; or (b) to otherwise enhance the standing of any such political parties, candidates or groups of candidates with the electorate in connection with any election, and such material shall be election advertising even though it can reasonably be regarded as intended to achieve any other purpose as well and even though it does not expressly mention the name of any political party or candidate, but excludes any button, badge, pen, pencil, balloon and any other thing prescribed by the Minister by notification in the Gazette”).

¹⁸² *Parliamentary Elections Act* s 78A(1)(b), read with *Parliamentary Elections (Election Advertising) Regulations* rgs 3-5.

¹⁸³ *Parliamentary Elections Act* s 78A(1)(a), read with *Parliamentary Elections (Election Advertising) Regulations* rg 3, described in the *Regulations* as “relevant particulars” (comprising the name and address of the publisher and name and address of every person for whom or at whose direction the election advertising is published).

¹⁸⁴ *Parliamentary Elections (Election Advertising) Regulations* rg 4 (positive list of election advertising), contrasted with rg 6 (no election advertising by relevant persons).

¹⁸⁵ For instance, an opposition party SDP sought permission from the Elections Department to put up podcasts, comprising some audio files such as an audio clip from its Secretary-General Chee Soon Juan from its website. It was ordered to take them down since the “positive list” in the *Parliamentary Elections (Election Advertising) Regulations* did not

advertising ban on polling day,¹⁸⁶ a ban on the publication of the results of any election survey during the election period,¹⁸⁷ and a ban on the exit polls on polling day.¹⁸⁸ These rules apply on top of the requirement for political parties operating sites to register with the regulator under the Class Licence Scheme, as set out above. The Minister explained the rationale for these rules as follows:

We encourage the free flow of information and exchange of views within our political system. However, for political debates and discourse to be constructive and taken seriously, people have to take responsibility for what they say and should not remain anonymous. Facts must be ascertainable and arguments examined.

Voters can then consider the issues calmly and rationally with a view to the impact on their future, and not get carried away by emotions in the heat of the moment. This is the basis on which we run elections and politics in Singapore, and this is how we have crafted our rules.¹⁸⁹

Aside from the political parties, candidates and their election agents, the language of the PEEA Regulations suggests that no “relevant person” is

specify podcasts. See for example “Party removes all podcasts from website”, *Straits Times*, 26 April 2006. See also, “Opposition parties slam podcast ban rule”, *Straits Times*, 5 April 2006. It has been queried if social networking platforms fall within the “positive list” of permissible election advertising. See Cherian George, *Election Regulations vs Social Networking* (12 September 2007), <<http://singaporemedia.blogspot.com/>> at 10 December 2007. To the extent that these platforms work on the basis of web sites and emails, they should be allowed, subject to the prohibition in the *Parliamentary Elections (Election Advertising) Regulations*, rg 4(2)(b) that the email “shall not contain any statement or matter requesting, appealing to or encouraging (expressly or otherwise) the recipient of the electronic mail message, advertisement or material to forward, re-transmit or further publish on what is commonly known as the Internet the electronic mail message, advertisement or message to any other person”. This will limit the viral quality of social networking platforms.

¹⁸⁶ *Parliamentary Elections Act* s 78B.

¹⁸⁷ *Parliamentary Elections Act* s 78C.

¹⁸⁸ *Parliamentary Elections Act* s 78D.

¹⁸⁹ “New Media, same rules – An interview with Singapore's Minister for Information, Communications and the Arts about the government's stance on blogs, podcasts and videocasts”, *Straits Times* and *AsiaMedia*, 15 April 2006 <<http://www.asiamedia.ucla.edu/article.asp?parentid=43361>> at 8 August 2007.

allowed to engage in election advertising.¹⁹⁰ The language of the rule, however, is somewhat unclear, because a “relevant person” is in turn defined to mean “any person or group of persons ... [who] provides any programme on the World Wide Web ... and [who] is required ... to register with the MDA [for] engaging in or providing any programme for the propagation, promotion or discussion of political issues relating to Singapore”¹⁹¹ under the Class Licence Scheme as explained above. Would this imply that persons who are *not required* to register with MDA may engage in election advertising? Prior to the General Elections in 2006, the Government, during Parliamentary Question time, noted that:

Private or individual bloggers can discuss politics. However, if they persistently propagate, promote or circulate political issues relating to Singapore, they are required to register with the MDA. During the election period, these registered persons will not be permitted to provide material online that constitutes election advertising.¹⁹²

The operative effect of this scheme is that where Mr/Mrs Blogger persistently engages in the propagation, promotion or discussion of political issues, he or she would be asked to register under the Class Licence Scheme and would be barred under the PEA and the PEEA Regulations from conducting “election advertising”. This became known in Internet circles as the “persistently political podcast” test, a test which bloggers took it upon themselves to apply during the period of the May 2006 General Elections in Singapore. By all accounts, bloggers were supposed to avoid discussing political issues and election rallies. But in a surprising turn of events, even the Singapore government acknowledged that the May 2006 elections were a watershed as Singapore’s “first Internet election” with reports, photos and videos of the election proceedings and various commentaries posted online.¹⁹³ Presumably the Government drew a line between the “neutral” reporting of election

¹⁹⁰ *Parliamentary Elections Act* s 78A(1)(b), read with *Parliamentary Elections (Election Advertising) Regulations*, rg 6.

¹⁹¹ *Parliamentary Elections Act* s 78A(3).

¹⁹² Parliamentary Sitting 3 April 2006, statement by Dr Balaji Sadasivan, see also footnote 35.

¹⁹³ “From light to lighter, to no touch?”, *Straits Times*, 17 June 2006.

activities, which is allowed, and the promotion of electoral success,¹⁹⁴ which is disallowed, as a distinction inherent in the definition of “election advertising”. No action was taken against any of these sites to require them to register, and the Minister for Information, Communications & The Arts even commended one blogger, Mr Brown, for making a wildly popular parody regarding a nomination day incident leading to the elections.¹⁹⁵ The Singapore government has since pledged to consider an “even lighter touch” to regulating the Internet, although the Minister was also quick to note that netizens do have a part to play to help bring objectivity, responsibility and balance in public discourse in cyberspace.¹⁹⁶ However, a schism remains, wherein the Government seems to take greater objection towards publications in the mainstream media than on the Internet,¹⁹⁷ even if the piece, written by the aforesaid blogger Mr Brown, in his capacity as a newspaper columnist was meant to be a satire, and the same piece of writing was freely accessible on Mr Brown’s website.¹⁹⁸

In summary, the advent of the Internet and the power of individual bloggers to influence the public and mainstream media are matters not to be ignored. While political parties and bloggers continue to test the legal boundaries relating to content regulation on the Internet, this

¹⁹⁴ The “self-restraint” has been documented by Cherian George. See Cherian George, *Looking for Patterns in 10 Years of “Light Touch” Regulation* (23 August 2007) <<http://journalism.sg/2007/08/23/looking-for-patterns-in-10-years-of-light-touch-regulation/>> at 10 December 2007.

¹⁹⁵ This is the Bak Cho Mee podcast by Mr Lee Kim Mun over an incident involving Mr James Gomez, who was embroiled in a controversy regarding his minority candidate certificate. See “WP’s Gomez detained over Elections Department complaint”, *Channel News Asia*, 7 May 2006 <<http://www.channelnewsasia.com/stories/singaporelocalnews/print/207083/1/.html>> at 7 August 2007. See also SingaporeAngle, *Top Fifteen Socio-Political Events of 2006* (3 January 2007) <http://www.singaporeangle.com/2007/01/top_fifteen_sociopolitical_eve_1.html> at 7 August 2007.

¹⁹⁶ Dr Lee Boon Yang - Minister For Information, Communications & The Arts, 5th Annual PR Academy Conference on “New Media: The New Frontier In Communications and PR”, 31 May 2006 <[≥](#)> at 7 August 2007.

¹⁹⁷ “Distorting the truth, mr brown? Letter from K Bhavani, Press Secretary to the Minister for Information, Communications and the Arts”, *Today*, 3 July 2006. More information about the incident can be found at “mrbrown” *Wikipedia* <<http://en.wikipedia.org/wiki/Mrbrown>> at 8 August 2007.

¹⁹⁸ Mr Brown, “S’poreans are fed, up with progress!” 3 July 2006 <http://www.mrbrown.com/blog/2006/07/today_sporeans_.html> at 8 August 2007.

process has also lent greater urgency to the need for a critical review as to the relationship between old and new media, and a more consistent regulatory model to deal with both types of media.

RELIGIOUS ISSUES AND RACIAL SENTIMENTS

The maintenance of religious and racial harmony is one of the key tenets of Singapore society.¹⁹⁹ This view, engrained into the Singapore psyche, stemmed largely from the horrific race riots which took place in July 1964.²⁰⁰ And these sentiments have been replicated in the various pieces of legislation that deal with these issues. The Maintenance of Religious Harmony Act²⁰¹ seeks to provide for the maintenance of religious harmony and empowers the authorities to issue restraining orders against officials or members of religious groups, institutions or other persons for inciting, instigating, or encouraging any religious group or religious institution to cause feelings of enmity, hatred, ill-will or hostility between different religious groups, to promote a political cause, carry out subversive activities or excite disaffection against the President or the Singapore Government under the guise of propagating any religious belief.²⁰² All such orders will be referred to an inter-religious council, known as the Presidential Council for Religious Harmony, which will make recommendations to the President to cancel or confirm the restraining order.²⁰³

The Internal Security Act²⁰⁴ (ISA) is another piece of legislation enacted to empower the authorities to detain, without trial, individuals suspected of subversion and for the suppression of organized violence against persons and property which is prejudicial to the security of the country.²⁰⁵ Where the President is satisfied that preventive detention will

¹⁹⁹ “Racial Harmony Day” *Wikipedia* <http://en.wikipedia.org/wiki/Racial_Harmony_Day> at 8 August 2007.

²⁰⁰ “1964 Race Riots” *Wikipedia* <http://en.wikipedia.org/wiki/1964_Race_Riots> at 8 August 2007.

²⁰¹ Cap 167A, 2001 Revised Edition.

²⁰² *Maintenance of Religious Harmony Act* ss 8, 9.

²⁰³ *Maintenance of Religious Harmony Act* ss 11, 12.

²⁰⁴ Cap 143, 1985 Revised Edition.

²⁰⁵ *Internal Security Act* Long Title.

prevent a person from acting in any manner prejudicial to the security of Singapore or to the maintenance of public order or essential services, the Minister may make an order directing that the person be detained or impose restrictions on his movements and activities.²⁰⁶ Judicial review of such orders is limited to questions relating to the compliance with any procedural requirements of the ISA governing such acts or decisions.²⁰⁷ In June of 2007, the ISA was exercised by the government to detain a young Muslim Singapore law graduate for planning militant activities. The details that were released showed that he was influenced by radical ideas and extremist propaganda on the Internet.²⁰⁸ This recent episode shows that despite being a pre-Internet piece of legislation, the ISA still wields a healthy bite to deal with modern day issues and problems exacerbated by the Internet.

The last piece of instrument, the Sedition Act,²⁰⁹ is a post-World War II British colonial law enacted in 1948. Prosecutions under the Sedition Act for acts or words which have a “seditious tendency”, defined to mean exciting disaffection against the Government or the administration of justice in Singapore, raising disaffection or exciting the residents in Singapore to procure the unlawful alteration of any matter, or promoting feelings of ill-will and hostility between different races or classes of the Singapore population, are very rare. However, given the breadth of the scope of “seditious tendencies”, and the ease with which individuals express their opinions on the Internet, particularly through acts of “flaming”,²¹⁰ it was only a matter of time before prosecutions were brought under the Act.

Thus matters came to a head in September 2005, when racist remarks were made by various parties on Internet fora and discussion groups in response to a letter written by a Muslim woman and published in the Straits Times regarding the issue of whether taxi drivers should allow uncaged animals to be transported in their cabs, since there were

²⁰⁶ *Internal Security Act* s 8.

²⁰⁷ *Internal Security Act* s 8B.

²⁰⁸ “‘Self-radicalised’ law grad, 4 JI militants held”, *Straits Times*, 9 June 2007.

²⁰⁹ Cap 290, 1985 Revised Edition.

²¹⁰ “Flaming (internet)” *Wikipedia*

<http://en.wikipedia.org/wiki/Flaming_%28Internet%29> at 8 August 2007 (the hostile and insulting interaction between Internet users).

religious concerns in Islam about whether the seats could be dirtied by dog saliva or their paws. This led to a verbal exchange on the Internet. Particularly vociferous were dog lovers, some of whom posted various anti-Malay and anti-Muslim remarks on blogs and discussion fora. Authors of three of these particularly bad remarks were charged in court for offences of sedition “to promote feelings of ill-will and hostility between different races or classes of the population of Singapore”. All three accused pleaded guilty. In his judgment, Senior District Judge Richard Magnus in *PP v Kob Song Huat Benjamin*²¹¹ pointed to the seriousness of propagating feelings of racial and religious hostility, and referred to the especial sensitivity of racial and religious issues in Singapore’s multi-cultural society. The court found particularly disturbing that both were young Singaporeans who had short memories about the sensitivities of race and religion, and had hidden behind the anonymity of cyberspace to pen diatribes against another race of religion. The judge went on to say:

The right to propagate an opinion on the Internet is not, and cannot, be an unfettered right. The right of one person’s freedom of expression must always be balanced by the right of another’s freedom from offence, and tampered by wider public interest considerations. It is only appropriate social behaviour, independent of any legal duty, of every Singapore citizen and resident to respect the other races in view of our multi-racial society. Each individual living here irrespective of his racial origin owes it to himself and to the country to see that nothing is said or done which might incite the people and plunge the country into racial strife and violence. These are basic ground rules. *A fortiori*, the Sedition Act statutorily delineates this redline on the ground in the subject at hand. Otherwise, the resultant harm is not only to one racial group but to the very fabric of our society.²¹²

The court imposed a deterrent custodial sentence of one month’s imprisonment for one the bloggers, in view of the fact that he had made particularly inflammatory and insulting remarks against the Muslim religion, together with his totally insensitive parody involving the Muslim

²¹¹ [2005] SGDC 272 (Singapore District Court).

²¹² [2005] SGDC 272 [8].

halal logo. The second accused was sentenced to a nominal one day imprisonment and a maximum fine of S\$5000, with the third accused sentenced to 24 months supervised probation.²¹³

Even though the prosecution of the bloggers under the Sedition Act received widespread support,²¹⁴ it was nonetheless perceived that the Government was using the Sedition Act as a sledgehammer to crack the “nut” in the form of the individual activities of these bloggers. In October 2007, Parliament passed the Penal Code (Amendment) Bill 2007, which both revised and introduced new provisions in the Penal Code to create new offences relating to religion or race, such as the offence of uttering words with deliberate intent to wound the religious or racial feelings of any person²¹⁵ and knowing promotion of enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony.²¹⁶ At the same time, a scheme for applying enhanced penalties (of up to one and a half times the original amount of the punishment) for racially or religiously aggravated offences was also introduced into the law.²¹⁷ As explained by the Minister, these provisions were introduced to ensure that there is an alternative to prosecuting bloggers under the Sedition Act, which is considered a high signature prosecution.²¹⁸ These provisions received overwhelming support from Members of Parliament at the parliamentary debates, with one member asking if the provisions go far enough to deal with such activities committed “innocently, ignorantly or under the guise of freedom of expression without deliberate intention to

²¹³ See “Third racist blogger sentenced to 24 months supervised probation”, *Channel News Asia* <<http://www.channelnewsasia.com/stories/singaporelocalnews/view/180127/1/.html>> at 8 August 2007.

²¹⁴ Cherian George, *Looking for Patterns in 10 Years of “Light Touch” Regulation* (23 August 2007) <<http://journalism.sg/2007/08/23/looking-for-patterns-in-10-years-of-light-touch-regulation/>> at 10 December 2007.

²¹⁵ Singapore *Penal Code* (Cap 224, 1985 Revised Edition), s 298.

²¹⁶ *Penal Code*, s 298A.

²¹⁷ *Penal Code*, s 74.

²¹⁸ Singapore, *Second Reading, Singapore Penal Code (Amendment) Bill*, 22 October 2007 (Associate Professor Ho Peng Kee – Senior Minister of State for Law), Parliament No 11, Session 1, Vol 83, Sitting No 14, Hansard.

provoke nor knowledge that it will lead to disharmony.”²¹⁹ However, the Minister was quick to add that these provisions set a high bar for the offences, and that freedom of expression and religion are preserved. However, these freedoms are not unfettered, for “in multi-racial and multi-religious Singapore, Singaporeans should recognise the sensitivities of other religious groups. It is one thing to preach to a person who is interested to hear your views. However, it is quite another to try to convert a person to your religion by denigrating his religion, especially when he has no desire to be converted.”²²⁰

In summary, laws regulating content relating to race and religion pre-date the Internet. But the issues and considerations do not differ, regardless of the use (or abuse) of the Internet and its intercession. This short review here shows that the freedom of speech as spelt out in the Singapore Constitution is heavily qualified,²²¹ and is subject to restrictions such as the Maintenance of Religious Harmony Act, the Internal Security Act and the Sedition Act, which are restrictions deemed necessary and expedient in the interests of public order. All these Acts remain highly relevant and pertinent in the Internet era.

COPYRIGHT INFRINGEMENT

Intellectual property laws that deal with the digital media industry are particularly up-to-date, because of the dual pressures of international intellectual property treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 and the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) of 1996, as well as Singapore’s implementation of its free trade agreement with the United States, the United States Singapore Free

²¹⁹ Singapore, *Second Reading, Singapore Penal Code (Amendment) Bill*, 23 October 2007 (Ong Kian Min – Member of Parliament), Parliament No 11, Session 1, Vol 83, Sitting No 15, Hansard.

²²⁰ Singapore, *Second Reading, Singapore Penal Code (Amendment) Bill*, 22 October 2007 (Associate Professor Ho Peng Kee – Senior Minister of State for Law), Parliament No 11, Session 1, Vol 83, Sitting No 14, Hansard.

²²¹ *Constitution of the Republic of Singapore* (1999 Revised Edition) art 14(1)(a), read with art 14(2).

Trade Agreement (USSFTA). Of particular relevance to the digital media industry are Singapore's laws relating to copyright protection.

An exhaustive review of all the changes and updates made to Singapore's copyright laws is not possible in this paper. Thus, only a summary of the most salient provisions will be given. Computer programs are protected as literary works in the Copyright Act,²²² as are multimedia works (as "compilations").²²³ Other types of works (artistic, dramatic and musical as "authorship works", sound recordings, cinematographic works, broadcasts, cable programme services and published editions as "entrepreneurial works") are also protected accordingly. The duration of protection has been extended to life of the author plus 70 years for authorship works,²²⁴ and 70 years for sound recordings²²⁵ and cinematographic works.²²⁶ Broadcasts, cable programme services and published editions receive protection for 50 years,²²⁷ 50 years²²⁸ and 25 years²²⁹ respectively.

The right of reproduction includes the right to convert a work into or from a digital or other electronic machine-readable form,²³⁰ and includes the making of a copy of a work which is transient or incidental to some other use of the work.²³¹ The right of "communication to the public", first introduced in 2004, encompasses the original rights of broadcasting and inclusion in a cable programme service. In addition, it also includes the new "making available" right.²³² This right, introduced via the WCT and the WPPT,²³³ recognises the right of the copyright owner to authorize any communication of his works to the public, 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.

²²² Singapore *Copyright Act* (Cap 63, 2006 Revised Edition) s 7A.

²²³ *Copyright Act*.

²²⁴ *Copyright Act* s 28.

²²⁵ *Copyright Act* s 92.

²²⁶ *Copyright Act* s 93.

²²⁷ *Copyright Act* s 94.

²²⁸ *Copyright Act* s 95.

²²⁹ *Copyright Act* s 96.

²³⁰ *Copyright Act* s 15(1B).

²³¹ *Copyright Act* s 15(1A).

²³² *Copyright Act* s 7(1) (definition of "communicate").

²³³ *WCT* art 8; *WPPT* arts 10, 14.

At the same time, various defences were introduced to protect network service providers, for any direct and indirect infringement of copyright arising from their provision of Internet services. These defences were adapted from the safe harbour provisions in the US Digital Millennium Copyright Act. In particular, these defences absolved the network service providers of fiscal liability for possible copyright infringement, for activities such as the transmission or routing of connections and any transient storage of works,²³⁴ for the caching of works,²³⁵ for the storage of infringing third party works on its network,²³⁶ and for linking to an infringing third party work (also known as the search engine or portal defence).²³⁷ In addition, both users and network service providers are also protected by a defence which exempts them from liability arising from any “transient and incidental electronic copy” of a work that is made as a result of viewing, listening or utilizing the work.²³⁸

Singapore law remains unclear as to the extent of secondary or indirect infringement of a party, arising from the provision of facilities or services which are used by a third party infringer. Unlike recent pronouncements from appellate courts such as the US Supreme Court in *MGM Studios v Grokster*²³⁹ and the Australian Federal Court in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (the *Kazaa* case),²⁴⁰ Singapore courts have yet to decide the issue. However, if the ruling of the Singapore Court of Appeal in *Lotus Development Corp v Ong Seow Pheng*²⁴¹ is any indication, developers or providers of facilities or services used for infringing purposes would not be held liable on the basis that they have no physical control over the infringer or their instruments of infringement and had no authority to authorize such infringements. This however does not mean that the infringer cannot be held liable. In August 2005, the police arrested three Internet users who had used the Internet to distribute 20,000 music files via an Internet Relay Chatroom. They were prosecuted under the revised section 136 of the Singapore

²³⁴ *Copyright Act* s 193B.

²³⁵ *Copyright Act* s 193C.

²³⁶ *Copyright Act* s 193D(1)(a).

²³⁷ *Copyright Act* s 193D(1)(b).

²³⁸ *Copyright Act* s 193E.

²³⁹ 125 S Ct 2764 (US Supreme Court).

²⁴⁰ [2005] FCA 1242.

²⁴¹ [1997] 3 SLR 137 (Singapore Court of Appeal)

Copyright Act,²⁴² and it remains to be seen whether the prosecutions will be under the provision that deals with a “significant extent of copyright infringement committed to obtain a commercial advantage”.²⁴³

NON LEGAL MEANS OF REGULATION

Aside from legislation and regulations, the Singapore regulator has always emphasized that there are two other components to the regulation of interactive digital media. The regulator has worked closely with the industry to promote industry self-regulation and encourage the industry to set its own standards.²⁴⁴ In 2006, the three mobile service operators in Singapore, in response to concerns expressed by the NIAC over undesirable mobile content, developed and adopted a voluntary industry content code which aims to protect users, especially the young, from undesirable and objectionable mobile content.²⁴⁵ Under this code, the mobile operators pledged to only offer images generally available in mainstream media.²⁴⁶ They also pledge not to offer any objectionable games (games which contain violence, denigrate any race or religion, have sexual content or are objectionable on moral, social or religious grounds)²⁴⁷ and to provide warnings for chat services that may be unsuitable for young persons and children.²⁴⁸ The mobile operators also undertake to apply the code to third party content operators that have a contractual arrangement with the mobile operators.²⁴⁹ The effectiveness of the code remains to be seen, since it is unlikely that mobile operators will themselves originate any objectionable code. If the bulk of the objectionable content is derived from third party content operators, these content operators do not seem to be privy to the code and the

²⁴² “Three Net users nabbed for sharing pirated music”, *Straits Times*, 18 August 2005.

²⁴³ Singapore *Copyright Act* s 136(3A).

²⁴⁴ Dr Balaji Sadasivan - Senior Minister of State for Information, Communications and the Arts, Parliament No 11, Session No 1, Volume 82, Sitting No 15, 3 March 2007).

²⁴⁵ M1, SingTel and Starhub, *Voluntary Code for Self-regulation of Mobile Content in Singapore*, 1 March 2006 <http://m1.com.sg/M1/about/regulatory/pdf/Self-Regulation_of_Mobile_Content.pdf> at 28 August 2007.

²⁴⁶ *Mobile Code* [2].

²⁴⁷ *Mobile Code* [3].

²⁴⁸ *Mobile Code* [4].

²⁴⁹ *Mobile Code* [5].

only mechanism for addressing any breach of the code in this regard is for the mobile operators to “notify and take-down” the undesirable content.²⁵⁰ In this regard, the sanctions, if any, appear thin, and there is no clear indication in the code as to whether the content operators will be fiscally sanctioned, or whether the mobile operators will themselves be held liable for such content. Certainly, the provisions and the language in the voluntary code can be further improved.

The Singapore regulator has also recognized the importance of education as a tool to promote media literacy and the discerning use of the media. A Cyber Wellness programme has been instituted, in which users are encouraged to understand the risks of harmful online behaviour, to be aware of how to protect himself and others from such behaviour and to recognize the power of the Internet to affect oneself and the community at large.²⁵¹ At the same time, the regulator and the NIAC also believe in empowering parents and families in managing their children’s use of the Internet.²⁵² In this regard, the regulator has also worked with the three main Internet Access Service Providers in Singapore to provide optional “family access networks” that parents can subscribe to for their children. This scheme was launched as early as 1998, largely through the efforts of the Parents Advisory Group for the Internet (PAGi). The “family access networks” seek to filter out pornographic as well as other undesirable sites and provide a hassle-free network solution to parents who are not familiar with the use of Internet filtering software but who want some measure of protection of their children from the undesirable elements of the Internet.²⁵³

²⁵⁰ See *Mobile Code* [5.2].

²⁵¹ These are described as the four core values of the Cyber Wellness vision - Balanced Lifestyle, Embracing the Net and Inspiring Others, Astuteness, Respect & Responsibility, which goes by the acronym BEAR. See MDA, *Internet \geq* at 28 August 2007.

²⁵² MDA, *NIAC Calls for Greater Industry Self-regulation and Promotion of User Empowerment Tools*, 20 February 2001 <<http://www.mda.gov.sg/wms/www/thenewsdesk.aspx?sid=294>> at 28 August 2007.

²⁵³ See MDA, *Internet* at 28 August 2007.

CONCLUSION

Outside of the non-legal framework, a matrix of laws and regulations govern the regulation of interactive digital media in Singapore, each of which operates at a different level and in a different context. The most fundamental law that all ISPs and ICPs that contribute to the digital media industry have to observe in Singapore is the Class Licence Notification and the Internet Code of Practice. This law sets out the basic requirement, which is that the Internet services cannot be against the public interest, public order, national harmony or offend good taste and decency. There are attendant issues regarding the scope of this basic Class Licence scheme, particularly in its application to private and personal communications. But from an administrative standpoint, the regulator has elected not to apply these standards to ICPs who are not targeting Singapore as their principal market.²⁵⁴

However, there remain issue specific laws that apply to different contexts in the digital media industry. Where digital media is in the nature of films and other prohibited materials, censorship laws such as the Films Act and the Undesirable Publications Act may apply. Where digital media is used in elections or towards political ends, the Films Act and the Parliamentary Elections Act and their regulations apply, regulating the types of films which may be used and the types and nature of digital communications which may be deployed during the campaign process. Where there are concerns that religious and racial harmony will be strained, other pieces of legislation such as the Maintenance of Religious Harmony Act, the Internal Security Act and the Sedition Act may be deployed to prohibit the circulation of such material or the detention and punishment of persons responsible. Last but not least, where issues of copyright are involved in the use of such digital material, the provisions in the Copyright Act may be referred to for various remedies and defences.

As this paper illustrates, the law relating to the interactive digital media industry has developed in an incremental fashion. Aside from the Class Licence regime which is Internet specific, other laws that regulate the digital media industry have evolved from existing rules and restrictions.

²⁵⁴ *Internet Industry Guide* [21].

As a medium, the Internet is capable of much harm. But it is also capable of much good. Laws should not be hastily enacted to deal with the harm brought about by the Internet, without due consideration for its legitimate use by millions of law abiding users. In this sense, having a very basic, minimally invasive and “light” Class Licence regime coupled with the “heavy” laws that deal with public order and security issues has worked well for Singapore. Nonetheless, there is clearly room for improvement, for greater clarity and precision in our laws, and for greater consistency in the policies and approaches applicable across issues, as this paper seeks to illustrate. No one disputes the correctness of the conclusion that our laws have to evolve and be updated as the Internet situation evolves. But paradoxically, the continued evolution of the Internet and innovations within the digital media industry cannot take place without a foundation of certainty and predictability. Singapore’s experiences with regulation of the Internet have suggested that perhaps the way forward is to have a minimal set of clear proscriptions that encapsulate clear positions taken on various positions. We may wish to consider taking a strong stand against child pornography, unattributed political statements and representations made by political parties, seditious racial and religious communications and digital materials that blatantly infringe copyright. We may want to signal our respect for individual privacy and freedom of speech, for transparent investigations and due process and for innovation and creativity. These principles should be reflected consistently in all our laws, and across all our piecemeal legislation. The advent of the Internet affords us a unique opportunity to examine the rationale for all our laws carefully. Let us not miss this opportunity.

WHY EMERGING BUSINESS MODELS AND NOT COPYRIGHT LAW ARE THE KEY TO MONETISING CONTENT ONLINE

Eric Priest

INTRODUCTION

The multimedia Internet is here to stay. Rich media – including videos, music, podcasts, and flash animation – is already a key feature of the Internet experience, and will only grow in diversity and importance. As Internet users increasingly crave – and technology increasingly enables – multimedia content delivered on demand over broadband connections, the number of songs, videos, and other media online will increase exponentially to feed the demand.

As online media consumption increases, so will expectations for its capacity to generate revenue for content owners and creators. Analysts boldly predict a bright future for the entertainment industries, especially in Asia, with broadband Internet cited as a key growth driver.¹ The main point of contention in the 2007 Hollywood writers' strike was compensation for media streamed or downloaded over the Internet.² Yet, to date, the vast majority of music and video acquired or consumed online is free and uncompensated. Despite the rising expectations for

¹ PricewaterhouseCoopers, *Global Entertainment and Media Outlook 2006-2010* (2006).

² Associated Press, 'A Look at Issues, Actions in the Hollywood Writers Strike' (International Herald Tribune, 12 December 2007)

<<http://www.ihf.com/articles/ap/2007/12/11/arts/Hollywood-Labor-FAQs.php>> at 17 January 2008.

monetising content on the Web, no clear sustainable, scalable model for monetising content has emerged that compare to the level of revenues copyright owners have enjoyed in the “physical” (as opposed to online) market.

This chapter considers the primary strategies that the international music and film industries have employed to date, namely lawsuits and technological protections, and why these strategies have failed to produce a viable path to long-term revenue generation. I argue that content owners should not hold out hope that using law (in the form of copyright infringement lawsuits against individuals) or technology (in the form of digital rights management encryption software) will unlock the Web’s potential for monetising their content. Instead, successful monetisation of content online will come through business models that can harness and monetise the current behaviour of Internet users. There are three emerging such models, each of which has significant potential and challenges: retail online content subscriptions, ad-supported content, and voluntary blanket licensing.

The following discussion is mostly broad, outlining circumstances facing copyright owners globally, and some emerging potential solutions. Nevertheless, I make a point throughout to highlight the situation in China in particular. Why? China is a challenging but dynamic Internet and digital media market, and is in fact the first market in the world where all three of the emerging models discussed in this chapter are actually being deployed in an effort to jumpstart the digital creative economy. China is an important market for the rest of the world to watch regarding emerging monetisation models.

Lastly this chapter is not meant to be a comprehensive overview of the many innovative ways that musicians, filmmakers, and other creators and companies are using the Web to make money from their content. Undoubtedly the Web has empowered many small and medium-sized content owners to distribute their works and connect with their fans in exciting and unprecedented ways. The purpose of this chapter is to explore the Web’s potential for generating wide-scale, significant, and sustainable content revenues for the entertainment industry, including minor and major content owners.

COPYRIGHT PROTECTION ON THE WEB

Copyright law has, by and large, failed to protect the rights of content owners and prevent unauthorised sharing and consumption of their works online. More importantly, copyright law has provided most owners of media content with no clearly scalable and sustainable mechanism for commercialising their works in an age increasingly dominated by digital distribution over the Internet.

Copyright law worked relatively well in an era in which consumers were primarily able to access copyrighted works on physical media like records, CDs, audiocassettes, videocassettes, DVDs, and paper books. The law worked because it erected legal barriers to access that were largely supported by limitations of the physical world. It was well beyond the means of the average person to produce and distribute perfect copies of LP records or books, for example. One could make imperfect copies – dubbing the LP onto a cassette tape or photocopying the book – but such measures were time consuming and expensive to do on any mass scale. So, physical limitations kept casual unauthorised copying to an acceptable level, and copyright owners could concentrate the bulk of their enforcement efforts on larger-scale commercial piracy operations.

Three technologies emerged to change that copyright ecosystem forever: optical disc media like CDs and DVDs, the personal computer, and the Internet. Optical disc media provide perfect digital source files to be read and cloned by PCs, and the Internet provides a means of accessing and distributing unlimited perfect copies of those files to anyone else with a PC and internet connection, at virtually no cost to the user. Users began to devise systems by which millions of users could network together to locate and share each others' files. The negative impact of these massive peer-to-peer (P2P) file sharing networks on the fortunes of the recording industry was seemingly immediate.

There has been debate about whether file sharing on the Internet has hurt sales of recorded music, and some researchers conclude that P2P file sharing has had no discernible negative impact on CD sales.³

³ Birgitte Andersen and Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada* (2007) <http://www.ic.gc.ca/epic/site/ipdd-dppi.nsf/en/h_ip01456e.html> at 17 January 2008;

Moreover, a convergence of diverse factors is likely to blame for the decline in music CD sales. That decline, however, has been so precipitous, and so neatly coincided with the advent of online file sharing, that it is difficult to imagine the easy availability of millions of free music files online has not impacted the market for CDs. In any case, the recording industry is in trouble and desperately needs to find a way to monetise music consumption online, regardless of whatever impact it has had on CD sales.

The film and television industry bought itself some breathing room due to physical limitations: digital video files are more complex and therefore contain far more data than digital audio files, so video files take longer to copy and distribute online, and take up more space on a user's PC hard drive. That grace period, however, is quickly coming to a close as bigger, cheaper hard drives find their way into users' computers, broadband speeds increase, and technologies like BitTorrent, a P2P downloading technology especially adept at downloading large files quickly, make file size a far smaller barrier.

Copyright enforcement has traditionally been challenging in China, with a developing legal system and a history of porous copyright enforcement leading to estimated CD and DVD piracy rates that at around 90% are among the highest in the world.⁴ But even the commercial pirates are feeling the squeeze caused by the open and ubiquitous free file sharing on the Chinese Internet. As the Internet booms in China – driven in part by the wealth of easily accessible free content online – people have increasingly little need to purchase movies from pirates or legitimate providers alike.

Widespread free online content is not just a Chinese phenomenon, to be sure; it exists everywhere today. But perhaps nowhere is the problem as out in the open as it is in China. The Chinese search engines and P2P networks that enable much of the unauthorised file sharing in China operate in broad daylight, some making a healthy living selling online ads

Felix Oberholzer and Koleman Strumpf, 'The Effect of File Sharing on Record Sales: An Empirical Analysis' (2004) <http://www.gsb.stanford.edu/facseminars/pdfs/2006_10-05_Oberholzer-Gee.pdf> at 17 January 2008.

⁴ For a discussion of piracy in China in the Internet age, see generally Eric Priest, 'The Future of Music and Film Piracy in China' (2006) 21 *Berkeley Tech Journal* 795.

to place in front of their millions of users. The ability to capture so many users with free content has helped many of these services attract capital investment from the most reputable Asian and American firms, or even to publicly list in the US.

Once the major copyright owners realised the size of the “tsunami” (as one major record label executive described it to me) that hit them when online file sharing went mainstream around the world, they sought to address file sharing using law as a first line of defence. The natural target of legal attacks were those, like Napster, who controlled the file sharing networks. Copyright owners were successful in shutting down Napster, a file sharing network with a centrally controlled file index. So, users quickly responded by developing P2P networks with no centralised index or mechanism for tracking and serving files. Copyright owners then aimed their legal crosshairs at individual users, initiating a sustained effort to file lawsuits against thousands of users in the US and UK, and sending thousands of warning letters to US universities requesting that they take action against students participating in illegal file sharing. The threats have had some effect on users’ behaviour, but online file sharing remains robust, CD sales continue to drop, and one may question whether any reduction in file sharing achieved through suing individuals was offset by the ill will the lawsuits created. After all, it may be the first time in which an industry has sued tens of thousands of its own customers.

Both domestic and international entertainment companies have tried the litigation path in China with little success. Major Chinese search engines like Baidu.com and Yahoo.cn have deep pockets and are far and away the most popular channel for accessing free music files online in China, so they were natural targets for contributory infringement suits. But murky legal issues (Baidu won on appeal because the court found it only aggregated links to content but did not in fact serve the content itself,⁵ while Yahoo.cn was found liable for infringement under similar circumstances⁶) and notoriously low damages for infringement available

⁵ *Music Labels Lose MP3 Search Case*, BBC News (19 November 2006), <<http://news.bbc.co.uk/2/hi/entertainment/6163352.stm>> at 17 January 2008.

⁶ Reuters, *Beijing Court Rules Yahoo China Violates IPR*, (21 December 2007) <<http://www.reuters.com/article/musicNews/idUSSHA9621520071221>> at 17 January 2008.

under Chinese law⁷ have left copyright owners with little recourse, and emboldened internet companies to continue to conspicuously serve up free, unlicensed content.

China's Internet gold rush is in full swing, and many companies believe that content is the best way to quickly attract page views (or "eyeballs") – one of the primary determinants of an internet company's value since more eyeballs presumably attract more advertising dollars. In the cutthroat Chinese Internet industry, most companies that wish to provide free content lack the considerable time, expertise, and financial and human capital required to seek proper licenses from myriad copyright owners. The few Chinese Internet companies for whom the provision of licensed content is a key aspect of their business model are at a significant disadvantage vis-à-vis their competitors who are not slowed by the need to negotiate a license before posting the latest movies, television series, and hit music, and who do not share their revenues with content owners.

Copyright law has had some impact on Chinese Internet companies, however. As these companies mature and seek to grow their businesses and reputations beyond China's borders, they feel compelled to play more by international rules. Baidu, for example, became the most successful Chinese Internet company largely by providing an MP3 search function that scans the Web, including blogs, online bulletin board systems, and other websites for free audio files, and provides users with a direct link to relevant files in its search results. Privately, Baidu officials have told me that MP3 searches account for 25 percent of Baidu's 100 million search requests per day (though many analysts believe MP3 searches actually account for a much higher percentage of Baidu's traffic).

While Baidu has made a good living providing Chinese netizens with links to free music, it nevertheless seeks to ally itself with copyright

⁷ Eric Priest, 'The Future of Music and Film Piracy in China', (2006) 21 *Berkeley Tech Journal* 826; See also, Reuters, 'Beijing Court Rules Yahoo China Violates IPR' (21 December 2007) (reporting that the appeals court in the Yahoo China infringement case ordered a fine of 200,000 yuan, or about US\$27 000) <<http://www.reuters.com/article/musicNews/idUSSHA9621520071221>> at 17 January 2008.

owners. In 2006 and 2007, for example, the company announced a series of high-profile partnerships and licensing deals with content owners including EMI Records, MTV/Viacom, and Rock Records (a large Taiwanese independent record label).⁸ The newfound interest in partnering with and paying copyright owners is not due to fear of copyright liability – the low damages typically awarded in Chinese copyright cases are easily within the cost of doing business for a company like Baidu, and in any event Baidu maintains it is not committing copyright infringement – a position with which at least one Chinese court has agreed. Rather, the company has international, even global aspirations (for example, it is a US-listed company, and in 2007 launched a Japanese version of its search engine), and seeks to improve its image as a global corporate citizen after suffering a barrage of lawsuits. Other Chinese Internet companies now find that giving their users easy access to free, unlicensed content is a quick shortcut to millions of eyeballs, but scalability beyond that point is a challenge when one's company and business model are dogged by serious legal questions.

The copyright industries have long dreamed that the rights and protections afforded by copyright law could be effectively replicated in software and other technologies designed to restrict consumers' access to copyrighted works. Somewhat euphemistically called "Digital Rights Management" (or "DRM"), in practice these technologies have proved largely incapable of preventing widespread copying and sharing of copyrighted works online. Restrictive DRM schemes have, however, proven rather effective at alienating paying customers and driving them to seek unrestricted files through alternative sources online, primarily through P2P file sharing networks.

⁸ Music Week, 'EMI Partners with China's Largest Search Engine' (16 January 2007), <<http://www.musicweek.com/story.asp?storyCode=25089§ioncode=1>> at 18 January 2008; See also Steve McClure, 'Baidu, Rock Records Team Up for Chinese Music Service', *Billboard*, July 5, 2007, <http://www.billboard.biz/bbbiz/content_display/industry/e3i5dfb3f63da5f9979a7e8662e8966e637> at 17 January 2008; See also 'MTV, Baidu Launch Stunning Alliance', *China.org.cn*, 18 October 2006, <<http://www.china.org.cn/english/2006/Oct/184736.htm>> at 17 January 2008.

DRM schemes range from crude, unilateral restrictions (for example, embedding code on a CD that makes it unreadable by a personal computer) to more sophisticated and nuanced controls (such as Apple iTunes's "Fairplay" DRM, which locks a purchased music or video file to a limited number of devices registered to a single user, and permits certain "fair uses" of the copyrighted works contained in those files, such as copying them to a limited number of recordable audio CDs).⁹ All forms of DRM, however, restrict usage in some way, resulting in some degree of inconvenience to the user, which reduces the value to most users of the purchased audiovisual product.

There are two particularly serious obstacles to the success of DRM. The first is a typical lack of interoperability among devices. For example, Apple's market-dominating iPod portable digital music player only supports Apple's own DRM technology, and will not play DRM-encoded files purchased from Microsoft, Yahoo, Real, or any other online music retailer. Likewise, files bought from Apple's market-leading iTunes Music Store are incompatible with any computers or portable devices except those that are either manufactured by Apple or running Apple's software.

The second obstacle is leakage. Despite the efforts of talented engineers and the millions of dollars of investment poured into DRM schemes by entertainment companies, no DRM has proved hack-proof. And once a DRM scheme has been hacked, the content it was meant to protect can be freely copied and distributed. Because of the nature of digital media, it takes only a single copy to seed an infinite number of perfect copies. So once a DRM scheme has been defeated on a single copy of a song or video, that song or video can and often does quickly leak onto public file-sharing networks where it immediately proliferates and is readily available to all. The best any DRM scheme has been able to hope for is to provide a "speedbump" to average users, who would prefer to pay for a legitimate copy of the file (which is guaranteed quality and can be downloaded immediately through digital distributors such as the iTunes Music Store or Real Networks' Rhapsody service) rather than go to

⁹ 'How Fairplay Works: Apple's iTunes DRM Dilemma', *RoughlyDrafted* 26 February 2007, <<http://www.roughlydrafted.com/RD/RDM.Tech.Q1.07/2A351C60-A4E5-4764-A083-FF8610E66A46.html>> at 17 January 2008.

whatever trouble might be associated with obtaining an unauthorised copy.¹⁰

The recording industry has been at the front lines of the DRM issue longer than the film industry, largely due to music's popularity as an entertainment form, its abundance in digital form on CDs, the ease with which music can be "ripped" from CDs to PCs (since CDs traditionally incorporate no DRM), and the comparatively small sizes of compressed audio files versus the considerably larger size of most video files. While the major record labels (which at the time of this writing have been reduced through industry consolidation to four: Universal Music, SonyBMG Music, EMI, and Warner Music) were unified in their strong support for DRM as the best strategy for combating rapidly increasing losses to online file sharing, the myriad problems associated with DRM left many others in the industry unconvinced that DRM is a saviour.¹¹ Many indie labels decided that selling their music for download without DRM would serve the double purpose of making their songs compatible with the widest variety of devices possible and making them freely copiable, which would help to promote the artists on their roster.

By 2007, the situation grew so dire for the global recording industry that it was clear to many there was no time to wait out the DRM experiment. Steep year-over-year losses from ever-weakening CD sales, and the increasingly apparent inability of digital sales revenue to supplant those losses, meant a drastic shift in strategy was required. In February 2007, EMI was the first major label to announce that it would begin selling

¹⁰ Charles Nesson, a proponent of the speedbumps approach, expressed his views in research on new digital media models at Harvard's Berkman Center for Internet & Society: "[The commercial success of online media services] does not depend on complete elimination of piracy or file-sharing. Instead, it depends on the comparative attractiveness of a service over file-sharing networks as a source for obtaining new releases of copyrighted works... The Speedbumps scenario seeks to craft a realistic and lawful approach that supports a viable commercial marketplace for digital entertainment products while also encouraging liberal reform of past practices in the entertainment industries, respecting the open end-to-end architecture of the internet, and retaining the basic structure of copyright law." Berkman Center for Internet & Society Digital Media Project, *'Speedbumps Scenario for Digital Media'* (2004), <<http://cyber.law.harvard.edu/media/scenario2>> at 25 September 2007.

¹¹ Nate Anderson, 'Making Money Selling Music Without DRM: the Rise of eMusic' *Arts Technica*, 22 May 2006 <<http://arstechnica.com/articles/culture/emusic.ars>> at 17 January 2008.

DRM-free music online.¹² Shortly thereafter, major online retailer Amazon.com dealt what many believe will prove to be the final blow to DRM by announcing a new music download service that would only sell DRM-free music. Universal, the largest of the four major record companies, became the second major label to release music online without DRM.¹³

While the DRM debate rages in the West, it has had little impact in China. The topic seems quaint in an economic environment in which there has never been a sustainable model or market for retail or subscription music or video downloads. Some legitimate music download services, such as China's largest legitimate download retailer 9Sky, ostensibly use DRM to satisfy major labels' requirements. Some users report, however, that even those services actually do not use DRM, because in an environment saturated with free content, imposing restrictions and complicated usage rules on content downloads is plainly disadvantageous. Because it rarely touches their lives, DRM is simply not a part of the online consumer consciousness in China in the way that it is in the West.¹⁴

At this time, the lawsuit path and the DRM path both offer the entertainment industries in the West little hope of resurrecting traditional entertainment business models and revenues. In China, the notion that either of these strategies could help drive a turnaround in the difficult market for legitimate content is simply a non-starter.

¹² EMI, 'EMI Music Launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire', *EMI Press Releases*, 2 April 2007, <<http://www.emigroup.com/Press/2007/press18.htm>> at 17 January 2008.

¹³ Ken Fisher, 'Music DRM in Critical Condition: Universal Tests DRM Free Music Sales', *Ars Technica*, 9 August 2007, <<http://arstechnica.com/news.ars/post/20070809-music-drm-in-critical-condition-universal-tests-drm-free-music-sales.html>> at 17 January 2008.

¹⁴ Wolf Richter, *Key Findings from Digital Media Survey China 2007* at 7 (2007), draft manuscript on file with author (reporting that 82 percent of Chinese university student survey respondents were either unconcerned or neutral about getting files without copy protection or other use restrictions).

EMERGING ALTERNATIVES

What new business models are emerging globally and in China to help blaze an effective path to online monetisation in the face of near-ubiquitous free content online? The following discussion examines three emerging models: (1) the subscription model; (2) the ad-supported model, and (3) the blanket licensing model.

Each of these models seeks to take advantage of Internet features that make it a particularly efficient distribution platform. First, all three are based on the Internet's ability to deliver content instantly on demand. Second, they can harness the Internet's ability to facilitate automated tracking of content consumption, and use that data to determine copyright royalty distributions to content owners. Third, they leverage the Internet's ability to enable distribution of smaller payments across huge numbers of users in the hope of enabling a large aggregate payout to copyright owners. In short, each of these models embraces the Internet's openness and economies of scale, while previous strategies of the major copyright industries (lawsuits and DRM) have not. And despite challenges that these models face, they have significant potential because of their focus on monetising current Internet user behaviour rather than attempting to restrict and change it.

Before moving into the following discussion, it is worth pausing to ask: what about retail download services? After all, Apple's iTunes Music Store is the most successful online music and video store in the world, boasting over 3 billion song downloads at 99 cents each since it opened its virtual doors in 2003.¹⁵ Amazon, the biggest online retailer in the world, launched a much-hyped DRM-free music download service in 2007.¹⁶ It seems as the incumbents, the pay-per-download retail services have a clear edge over any emerging alternatives. Shouldn't retail download be discussed as a key emerging model for monetising content? Probably not.

¹⁵ 'iTunes Store Tops Three Billion Songs', *Apple Press Release*, 31 July 2007

<<http://www.apple.com/pr/library/2007/07/31itunes.html>> at 17 January 2008.

¹⁶ Joshua Topolsky, 'Amazon Launches DRM-Free "Amazon MP3" Music Downloads', *ENGADGET*, 25 September 2007 <<http://www.engadget.com/2007/09/25/amazon-launches-drm-free-amazon-mp3-music-downloads/>> at 17 January 2008.

The success of the iTunes store seems to be the exception that proves the rule. No other retail download service in the world has come close to the volume of sales iTunes has mustered. Apple owns three-quarters of the legitimate music download market, while the next closest competitor has a single-digit market share.¹⁷ Apple's continued unchallenged dominance in this area suggests that the iTunes store's tight integration with its market-dominating iPod music player is an especially unique and compelling combination that other services cannot duplicate; but it also suggests that in general consumer apathy toward retail downloads is high. This seems particularly true when comparing the number of legitimate downloads from iTunes over four years from 2003–2007 (over 3 billion) to the number of files downloaded through P2P networks during the same period (estimated at 1 billion per month).¹⁸

The Retail Subscription Model

Some observers believe the music industry is undergoing a fundamental transition from a product-based industry to a service industry.¹⁹ Before the technology existed to record music and sell it as a physical product, the music business was necessarily a service industry: those in the music profession made their living performing, teaching, or writing commissioned compositions. Since the advent of recorded music, however, selling music as a physical product became the lifeblood of the industry. Now that digital technologies have allowed freely available recorded music to become ubiquitous, thereby gutting the value of recorded music to a growing number of consumers, some ponder whether the industry will be forced to return to a model in which services comprise its primary revenue stream.

¹⁷ In the US, the world's largest online music market, Apple enjoys more than 70 percent of the legal download market. Emusic is a distant second at around 9 percent. See, eg, Devin Leonard, 'Rockin' Along in the Shadow of iTunes', *Fortune*, 13 February 2007, <http://money.cnn.com/magazines/fortune/fortune_archive/2007/02/19/8400178/index.htm> at 17 January 2008.

¹⁸ David Kravets, 'Piracy Milestones Converge, Illegal Downloading Goes Unabated', *WIRED BLOG*, 4 September 2007 <<http://blog.wired.com/27bstroke6/2007/09/piracy-mileston.html>> at 17 January 2008 (citing data from network traffic research firm BigChampagne).

¹⁹ David Kusek and Gerd Leonhard, 'The Future of Music: Manifestos for the Digital Music Revolution' (2005) 12–15.

In an environment where content has little value because it is freely obtained, but where unlicensed P2P services cannot directly “touch” the content they deliver for fear of contributory copyright liability, value-added services may become the thing users are most willing to pay for. It is plausible, therefore, that all the content industries, not just music, are headed in the direction of the service-based model for monetising content in the digital age. Services for which consumers are willing to pay a premium might include recommendation technologies to help people discover new content of interest, social networking features integrated with the content, central online hosting and storage of content for ubiquitous access via any Internet-connected device, convenient content searching and file access, faster download speeds, reliable virus-and-malware-free files, and provision of reviews, information, and lyrics or screenplays to accompany the music or video content.

A services-oriented model might suggest a shift toward a subscription paradigm for online content, in which users pay a recurring fee not to own the content, but to access it on demand together with core value-added services. In the music context, industry veterans Rick Rubin and David Geffen sketch a subscription model they believe will save the industry:

“You would subscribe to music,” Rubin explained.... “You’d pay, say, \$19.95 a month, and the music will come anywhere you’d like. In this new world, there will be a virtual library that will be accessible from your car, from your cellphone, from your computer, from your television. Anywhere. The iPod will be obsolete, but there would be a Walkman-like device you could plug into speakers at home. You’ll say, ‘Today I want to listen to ... Simon and Garfunkel,’ and there they are. The service can have demos, bootlegs, concerts, whatever context the artist wants to put out. And once that model is put into place, the industry will grow 10 times the size it is now.”

[According to Geffen,] “The subscription model is the only way to save the music business. If music is easily available at a price of five or six dollars a month, then nobody will steal it.”²⁰

²⁰ Lynn Hirschberg, ‘The Music Man’, *NY Times Magazine*, 2 September 2007, <<http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html>> at 17 January 2008.

Rubin and Geffen are describing a music service, but the subscription model they advocate is applicable to movies, short-form video, and other types of digital media as well.

“Churn” is a key weakness of the retail subscription model Rubin and Geffen envision. What’s to stop me from signing up for the service for a month or two, downloading all the content I am interested in, and then cancelling my subscription? I can expand my album collection tenfold for a few dollars, with ease, speed and a user experience that greatly transcends what I can get from unlicensed file sharing networks. And once a year I can repeat my strategy to top up on the latest content. If a large enough percentage of users do the same, and enough new users haven’t subscribed to offset the cancellations plus lead to sustainable growth, then the model breaks down.

Early entrants into the retail subscription space usually attempt to combat churn by providing high-quality services and a large pool of content in a “rental” model, using a DRM strategy that disables any content a subscriber has downloaded once the DRM software detects that the user has stopped paying the monthly subscription fee. For many consumers, however, a DRM-enforced rental model leaves much to be desired in terms of convenience and compatibility with popular media devices such as the iPod. In addition, many users prefer to own their content outright, especially music.

After several years in the market, a handful of music rental services are beginning to gain traction with consumers in North America. Rhapsody, owned by Real Networks, is the DRM-based subscription service that has fared the best. Rhapsody charges customers \$12.99 per month for unlimited access to music, and \$.99 per song for à la carte music downloads. Real claims approximately 2.7 million users for all its music services, though it is unclear what percentage of those are Rhapsody subscribers at the \$12.99 rate.²¹

²¹ ‘Rhapsody Teams with Universal Music Group for DRM-Free Music Test’, *Real Networks Press Release*, 10 August 2007, <http://www.realn networks.com/company/press/releases/2007/rhap_umg.html> at 17 January 2008. (“RealNetworks ... currently leads the market for music subscription services with more than 2.7 million subscribers to Rhapsody and its other premium music services.”).

At least one music service, US-based eMusic, provides DRM-free subscriptions, that is, “all-you-can-eat” downloads of unencrypted music files for a fixed monthly fee (though the number of downloads permitted each month is capped).²² After a decade in the market, eMusic boasts about 300,000 subscribers, with a nearly 20 percent increase in subscribers in 2007.²³ Still, for the music industry, the subscriber levels are discouragingly low. With so much free content now available on the Web, and so many more options vying for consumers’ entertainment dollar today than twenty-five years ago, it seems unlikely retail content subscription services will have more than niche appeal. Retail models – including subscription services – thrive on scarcity, thereby encouraging users to pay higher prices for access. But scarcity simply does not apply well to the Internet.

Retail subscription services, like retail download services, have gained little traction in China. At least two local companies have launched music subscription services: 9sky.com, which provides “all-you-can-eat” music download services from a large catalogue of content for about US\$3 per month, and Top100.cn, which launched its service in 2006. Neither has been successful with the model, and both are now shifting to other models in an attempt to monetise content more effectively (9sky plans to bundle music with proprietary personal media devices,²⁴ while Top100.cn was purchased by Google in 2007 and plans to provide ad-supported music download services).

The Ad-supported Model

Recent nosebleed valuations of Internet media companies such as YouTube – which Google acquired in 2006 for US\$1.65 billion – have driven entrepreneurs in droves to produce websites and social networking applications that serve up free content to users, whether or not valid licenses for the content have been obtained. In the current “Web 2.0” phase, eyeballs are the most valuable currency for Internet

²² See further www.emusic.com.

²³ ‘eMusic Momentum Continues; Tops 300,000 Subscribers’ *eMusic Press Release*, 17 Apr. 2007, <<http://www.emusic.com/about/pr/pr2007417.html>> at 17 January 2008.

²⁴ See further <<http://www.trb.cn/wordpress/index.php/2007/12/20/527/>> at 17 January 2008.

companies. Sites attracting the most eyeballs are the most valuable sites on the Web regardless of whether they make a profit (and many do not).²⁵ Giving away content for free is an effective way to attract a large number of eyeballs.

The assumption underlying the sky-high valuations of new media websites is that those with high traffic volumes will figure out some way to profit from that traffic in the future, even if they have negative cash flows today. Most look to Internet advertising revenue as the default strategy for monetising the traffic. Giving content away and monetising it through ad revenue – similar to the network television model – is a path to monetisation that is certainly compatible with most consumers' expectations about Internet content: that it is free.

Still, there are major questions concerning the online advertising model. Most importantly, will there ever be enough Internet ad revenue to sustain a legion of Web 2.0 businesses, social networking sites, “widgets” embedded in those social networking sites, search engines, newspapers, portals, gaming sites, and blogs, in addition to helping support healthy content industries that produce high quality, high-production-value works?

Online ad spending is increasing, to be sure, growing at an expected rate of over 21 percent each year through 2011.²⁶ Analysts believe the global market for online spending will increase from US\$36 billion in 2007 to US\$61 billion in 2010, overtaking global radio and magazine ad spending during that period.²⁷ Rich Internet media, including music and video, is helping to drive growth in online advertising, and content owners who license their works online will no doubt benefit from the flow of ad revenue.

²⁵ Dan Tynan, ‘VCs Tell Startups: Don’t Show me the Money (Yet)’, *WIRED*, Dec. 4, 2007, <<http://www.wired.com/techbiz/startups/news/2007/12/monetize>> at 17 January 2008. (“Numbers clearly matter [to a start-up’s overall value],” says [the CEO of a Web 2.0 site]. ‘But the numbers that matter most are not the ones with dollar figures attached, they’re the ones that measure page views and site engagement.’”)

²⁶ Veronis Suhler Stevenson, ‘VSS Communications Industry Forecast 2007-2011’ (2007), <http://www.vss.com/industry_research/publications/communications_industry_forecast/index.asp> at 17 January 2008.

²⁷ ‘Global Ad Market to Accelerate in 2008 Despite Credit Squeeze’, *ZenithOptimedia Press Release*, 3 December 2007.

It is unclear, however, what percentage of this revenue will find its way to content owners versus all the many other online industries that rely primarily or solely on ad revenue. The majority of ad revenue remains locked up in a handful of sites, with more than 90 percent of total online ad revenue in the US going to the top fifty websites, and 70 percent going to the top ten sites.²⁸ As content consumption moves increasingly online, will content owners be able to snatch away a large enough piece of the advertising pie from top web companies to be sustainable?

According to one media and investment executive, projected ad revenue will not be enough to sustain the myriad of new Internet and media-related businesses.

“I’m getting to the point where I feel like every answer to every business development pitch is ‘We’re going to be advertiser supported,’” said Beth Comstock, president of Integrated Media at NBC Universal, which this year set up a fund to invest in media and digital companies. “It’s just not going to be possible,” she said at a recent advertising conference. “There are not going to be enough advertising dollars in the marketplace. No matter how clever we are, no matter what the format is.”²⁹

Moreover, it is unclear how to most effectively combine advertising with online content. In traditional ad-based media such as television or radio, content was performed for the viewer or listener with advertisements interspersed. Internet users have far more control over their content experience than previous generations of consumers. Internet users can download and store music and video for playback when they want on whatever device they choose. A site may require a user to view a banner ad before or while downloading the content, but this method of advertising fails to maximise the content’s economic value because the user only views the banner ad once, but may enjoy the download thousands of times in ensuing years. Ways to address this problem include embedding ads in the content itself, or requiring the viewer to experience the content in a DRM-controlled environment on the user’s

²⁸ Paul Thomasch, ‘Ad Dollars Flood Web, but Will They Go Far Enough?’, Reuters, 12 October 2007, <<http://www.reuters.com/article/internetNews/idUSN1221764120071012?pageNumber=1>> at 17 January 2008.

²⁹ Ibid.

PC that displays ads while playing the content. But users may be annoyed by the embedded ads or restrictions on how the content can be enjoyed, which may cause them to quickly reject the “legal” content when myriad “illegal” sources of the same content are readily available.

It is also worth noting that many traditional media outlets for some time have not relied solely on advertising income. Newspapers and even cable television stations have generally relied on a combination of subscription revenue and advertising income to support their businesses.

Nevertheless, the ad-supported online media experiment has begun. One new online music destination, SpiralFrog, in 2007 began serving free downloads of DRM-encrypted music files, including major record label content, in exchange for users visiting the site and viewing advertisements at least once a month.³⁰ Another service, We7, allows users to download free, DRM-free music, though the music files contain a short pre-roll advertisement at the beginning of the song.³¹ Video sites have also begun exploring advertising solutions, most notably YouTube, which provides free video streaming and in 2007 began experimenting with inline ads at the bottom of some videos.³² And “viral” video site Revver embeds ads in its free video files and shares ad revenue with content creators.³³

China will prove an interesting test market for licensed, free online content. At the time of this writing rumours are flying that Google, in a bid to compete with Baidu for China search market dominance, plans to release a music portal from which users can search and download ad-supported, DRM-free content, including content from at least some of the major record labels. If true, Google’s will be the first such service anywhere in the world to serve licensed, DRM-free major label content for free download. The experiment is especially interesting in China where, despite Internet growth that is unparalleled elsewhere in the world, the online ad market remains surprisingly soft. Estimates for 2007

³⁰ See further www.spiralfrog.com.

³¹ See further www.we7.com.

³² Catherine Holahan, ‘Google’s In-Video Ad Experiment’, *Business Week*, May 24, 2007, <http://www.businessweek.com/technology/content/may2007/tc20070524_820093.htm> at 17 January 2008.

³³ See further www.revver.com.

online ad revenues range from US\$850 million to US\$1.3 billion, as compared with US\$21 billion spent on online advertising in the US in 2007.³⁴

The Voluntary Blanket Licensing Model

The voluntary blanket – or “collective” – licensing model seeks to create a healthier long-term ecosystem for content owners and Internet service providers (“ISPs”) by utilising the ISP’s billing relationship with the consumer and extracting economic value for online works at the service provider level.³⁵ One can argue, plausibly, that content is already monetised on the Internet, but not by content owners. ISPs earn billions of dollars in revenue from the provision of Internet access services, and content – much of which is unlicensed and unmonetised by content owners – accounts for a huge percentage of Internet traffic.³⁶ If unlicensed P2P traffic and the distribution of other unlicensed content consumes a significant percentage of the bandwidth that ISPs sell, it is reasonable to suggest the content being accessed via that bandwidth creates value for the consumer accessing, and the ISP selling, the bandwidth. The less content there is available on Web, the less valuable the Web is to consumers, and this fact should impact the price that the market will bear for Internet access services.

³⁴ Thomas Crampton, ‘*Bill Bishop’s Estimate of 2007 China Internet Advertising Revenue*’, 28 October 2007 <<http://www.thomascrampton.com/2007/10/28/bill-bishops-estimate-of-2007-china-internet-advertising-revenue/>> at 17 January 2008. (Crampton writes on technology and media for the International Herald Tribune and the New York Times); See also eMarketer, ‘*Online Advertising on a Rocket Ride*’, 7 November 2007, <http://www.emarketer.com/Article.aspx?id=1005549&src=article1_home> at 17 January 2008 (projecting \$21.4 billion in online ad spending for the US market in 2007).

³⁵ The model outlined here is a private, non-compulsory variant on the government levy “alternative compensation system” model defined by William Fisher III and others, and a refinement of Fisher’s “co-op” model. See William W Fisher III, ‘Promises to Keep: technology, Law, and the Future of Entertainment’ (2004). For a discussion of the alternative compensation model in China, See Eric Priest, ‘The Future of Music and Film Piracy in China’, (2006) 21 *Berkeley Tech. Journal* 305.

³⁶ Jason Kowal, ‘The Never Ending Rush Hour: Internet Traffic Growth Requires Continual Investment in Capacity and Innovation in Network Management’ (9 August 2007) <http://www.newmillenniumresearch.org/archive/Rush_Hour_August2007.pdf> at 17 January 2008. (P2P applications occupied nearly 40 percent of U.S. broadband traffic in 2007).

It makes sense, then, for the customer and ISPs to pay a fee directly to content owners. If the fee is charged to all users and thereby distributed across a large number of individuals, the fee per individual can remain low while the total pool of revenue collected and distributed to copyright owners is high.

How would such a model work in practice? An entity such as a company or collective would administer blanket licenses to networks and operate the required technologies for counting content usage and distributing royalties to content owners. The company would aggregate licenses from owners of a wide variety of content including music, videos, documents, e-books –virtually anything that can be digitised, downloaded, and shared online. It would then distribute those works as digital file downloads or “streams” to ISPs and their users in return for per-subscriber monthly fees paid by participating ISPs on behalf of their users. The ISPs could choose to pass the fees through to the end users as a slight mark-up or pay the fees directly without passing them through to subscribers. Key to the model is the monetisation of content online without having to rely on a retail relationship with consumers, as retail content services have failed to generate sufficient uptake.

A central function of the company would be to collect data on end users’ actual consumption of content (how frequently a given file was downloaded, played, burned to CD, copied to an external MP3 player, and so on). To do so, the company would operate a sophisticated content usage counting and accounting system, which importantly should include mechanisms to ensure the privacy of users’ consumption data. The data would then be processed and used to determine a pro rata distribution to content owners of the pool of revenue collected from ISPs. Online advertising could provide a supplemental income stream and also be shared with content owners.

The primary benefit of the blanket licensing model is that it monetises the abundance of content on the Web, as well as users’ online behaviour – downloading, consuming, and sharing content – rather than seeking to alter user behaviour to fit more outmoded scarcity-oriented retail models. Retail models for online content are generally not very consumer-friendly. Compared to the free content to which many consumers have easy access, retail is inconvenient (requiring the entry of payment information before consummating a transaction) and expensive

(iTunes in the U.S., for example, charges 99 cents per song, \$1.99 per TV show, and more than ten dollars per movie). These barriers to entry make the retail model especially challenging in China, and make the blanket licensing model especially attractive in a market where users see value in “zhengban” (or, legitimate) content, but are loathe to pay more than “daoban” (or, pirate) prices. The economies of scale leveraged by the blanket licensing model can ensure copyright owners are well compensated for their works online, even if the fee collected per subscriber is low.

An ISP would participate in the blanket licensing model only if doing so makes good business sense. Fortunately, it can make good business sense for an ISP to pay a small content fee on behalf of each of its subscribers. ISPs naturally wish to sign up and keep new subscribers, and providing an “all-you-can-eat” licensed content download service can help with that objective. ISPs are also increasingly concerned about potential legal liability for large volumes of unlicensed content stored and transported on their networks.³⁷ Joining a blanket licensing program could help shield ISPs from legal liability, at least for the content covered by the blanket license. Further, blanket licensing can help ISPs save on bandwidth costs—an ever-important objective to ISPs.³⁸ Signing up with a blanket licensing provider would essentially “site-license” the network for a catalogue of content, which could then be stored, or “cached,” legally throughout the ISP’s own network infrastructure. This would allow the ISP to corral more traffic within the network (rather than flowing outside the network), which can reduce the network’s bandwidth costs.

There are, no doubt, challenges facing the blanket licensing model.³⁹ First, as with the ad-supported model and the subscription model, it

³⁷ ‘Record Companies Win Legal Copyright Case Against ISP’ *IFPI Press Release*, 18 Dec. 2006, <http://www.ifpi.org/content/section_news/20061218.html> at 17 January 2008.

³⁸ Ramayya Krishnan et al., ‘The Economics of Peer-to-Peer Networks’, (2003) 5 *Journal of Information Technology Theory and Application* 31 (observing that P2P traffic often occupies a very large percentage of network bandwidth and can create large transit fees for ISPs that permit P2P traffic).

³⁹ For a more in-depth discussion of challenges related to alternative compensation models like the blanket licensing model, see William W Fisher III, ‘Promises to Keep: technology, Law, and the Future of Entertainment’ (2004); and Eric Priest, ‘The Future of Music and Film Piracy in China’, (2006) 21 *Berkeley Tech Journal* 305.

remains to be seen whether the blanket licensing model can in the long run generate enough per-user revenue to be the global answer to monetisation of the creative industries. Second, some may see inequities in the cross-subsidisation aspects inherent in the model. When, for example, an ISP chooses to pass the content fee along to subscribers, some will inevitably use the content more than others. (It is worth noting that such cross-subsidisation is typical in the Internet service context. For example, light bandwidth users generally pay the same Internet access fee as heavy bandwidth users, though light users are subsidising the high bandwidth costs of the heavy users. The cross-subsidy helps keep the fee reasonable for all users.)

Third, the blanket licensing model is the most untested of the three emerging models discussed in this chapter. More specifically, the ISP blanket licensing model has never been tested in the marketplace (though collective licensing for music publishers and composers has existed for over a century and provides the ISP blanket licensing model with a strong precedent). That the ISP blanket licensing model is untested is about to change, however. Since late 2005, I have been involved with a project, founded at Harvard Law School's Berkman Center for Internet & Society, to research and later develop a specific implementation of the blanket licensing model. The research was funded initially by the MacArthur Foundation, but it became clear that a real-world implementation of the model would require significant resources and private capital, so a private company was formed, of which I am presently an officer.

We selected China as our first market largely because stakeholders in China, particularly content owners and ISPs, saw the model as a compelling solution to a difficult online piracy problem. Chinese stakeholders were more open-minded and willing to embrace the model than their counterparts in the West, who at the time were concerned about the model's potential for disrupting the current entertainment industry structure. There were no such concerns in China, and that, coupled with the fact that China is the fastest growing Internet and entertainment market in the world, helped convince us China was the right opportunity. Importantly, one of our objectives was, together with our Chinese partners Tsinghua University and the China Education and Research Network (CERNET), to help China develop an innovative

solution to intellectual property challenges it faces, and in doing so help China emerge as a global leader in intellectual property protection in the Internet age.

CONCLUSION

The central theme of this chapter is not protection of copyright on the Internet – it is monetisation of copyrighted works on the Internet. The distinction is important because there was a time when copyright “protection” went hand-in-hand with “monetisation,” but that is no longer the case. Internet users now control how music and video are acquired, shared, and consumed on the Web. For the most part, content is free from cost and restrictions. Strategies involving suing Internet users or protecting legitimately purchased digital files with DRM have not offered a path to monetisation in the face of near-ubiquitous free content online. Models that seek to “put the genie back in the bottle” and alter users’ behaviour offer little hope to content owners of monetising their content online in a viable, sustainable way.

P2P services and other services that provide free streaming and downloading of content are popular for a reason: they are inexpensive and convenient, giving users the control to determine how and when they enjoy the content. Successful future models are those that can harness and monetise these features. The successful models will embrace users’ current behaviour – downloading unlimited content that they can share and keep without restriction – and monetise it by adding value to all the stakeholders in the chain: ISPs, content owners, and consumers. Copyright law will continue to have a role on the Internet, but more as a facilitator of these new models (enabling attributions, royalty payments, and so on).

The ad-supported model and the blanket licensing model embrace the openness of the Internet, and have mechanisms for leveraging that openness into revenue streams for content owners, and therefore are more likely to succeed in the long run than retail models – including the retail subscription model – that rely on scarcity. Nevertheless, all three of these models will coexist for some time into the future, and will help enable the Internet to finally live up to its potential as the dominant media distribution platform.

INTERNET CONTENT PROVIDER LICENCES IN THE PEOPLE'S REPUBLIC OF CHINA'S INTERNET INDUSTRY: A PRACTICAL PERSPECTIVE

Wentao Sha and Difei Yu

The provision of internet services in China is governed by a detailed regulatory regime. This chapter will outline the basic legal framework for such regulation and highlight current issues created by the existing model.

BACKGROUND

As reported by the AFX News,¹ and other mainstream media, China's authorities have scrutinised Google for operating under a partner's Internet Content Provider Licence (ICP Licence). The AFX reporter believed such scrutiny suggested policymakers were making a political statement, rather than punishing a company that had breached the law.

According to Deutsche Bank sector analyst William Bao Bean, each foreign multinational 'borrows licences or uses someone else's licence, but generally they own those companies'. Most overseas-listed internet companies acquire licences through local companies owned by Chinese nationals who then work for the listed company; these locally-owned companies are not directly owned by the listed entity.² However, Google does not own its partner Ganji.com.

¹ See <<http://www.forbes.com/work/feeds/afx/2006/02/23/afx2547661.html>> at 25 January 2008.

² For instance, Internet giant eBay acquired its license through Chinese partner EachNet, while Yahoo and Amazon respectively cooperate with their local partners, 3721 and Joyo. Practically speaking, such cooperation will be based on a trustee structure via domain

The primary legal issue for industry players in conducting relevant businesses under the Chinese Administration is value-added telecom services (VAS). People are pleased that Google will soon be obtaining an ICP Licence,³ however this may raise questions such as: will the ICP Licence cover all the businesses conducted by Google? How can Google meet all the People's Republic of China's (PRC) legal requirements regarding ICP Licence, especially the requirements for service in restricted areas (for example the news sector)? And, will China's provision on ICP Licence be changed due to the growth in the Internet service industry?

ICP-RELATED LEGAL FRAMEWORK FOR THE INTERNET INDUSTRY

PRC's Legal Environment

The PRC Internet industry is jointly regulated by several government authorities, including: the Ministry of Information Industry (MII, formerly the Ministry of Post and Telecommunications), the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), the Ministry of Public Security (MPS), and the General Administration of Press and Publication (GAPP). MII and MOFCOM which are the most relevant and important Ministries to the industry players, are responsible for assessment of the qualification of market entrances, regulating market entry and the daily operation of Internet-related enterprises; while SAIC, MPS and GAPP regulate Internet content. There are certain areas in the PRC relating to the Internet that are protected by existing laws and regulations, these

name and trademark license arrangements, which will legally guarantee foreign multinationals' control over relevant local partners.

³ This was reported in the *Caijing Magazine*, 13 April 2007, volume 184. For the electronic version of this article see <<http://www.caijing.com.cn/newcn/coverstory/2007-04-28/18646.shtml>> at 25 January 2008. According to the most recent report in this regard, we now know that Google has obtained the ICP licence through a joint venture named Beijing Gu Xiang Information Technology Co., Ltd., the shareholding of which is half-half held by Google and Ganji.com respectively.

include: telecom, PRC and international computer network connections, information security and censorship.

The *Telecommunications Regulations of the People's Republic of China (Telecom Regulations)* is fundamental to regulating China's telecom industry. These regulations provide the general legal framework under which domestic Chinese entities may engage in various types of telecom services.⁴ Article 80 of the *Telecom Regulations* provides that the State Council will separately enact measures under which foreign companies may invest in, and operate telecom services in the PRC.⁵ These regulations reiterate the long-standing principle that telecom service providers must acquire an operating licence, before commencing business.

Furthermore, the *Telecom Regulations* draws a distinction between 'basic telecommunications services' and 'value-added telecommunications services'.⁶ Attached to the *Telecom Regulations* is the *Catalogue of Telecommunications Business (Catalogue)*. This lists which types of telecom and telecom-related activities are deemed basic or value-added services.⁷

The *Administrative Measures for Permits for the Operation of Telecommunications Business* requires operating licences to be divided into two categories: Permit for Operation of Basic Telecom Business and Permit for Operation of Value-added Telecom Business. The Permit for Operation of Value-added Telecom Business is valid for five years, and includes the Permit for 'Trans-regional Operation of Value-added Telecom Business

⁴ The *Telecom Regulations* were circulated by the PRC State Council on 25 September 2000, and came into effect at the date of circulation. The Chinese version is available at <http://www.mii.gov.cn/art/2005/12/15/art_523_1322.html> at 25 January 2008.

⁵ Such measures refer to *FITE Rules* as stated in the last paragraph of this section.

⁶ See Article 8 of the *Telecom Regulations*.

⁷ The 2003 *Catalogue* lists the following services as being of 'value-added' nature: online data and transaction processing services (including transaction processing services, electronic data interchange services, network/electronic equipment data processing services), domestic multi-point communication services (including domestic multi-point communication telephone services, domestic video conferencing services, and domestic Internet conferencing video and image services), domestic Internet virtual private network services, Internet data center services, voice mailbox, x.400 e-mail services, fax storage and forwarding services, call center services, Internet access services and information services. To clarify, information services refer to the value-added service provided by the industry player *via* a fixed network, mobile network and Internet. This chapter will focus on the regulation on the Internet information service.

and the Permit for Operation of Value-added Telecom Business at a provincial level.⁸

Specific Regulations on ICPs

The Internet information services are the mainstream VAS in the information services sector. The principal guidelines for the Internet information services is the *Administrative Measures for Internet Information Services 2000 (ICP Measures)*, which require all commercial 'Internet information providers' (or ICPs) in China to obtain an operating licence (ICP Licence), and all non-commercial ICPs to file with the MII or its local provincial branch in accordance with the *Telecom Regulations*.⁹ For instance, MII considers e-commerce to be a commercial Internet information service, so it can only be managed by an enterprise after an ICP Licence has been granted.

In addition to this, the *ICP Measures* require ICPs involved in news, publishing, education, medicine, health, pharmaceuticals, and medical equipment industries to be consented to by the relevant national authority, before applying for an ICP Licence.¹⁰

ICPs are also required to display their operating licence numbers in a conspicuous location on their homepage,¹¹ and remove content the law deems 'inappropriate'. This obligation reiterates the Internet content restrictions issued by other government departments during the past few years.

⁸ Specifically, in applying to operate a value-added telecom business, the applicant shall comply with Article 13 of the *Telecom Regulation* and the following requirements: (1) its registered capital shall be no less than RMB 1 million if it operates the business at a provincial level or no less than RMB 10 million if it operates the business throughout China or by covering different provinces, autonomous regions, or municipalities directly under the Central Government; (2) it has the feasibility study report and relevant technical schemes; (3) it has a necessary place and facilities; and (4) it has committed no material illegal acts within the last 3 years of the application. See Article 6 of the *Administrative Measures for Permits for the Operation of Telecommunications Business*, the Chinese version is available at <http://www.mii.gov.cn/art/2005/12/17/art_524_1621.html> at 25 January 2008.

⁹ Article 3 of the *ICP Measures*, the Chinese version is available at <http://www.mii.gov.cn/art/2005/12/15/art_523_1323.html> at 25 January 2008.

¹⁰ See Article 5 of the *ICP Measures*.

¹¹ See Article 12 of the *ICP Measures*.

Furthermore, according to the *Administrative Rules for Foreign-invested Telecommunications Enterprises (FITE Rules)*,¹² a joint venture (JV), with foreign investments of up to 50% in equity interests is allowed to conduct a VAS business (for example Internet information services), if the JV has obtained an ICP Licence.¹³ This regulation is in accordance with the *Protocol on the Accession of PRC* as agreed with by the World Trade Organisation (WTO). For instance, Microsoft's MSN service has been operating as a JV in China since 2005.

PRACTICAL CHALLENGES AND NEW DEVELOPMENTS

Internet Information Services: ICP Licence or ICP Filing?

As previously specified, the criteria for an ICP obtaining an ICP Licence, or ICP filing depends on whether the ICP is commercial or non-commercial in nature. According to the *ICP Measures*, commercial Internet information services refers to information, the creation of web pages, and other services provided to Internet users for consideration. Non-commercial Internet information services refers to those services that provide publicly available information that is accessible and free for Internet users. Because the provision is so general, in practice it is difficult for MII's local branches and industry players to identify commercial and non-commercial ICPs.

On the provincial level, the Beijing Communication Administration (BCA) issued the *Rules of ICP Licence and ICP Filing Application for Internet Information Services* on 3 November 2000. This specifies that commercial ICPs refers mainly to ICPs which derive income from: providing online advertising, creating web pages, leasing server memory space, web hosting, providing specific information services for consideration, e-commerce and other online applications. Non-commercial ICPs refers mainly to websites sponsored by the government at each level, news

¹² The *FITE Rules* were circulated by the PRC State Council on 11 December 2001 and came into effect on 1 January 2002. The Chinese version is available at <<http://www.edu.cn/20031105/3093883.shtml>> at 25 January 2008.

¹³ See Article 6 of the *FITE Rules*.

agencies (by providing electronic news letters), various public benefit websites sponsored by enterprises or public institutions and the self-promoting websites of various entities. However, while these rules remain valid, the BCA has treated them as out-dated since 2006.

Online Advertising

SAIC, which is the government department responsible for the advertising industry, issued no regulations governing online advertising before 2004. However, during the interim period, SAIC's Beijing branch (Beijing AIC) released several regulations in this area in 2000, including: *Qualification Standards for the Registration of Online Advertising Business and Mandatory Conditions for Enterprise Administrative Systems for Advertising*.

In April 2001, the Beijing AIC issued the *Provisional Measures of Administration of Online Advertising Businesses of Beijing Municipality*¹⁴ which states that, only those entities that have already obtained an advertising operating licence can engage in the advertising publication business through their websites, and undertake design, production and agency work in relation to online advertising. The Internet information service providers, who have been granted an advertising operating licence, are required to record the licence number on the HD 315 website, the official website of Beijing AIC. Enterprises conducting online advertising businesses in Beijing when the *Provisional Measures of Administration of Online Advertising Businesses* was issued were treated as commercial Internet information service providers, and were required to obtain an ICP Licence by MII.¹⁵

However, according to the *Administrative Measures for Advertising Operating Permits* issued by SAIC on 30 November 2004, only 3 types of entities are required to obtain an advertising operation permit before engaging in advertising activities:

1. Radio or television stations, newspaper or magazine publishers;
2. Non-profit institutions; and

¹⁴ Effective as of 1 May 2001. The Chinese version is available at <<http://www.baic.gov.cn/gcs/fagui/select.asp?id=1293>> at 25 January 2008.

¹⁵ In practice, this is the same with Shanghai and Guangdong.

3. Other entities as required by PRC laws and regulations.¹⁶

As such, enterprises engaging in online advertising, with a business scope that includes publishing advertisements, are required to file with MII's publicly accessible, file management system.¹⁷

The afore-mentioned conflicts reflect the development of the authorities' understanding of commercial and non-commercial ICPs, and the Internet service industry. The uncertainty of the regulations sometimes requires the industry players to proceed with different ICP procedures for the same business. This was the case with sina.com.cn, which was required to obtain an advertising operation permit for its online advertising business.¹⁸ Sina's permit was rendered meaningless in 2005, due to the *Administrative Measures for Advertising Operating Permits*.

E-commerce

As previously mentioned, e-commerce businesses (such as online retail in the B2C model) are traditionally treated as commercial Internet information services, because they derive profit from transactions through the Internet. However, since more traditional enterprises have started to promote their offline businesses through the Internet, several local branches of MII have rethought the scope of their regulations regarding commercial Internet information services.

With the development of the Internet service industry, e-commerce businesses have fallen into the category of 'non-commercial Internet information services'. In the Beijing province, the current practice since 2006 requires non-commercial Internet information service providers to make an ICP filing at MII's file management system, prior to establishing their websites.

Similarly, the Shanghai Communication Administration (SCA) has established administrative rules to clarify the details of service methods

¹⁶ Effective as of 1 January 2005. The Chinese version is available at <http://www.saic.gov.cn/flfg/flfg_detail.asp?flfgid=1320&keyword=undefined> at 25 January 2008.

¹⁷ See <http://www.miibeian.gov.cn/share/cx_dwfl_daimabiao.jsp?id=3> at 25 January 2008.

¹⁸ A Chinese copy of Sina's advertising operation permit is available at <<http://www.sina.com.cn/licence/ad1000007000001.html>> at 25 January 2008.

for providing non-commercial Internet information services. The SCA has been treating e-commerce businesses as 'non-commercial Internet information services' since early 2006. This category was changed because e-commerce businesses derive profit from the products bought by end users, not from Internet information services. Only Internet information services that charge Internet users for accessing provided information need a permit from the SCA (specifically ICP Licence).

These rules only apply in Beijing and Shanghai, and they have not been issued in writing by these two local branches. Officials in other cities and provinces (such as Guangdong) still consider e-commerce businesses to fall within the category of commercial Internet information services, thus requiring commercial businesses to have ICP Licences. This type of uncertainty in the regulatory environment may result in confusion amongst industry players, especially foreign investors.

MII's New Policy on the Qualification of ICPs for Foreign Investors

In addition to the *FITE Rules*, there is a new notice which dramatically affects the entry model of the foreign investor in the area of Internet information services. This notice further specifies MII's requirements on the qualification of foreign-invested ICPs.¹⁹

On 28 July 2006, MII issued a public notice in the name of its Telecommunications Administrative Bureau. This notice was designed to strengthen the administration of foreign investment in the PRC telecom businesses, particularly those involving VAS.²⁰ The notice states that some foreign investors working with domestic VAS companies have been evading the approval requirements under the *FITE Rules*, through domain names and trademark licensing arrangements.

The notice requires foreign investors in the PRC telecom businesses to establish a foreign-invested telecom enterprise, and apply for the relevant

¹⁹ See

<<http://www.transasialawyers.com/publications/index.php?action=viewpub&id=&pub=10>> at 25 January 2008.

²⁰ The Chinese version is available at <http://news.xinhuanet.com/tech/2006-07/28/content_4886944.htm> at 25 January 2008.

licence (for example a VAS licence) in accordance with the *FITE Rules*. Domestic telecom companies (including VAS companies) may not directly, or indirectly lease, transfer or sell their permits, or provide facilities or resources, to foreign investors engaging in telecom businesses in the PRC, without the required approvals. In addition to this, telecom companies must have their business premises and facilities (including servers) located within the region covered by their VAS permit, and corresponding to the VAS they are authorised to provide.

The provincial telecom administrative bureaus, in issuing and renewing VAS licences, are required to be more stringent when reviewing materials regarding VAS companies' domain names, trademark registrations,²¹ and facility locations (including servers). The provincial level telecom administrative bureaus are also required to investigate existing VAS licence holders, especially those most visible in the consumer market, with investigation results to be submitted to MII by 1 November 2006. Companies that do not comply with their VAS permit have a set time to rectify their non-compliance, after this their VAS permit may be revoked.

According to industry experts, this notice reflects MII's efforts to encourage all foreign investors providing VAS in China, to do so under a JV structure. Many foreign investors have adopted other structures as a result of assessing their business's needs for a local partner, and the difficulty faced in securing approvals for JVs. Less than 10 telecom JVs have been approved by the MII so far, much to the frustration of the Internet players.

For trusteeship purposes, foreign investors are not allowed to licence a domain name, or trademark to a domestic VAS company. Under the prevailing investment model, this restriction makes it difficult for a foreign investor to incorporate its brands into its PRC operations. However, the intended degree of regulation over the prevailing investment structure remains undetermined.

²¹ According to such rules, telecom companies (or their shareholders) must hold all domain names and trademarks that they use in their provision of VAS.

Regulation: Both Overlapping and Vacant

As stipulated by the *FITE Rules*, a JV may engage in Internet information services. However, MOFCOM has recently raised this threshold for foreign investors, through strict scrutiny of their JV's business scope with regard to VAS. To some extent, this regulation illustrates why there are so few telecom JVs established in China since the *FITE Rules* were issued.

For instance, foreign investors who are planning to conduct retail businesses through the Internet have met with admittance restrictions from MOFCOM. In accordance with the *Administrative Measures for Foreign Investment in Commercial Fields*, the business scope of a foreign-invested enterprise (FIE), which includes JVs and foreign-owned enterprises is subject to the scrutiny of MOFCOM, or its local branch. As a result, an FIE conducting a retail business through the Internet has to gain prior approval from MOFCOM. Even so, officials in charge of scrutinising FIEs believe that at this stage, in order to standardise industrial practice, and restrict foreign investment in the PRC e-commerce market, no FIE will be permitted to conduct retail businesses through the Internet. In this regard, if a JV is granted an ICP Licence, it will not cover Internet information services, or online retail in its business scope.

Even though an enterprise may have been granted an ICP Licence, the enterprise may be subjected to regulations from other authorities, before being allowed to conduct its VAS. For instance, China's leading portal sina.com.cn conducts its business with eleven relevant permits and licences.²² Most foreign investors will be frustrated by the application of such permits or licences, especially when their validity is subject to annual inspections from the relevant authorities.

²² Those permits and licenses include: Internet Culture Operation (Ministry of Culture); Internet Publishing Services (GAPP); Transmission of AV Programs *via* Information Networks (State Administration of Radio Film & Television); Online News Information Services (State Council Information Office); Certificate for Online Drug Information Services (Beijing Drug Administration); Approval for Online Drug Information Services (for example, for advertisements) (State Food & Drug Administration); Approval for Online Education Information Services (Beijing Education Committee); Approval for BBS Services (BCA); ICP licence (MII); Telecom and Information Services (BCA); and Approval Notice for Online Health Information Services (Ministry of Health).

CONCLUSION

Under the current ICP-related legal framework for the Internet industry, which is based on the *Telecom Regulations*, an enterprise conducting a commercial Internet information service will be required to obtain an ICP Licence at MII or its local bureau.

There are still practical challenges to how the ICP Licences are currently regulated; this is caused by the temporary uncertainty of different authorities' regulations at both provincial and national levels. However, China's framework for regulating the Internet information industry is becoming clearer, and the provision of ICP Licences is becoming more sophisticated.

Due to the growth of the Internet service industry, the various agencies have adjusted their regulation of this area; this will allow the Internet service industry to become free and open. As a result of the regulations, China's regulation of the Internet industry has become more reasonable, with very few foreign websites blocked for providing 'inappropriate' Internet content.²³

Some local branches of MII have tried adopting new administrative rules to regulate their ICPs. These administrative rules reflect the regulation momentum directed by MII: to create a healthy legal environment, in order to develop China's telecom industry through a balanced regulation method. It is predicted that after drafting the *Telecommunications Law*, China's Government will take more substantial measures in regulating the Internet industry to promote a more unified approach to regulation that is consistent with the mainstream practice of other WTO members.

²³ On 20 December 2007, the State Administration of Radio, Film and Television (SARFT) and the Ministry of Information Industry (MI) jointly promulgated a new regulation, *Rules for the Administration of Internet Audiovisual Program Services*, which took effect as of 31 January 2008. This new regulation specifies that an entity seeking to provide online audio and video services, which cover the production, aggregation, integration and/or steaming of audiovisual content over the Internet, both fixed-line and mobile, must now obtain a permit from the administration for radio, film and television at the provincial level or above before it applies for an ICP Licence. Further, all online audio and video service providers are required to be either state-owned or state-controlled, except for the providers in operation prior to the issuance of such rules.

IMPROVING THE REGULATIVE
ENVIRONMENT TO FACILITATE THE
EXPLOITATION OF INFORMATION
RESOURCES IN THE PEOPLE'S
REPUBLIC OF CHINA

Xiao-Li Zhi and Fuping Gao

INTRODUCTION

A supportive regulatory environment is necessary to facilitate the development and utilisation of information resources in China. The legal system and its enabling policies for information resources should focus on removing all the macro-level obstacles in order to promote and ensure the positive feedback effect of information cycles. This would include constructing a competitive market, enhancing infrastructure, strengthening taxation and financing the supporting system. The core interest in information exploitation is intellectual property (IP). There are five levels of IP protection: judicial trial, administrative execution, technological measures, collective management and industry discipline as well as private control. While strengthening IP protection ranks as the Government's priority policy, the free distribution and sharing of information should be strongly advocated to optimise the development and utilisation of information resources.

Digital information is playing a more significant role in our society than physical goods in regard to quantity and effects. Digital information is changing the whole world, with for instance, E-government, E-commerce and E-life. Information resources have become an important asset and key driver for social development.

The 'Developmental Strategy for Informatisation in China 2006-2020' issued by the Communist Party of China (CPC) Central Committee and the State Council declares that informatisation is a key strategy for maintaining national competitiveness and sustainability.¹ The key of informatisation is the development and utilization of information resources. While this is rather weak in China, enhancing the development and utilisation of information resources has been ranked as a priority government task because of the value in constructing a flexible and enabling regulatory framework.

INFORMATION EXPLOITATION

Inclusiveness of information resources

In social science information resources include all the information or data, created or used in social and economic life. While there is public information (from government or other public institutions), commercial information and community, or personal information, only orderly, applicable and sharable information becomes part of society's information assets. Information appears as a type of product during exploitation, and in the broadest sense any result from human labour is a product.² However an information product consists of two indispensable parts: the content of the product and its type of carrier, for example a creative artefact, a database, or a weather forecast.

Advances in information technology make it possible to digitise audio, video, text and other forms of information into a series of binary numbers. This further standardises information processing and communication and allows information development and utilisation to progress with unprecedented efficiency, broadness and depth. The development of information resources requires implementing some type of process on information such as collecting, communicating and

¹ People's Daily Online, '*China maps out informatization development strategy for next 15 years*' <http://english.peopledaily.com.cn/200605/09/eng20060509_264184.html> at 14 November 2007.

² Li Yang 'On the Informational Products' Responsibility' (2004) 6 *Chinese Legal Science* 72-81.

analysing. Utilising information resources requires using information in manufacture, decision-making and entertainment activities. Strengthening the development and use of information resources will promote the positive effects of information resources on the whole society; in other words the ever-evolving information requirements will be satisfied if quality information products are available.

Status quo of information exploitation in China

Information resources on the Internet

The Internet is becoming increasingly popular in China with 123 million Chinese using the Internet by the end of June 2006 (second only to the United States). At that point in time the number of broadband users reached 77 million and there were over 788 000 websites, 295 000 online databases and 2.4 billion web pages in the country.³ More remarkable than this is digital content and its applications with over 1.5 million people who frequently use network education; 2.5 million people who applied for jobs on the Internet; 3 million people who shopped online and 2.8 million people blogging. Digital information has given birth to new industry sectors and has compelled traditional industries to change and develop.

National fundamental databases

As reviewed in the 'China Informatisation Development Report 2006'⁴ the construction of national fundamental databases has made considerable progress. The land and resources main database has provided ample geographic information and technological support for e-government. The geographic information network service system has greatly improved, with numerous e-maps available. The public security agencies have gathered volumes of firsthand information, enough to support several thousand applications and websites covering nearly all administrative operations. Meanwhile, the Ministry of Civil Affairs began

³ China Internet Network Information Centre, *The 18th Statistical Report on China Internet Development Status* (2006); China Internet Network Information Center, *2005 China Internet Network Information Resources Study Report* (2006).

⁴ See the *Informatisation Report of China 2006* (Chinese Version), <<http://www.acsi.gov.cn/WebSite/ACSI/UpFile/File149.pdf>> at 14 November 2007.

establishing the ‘China natural disasters database’ at the beginning of 2005 in order to improve disaster assessment, emergency assistance, recovery, and decision making.

Information service for public welfare

The development and utilisation of information resources for public interests has drawn much attention and finance from the country. The Ministry of Agriculture has built an information collection system, a day-by-day news system and a monitoring system for agricultural production, marketing and resources. The ‘*Implemental Recommendations for the Construction of the National Science and Technology Fundamental Platform in the Eleventh Five Year Period*’ released in 2005 is scheduled to build platforms for sharing large-scale scientific apparatus and research data by 2010.⁵ The ‘Chinese traditional medicine patents searching system’, ‘library of laws’ and provincial special patents databases have been, or are being developed to provide patent information and free legal advice. The Chinese Ministry of Education’s ‘university graduates employment information network’ is the largest website of its kind. While the Education Department’s projects, such as ‘modern distance education for rural primary and secondary schools’, ‘construction of national fundamental education resources library’, ‘construction of modern distance career training resources library’ and ‘modern distance career and adult education resources development base’ are all in effect. These projects will establish favorable conditions for sharing and utilising education resources. It should also be noted that the construction of the national digital libraries and archives has also made significant progress.

POLICY OUTLINES TO STRENGTHEN EXPLOITATION OF INFORMATION RESOURCES

From the perspective of economic study, ‘information resources development’ refers to the producing of information products; and

⁵ See the ‘*Implemental Recommendations for the Construction of the National Science and Technology Fundamental Platform in the Eleventh Five Year Period*’

<<http://www.hzst.gov.cn/zcfg/nation/2/21.htm>> at 14 November 2007.

'information resources exploitation' refers to the consuming of information products. The 'information resources market' encompasses the whole relationship arising from the exchange of information products and services. The information resources industry (used as a synonym of digital content industry) includes all the providers of information products and services such as cultural information, publishing, consultation, advertising, radio and news, network gaming, market studies and Internet information services.

Information resources have a production, distribution - exchange and consumption cycle. The exploitation policies regarding information resources should be designed to remove any macro-level factors adverse to the information production cycle, and to promote its positive feedback effects on society's advances. These policy outlines include: enriching the provision of public information resources, reforming mechanisms for better development efficiency, enhancing infrastructure and building a conducive financing and taxation support system.

Demand oriented, application based development mechanism

Information content is fused with its specific application. The development of information resources rephrases the development of information applications. The General Office of the CPC Central Committee in 2004 issued '*Recommendations to strengthen the development and utilization of information resources*' which pointed out that the information resources exploitation should be market centered and application driven.⁶ Different levels of information products or services are needed to meet the various requirements for social and economic evolution. Efficient development heavily depends on long term, flexible, operating mechanisms. There are three types of operating mechanisms that may be used in this area: administrative mechanisms, public mechanisms, and market mechanisms. An operating mechanism running on market rules with numerous business entities of diverse ownership is of special strategic importance. Such an operating mechanism will ensure the successful commercialisation of the development process and

⁶ See 'Recommendations to strengthen the development and utilization of information resources' (Chinese version), <<http://www.chinaird.com/policy/034.html>> at 14 January 2008.

industrialising applications and services, while modernising the implementing measures.

Enhancing information infrastructure

Comprehensive broadband networks and high-level technological platforms are required for flourishing information applications. While information exploitation in China currently lags behind the construction of infrastructure, the infrastructure could be improved by:

- increasing broadband network penetration and decreasing its access cost;
- advancing the convergence of networks and digital content;
- safeguarding private information and national confidential information; establishing the PKI and PMI systems; and
- building up a high-level information processing center, an open lab of advanced technologies and research and network studios for information products development.

Building fundamental databases and fortifying reserve of information

China has started a number of impressive demonstrative projects on information resources, such as a government information exchange system, land and resources fundamental information databases, corporations information database, demographic information systems, macro economic information systems, credits databases, digital libraries, courseware libraries, historical culture and development achievements network promotion system, and Internet information resources mining. Not only are these projects exploiting information resources, but they are making significant contributions to the national information reserves.

Exploitation of information resources for the public interests

Public sector information resources are central to advancing harmony, social welfare and equity. While public information should be fully publicised and accessible to the public, the commercial use of public

information is strongly opposed. Public information can become a major source of content innovation by virtue of a clearly defined pricing policy and copyright licensing by the public sectors. This issue is recognised by the administration with commercial exploitation, public use and the social value-added development of public information resources being listed as special programs in the government's schedules for the Eleventh Five Year development period.⁷

Financing and taxation system to boost information resources industry

Finance and taxation are two powerful weapons to influence the development of information resources and other social resources (for example human resources), because they can potentially boost the information resources industry. A variety of favorable policies for the high-tech industry have been issued by the central government or local administration. However enterprises in the information content sector will not benefit from these policies because advances in the information resources industry are hindered by the lack of financial support.

As a comprehensive industry, information resources is challenged to improve the way information exploitation is measured, to develop appropriate indicators and metrics for the quality of the information products and to improve the systematic collection, research and analysis of the industry sectors. It has been commonly recognised that lagging statistical indicators mask the economic potential and implications of emerging industry sectors and trends, which affect both business issues and the government policy setting.

LEGAL FRAMEWORK FOR INFORMATION EXPLOITATION

While the development and utilization of information resources is ready to flourish, the legislation required is incomplete, with legal conflicts and regulation gaps still in existence. Information exploitation needs to

⁷ See the Outline of the *11th-Five-Year Plan for National Economic & Social Development of PRC*, <http://ghs.ndrc.gov.cn/15ghgy/t20060529_70793.htm> at 25 January 2008.

build up a systematic legal framework to ensure a sustainable level of progress. This will allow for the stakeholders conduct in the information exploitation to be adjusted to maintain a favourable balance of interests.

Legislative principles

Legislation on information exploitation should correspond with the Constitution and maintain the strategic goals of national informatisation.⁸ Rules and regulations should focus on promoting the driving effects of information resources on the whole society with:

- a. Public interests first. Putting public interests first ensures that entities must put public concerns before the pursuit of their own interests
- b. Public information being open and statutorily available.
- c. Information freedom. This is a priority right and includes the freedom to obtain and communicate information
- d. Information safety and security. The freedom to obtain and share confidential information may result in a risk to personal or national interests. The definitions of public information and information secrecy should be defined in legislation. Adequate measures to protect information and liability for the safety of information should be rigorously regulated.

Basic framework

With the focus on expediting the circulation of information products, the legal framework for information exploitation should cover the following issues:

- a. Information access and procurement. Who has the rights or liabilities to access, procure or provide what kind of information?

⁸ Yang Xueshan 'Several Theoretic and Practical Problems for Legislature of Informatization' (1997) 10 *China Computer World*, 210.
<<http://www2.ccw.com.cn/1997/10/155364.shtml>> at 14 November 2007.

- b. Information communication. Who are allowed to or prohibited from communicating what information via what communication channels with what tools or devices?
- c. Information exchange and trade, including rules and regulations on the rights of digital content, intellectual property trading and international issues, information contracts, e-commerce, digital credit and authentication, regulations on information products.
- d. Information consumption. How to punish or prevent the improper use of information?
- e. Information safety and security. Who are allowed or prohibited to use what sensitive information? Who should use what measures to keep sensitive information secret?

FIVE LEVELS OF INTELLECTUAL PROPERTY PROTECTION

The development of information resources is a process of innovation with the value of information products resting with its creative content. The primary interest of information exploitation is IP. There are five ways to protect IP:

Judicial litigation

The extent of IP protection in Chinese law corresponds with endorsed international IP treaties. The IP owner or public prosecutor may raise an administrative, civil or penal lawsuit against the person accused of violating the IP material. A number of rules and regulations such as IP laws, contract laws, patent laws, trademark laws, criminal laws and unfair competition laws function as a safeguard for statutory IP rights.

Administrative execution

In China administrative responsibility for IP protection is covered by several agencies including the IP Bureau, Patent Bureau, Trademark Bureau, and Copyright Bureau, according to the provisions of *Patent*

Law, Copyright Law and *Trademark Law*. Customs is responsible for protecting IP in relation to imported and exported goods as prescribed in the *Statute of IP Protection in Customs Bureau 2004*. The National Quality Supervise, Inspection and Quarantine General Bureau has assumed the obligation of IP protection for producing original area marks, scientific and technological production appraisal and transfer as well as Chinese brand names. The Department of Science and Technology also assists protecting and managing IP in relation to science and technology.

Government agencies are able to implement comprehensive IP actions according to their administrative legal rights, provided the agencies follow the required statutory procedures. There are three primary classes of administration activities:

- a. Managerial activities such as accepting, examining, approving and registering an IP application;
- b. Executive activities such as settling IP ownership clashes, mediating infringement disputes, inspecting and punishing lawbreaking acts;
- c. Service activities such as consulting on IP policies and laws, patent searching and IP promotion.

The government agencies can take actions to manage IP infringement on their own initiative or upon an applicant's appeal. The judicial and administrative approaches to IP protection have their advantages and disadvantages. The judicial approach is more stable, exclusive, fair and final while being generally passive. Whereas the administrative approach is more adaptive, transferable, predeterminate, efficient and cheaper while being generally active overall.

Technological measures

Digital technologies have significantly changed and expanded the production, distribution and consumption of information products, while bringing new challenges for IP owners to remain in control of their digital products. Technological protection measures seem to be a possible and promising solution, as evidenced by the intense Digital Rights Management (DRM) practices worldwide. It is commonly recognised that inappropriate dependence on technological measures

would incur a new imbalance of interests between the owners and users of IP property. The following views can be beneficial in making appropriate use of the technological measures offered:

- a. Offering a restricted rationale of technological measures to avoid the privatisation and personalisation of IP rights. Only those measures applied by the proper right holders for the legal purposes of technological feasibility may be deemed the 'right' measure;
- b. Liability for inadequate information disclosure about the technological measures. Sufficient information should be provided to maintain the users' right to know and right to choose;
- c. Providing enough legislative space for listing exceptions to the ban on circumventing the technological measures. Some typical exceptions are: reverse engineering by specific classes of people for limited purposes; protection of personally identifying information; security testing; exemption for nonprofit libraries, archives, and educational institutions; law enforcement, intelligence, and other government activities and encryption research.

Collective management and industry self-discipline

Collectively managing IP has become an international trend. The collective management of IP allows for the smooth development of the copyright industry, while giving IP owners an effective way to profit from their rights. China's *Copyright Law* sanctions the collective management of copyright, as provided in subparagraph 54. There are two collective management agencies in China with: Music Copyright Society of China⁹ and China Audio-Video Collective Administration (CAVCA)¹⁰. Moreover, preparation is being made for establishing

⁹ It was founded by the China Musicians Association in 1992 for the purpose of protecting the copyright of musical works for the sake of musicians. For more information, please visit www.mesc.com.cn.

¹⁰ It was founded by the China Audio-Video Association and approved by the National Copyright Administration in 2005 for the purpose of managing and promoting the legal

another agency, namely the Collective Management Organisations for Literature, Films and Photographs. The China Collect and Transfer Center for Copyright Licence Fee,¹¹ a statutorily licenced copyright clearing agency is also in effect. It appears that the copyright collective management regime in China is developing normally.

An authoritative copyright information system (CIS) will help improve copyright management. For example a CIS holds the digital credentials required for network downloading and uploading, which implies some enforceable liabilities for the network content providers. The network content providers have to ensure the digital content on their server has the required identifiable labels to avoid any accusations of copyright infringement.

It has been recognised that industry cooperation will develop a win-win situation and move the industry forward, towards self-discipline. The only non-commercial, self-disciplined, working committee on network copyright under the China Internet Association was approved by three parties of network service providers, content service providers and copyright holders in January 2005.¹²

Private control on IP with information contracts

Business models of information products and involved interest relations vary greatly. The most flexible and convenient legal way to negotiate and settle the terms of trade among the parties is by establishing a specific

use of audio-video programs. It has been waiting for further approval by the Ministry of Civil Affairs of the PRC For more information, please visit www.cavca.org.cn.

¹¹ Copyright Agency of China (CAC) was set up in 1988 . 'Apart from the traditional copyright agency business of copyrights of books and audio-video products, CAC has made great efforts to extend the scope of business of the agency to the rights of periodicals, movies & television, works of fine arts, photographic works, electronic publications, digitized products, animation & comic, game software, and network communications. Its primary responsibility is to transfer and license copyright, to provide legal consultation and protection regarding copyright issues, and to collect and distribute the remuneration for the use of copyright.' For more information, please visit www.ccopyright.com.cn.

¹² See '*Self-Discipline Convention for Internet Copyright*' (Chinese Version), initiated by the China Internet Society in 2005, <<http://www.china.com.cn/chinese/PI-c/959921.htm>> at 14 November 2007.

contract. Through contracts the owner of information rights can personally control the distribution of information products.

The legal validity of new styles of information contracts

Information trade acts as a cradle of innovation on the types of contracts available, for example 'click or not' contracts and 'shrink-wrap' licences. These non-traditional styles of contracts help to cut trade cost and expand circulation. As their legal validity is in some instances uncertain, it is necessary to update the law to accommodate the emerging styles of contracts, or allow for judicial interpretation.

Technological particulars of a contractual right

Technologies are tightly coupled with digital information. Neglecting the technological particulars in information contracts may bring an unexpected expansion of rights, which may result in disputes between the parties. For example a right to broadcast a program may be considered as the right to broadcast via satellite, cable network, telephone network, DSL and other transmission method using the Internet, unicast or multicast signals to PC, television, mobile and other terminals. It is recommended that the contracts are standardised on a time frame with all means of exploitation allowed within that time and if the contract is silent on the technical means of distribution, then it does not include the rights to the manner in which the information is distributed.

Contracts for information free share

There are special types of information contracts which protect the integrity of voluntary licensing of IP rights. The most influential of these contracts of freedom are Copyleft for open source software and Creative Commons (CC) for general, creative products.

The term 'open source' commonly refers to a software program or a set of software technologies, which is made widely available by an individual or group in a source code for use, modification and redistribution under

a relatively unrestricted licence agreement.¹³ GNU Public Licence (GPL), Mozilla Public Licence (MPL), Lesser General Public Licence (LGPL) and Berkeley Software Development Licence (BSD or BSL) are the most widely used open source licences. Under these licences, licencees are given broad rights to sell, copy and modify the licenced programs, provided the licencees grant other licencees the same rights to sell, copy and modify the modifications to the original program. There are numerous software products under open source licensing including: Linux, X Window and the Apache web server package.

To encourage the use of creative materials available CC creates an alternative to full copyright where permission is required to use the material, and the public domain where permission is not necessary. CC offers a variety of licences for creative works based on mixing and matching terms, for example: ‘no-derivatives’, ‘non-commercial’ and ‘share-alike’. Unlike many open source software licences the stated objective of CC is to protect the author’s intent in allowing the re-use of their creative works, rather than promoting the re-use of works generally, or ‘free’ information that can be re-used by anyone. Numerous websites and network information products have adopted CC licences.

CONCLUSION

The development and utilisation of information resources is vital to the success of informationisation in China. Supportive policies and regulations are essential to facilitate the exploitation of information resources. The effect and the efficiency of information development rely on sustainable, demand-based, application driven, information market operation mechanisms, with a long term view; this should also be the focus of information policies. IP, as one of the core interests in information exploitation, needs to be effectively protected on different levels through a range of measures such as judicial trial, administrative execution, collective management, and personal or private control. Strengthening IP protection will remain one of the leading objectives for

¹³ Zhang Taolue, ‘*Study on the Intellectual Property of Open Source Software – Institutional Inducement, Rule Framework and Theoretic Reflections*’ (Masters Thesis, Beijing University, 2004).

government work in the future. Nevertheless the free distribution and sharing of information should be strongly promoted to optimise the exploitation of information resources and to maximize the contributions of information to help society advance and evolve. A practical approach to promote information sharing within IP is through applying special licensing models such as Copyleft or Creative Commons (CC).

PART 3 – COPYRIGHT LAW, NEW
MEDIA AND THE FUTURE

COPYRIGHT 2010: THE FUTURE OF COPYRIGHT LAW

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2006 marked the 30th anniversary of the US *Copyright Act 1976*,¹ 2008 marks the 40th anniversary of the Australian *Copyright Act 1968*² and 2010 marks the 300th anniversary of the Statute of Anne. There is no doubt that concepts about how to manage, control and share knowledge, culture and creativity existed in societies well before 1709/10³ but it is the Statute of Anne that is the symbolic birthplace of what we know as modern copyright law.⁴

As we enter an era of unprecedented knowledge and cultural production and dissemination we are challenged to reconsider the fundamentals of copyright law and how it serves the needs of life, liberty and economy in

¹ The previous statutes at the federal level were the *Act of 31 May 1790* (further statutes introduced new subject matter and expanded the scope and term of protection in 1802, 1819, 1831, 1834, 1846, 1855, 1856, 1859, 1861, 1865, 1867, 1870, 1873, 1874, 1879, 1882, 1891, 1893, 1895, 1897, 1904 and 1905) and the *Copyright Act 1909*. See: B Kaplan, *An Unhurried View of Copyright* (1966) 25-6, 38-9.

² The previous statutes at the federal level were the *Copyright Act 1905* and the *Copyright Act 1912*. For further discussion of these acts of parliament see: B Atkinson, *The True History of Copyright* (2007).

³ R Versteeg, 'The Roman Law Roots of Copyright' (2000) 59 *Maryland Law Review* 522; P E Geller, 'Copyright History and the Future: What's Culture Got To Do With It?' (2000) *Journal of Copyright Society of the USA* 209, 210-15; M Barambah and A Kukoyi, 'Protocols for the Use of Indigenous Cultural Material' in A Fitzgerald et al (ed), *Going Digital 2000: Legal Issues for E-Commerce, Software and the Internet* (2000) 133.

⁴ P Samuelson, 'Copyright and Freedom of Expression in Historical Perspective' (2003) 10 *Journal of Intellectual Property Law* 319, 324; B Kaplan, *An Unhurried View of Copyright* (1966); R Patterson, *Copyright in Historical Perspective* (1968); S Ricketson and C Creswell, *The Law of Intellectual Property: Part II Copyright and Neighbouring Rights*, Ch 3 documenting the numerous copyright statutes to follow on from the Statute of Anne in the UK at [3.230] ff, [3.280], [3.370]. On the origins of modern copyright elsewhere in Europe see: G Davies, *Copyright and the Public Interest* (2nd ed, 2002) Ch 3.

the 21st century. More radical proposals advocate the abolition of any legislative and regulatory regime in order to leave the trading (both commercial and non commercial) of ideas to other mechanisms such as politics, the market or social networks. More moderate reforms – within the framework of the current regime – have been the centre of discussion at Professor Hugh Hansen’s Fordham International Intellectual Property Conference (2007), a specialist workshop run by Professor Pamela Samuelson in July 2007 in Napa Valley⁵ and will be further discussed at a world congress proposed by creative economy guru and Adelphi Charter⁶ figurehead John Howkins⁷ to celebrate or commiserate the Statute of Anne in 2010.

THE NEW LANDSCAPE

The way in which culture is represented, reproduced and communicated to the world has vastly changed. We live in an era where any person of any age can email, blog, podcast, make entries in Wikipedia⁸ or upload a home crafted or user generated video to YouTube⁹ in the blink of an eye to a world wide audience of hundreds of millions of people. This is driven by an incredible capacity to search the world wide web through search engines such as Google,¹⁰ Yahoo¹¹ and Baidu¹². Creativity and sharing have taken on incredible new dimensions.

⁵ See further: P Samuelson, ‘Preliminary Thoughts on Copyright Reform’ forthcoming (2007) *Utah Law Review* <<http://people.ischool.berkeley.edu/~pam/papers.html>> at 25 January 2008.

⁶ Royal Society for the encouragement of Arts, Manufactures & Commerce (RSA), *Adelphi Charter on Creativity, Innovation and Intellectual Property*. See further at <<http://www.adelphicharter.org>>.

⁷ J Howkins, *The Creative Economy: How People Make Money from Ideas* (2001).

⁸ <<http://www.wikipedia.com>>.

⁹ <<http://www.youtube.com>>.

¹⁰ <<http://www.google.com>>.

¹¹ <<http://www.yahoo.com>>.

¹² <<http://www.baidu.com>>.

THE SOCIAL NETWORK

The centre point of this Web 2.0¹³ style activity is the “social network” – a space for making friends and sharing knowledge and creativity.¹⁴ The social network is epitomised by well known spaces such as MySpace,¹⁵ Facebook,¹⁶ Flickr¹⁷ and YouTube¹⁸ but is also evident in the millions of blogs, live chat rooms and wikis that exist throughout the Internet world.

Within the social network people create things in and provide thoughts from their bedrooms, studies, lounge rooms, cafes and offices and communicate them via the network to the outside world. Sharing amongst participants within the social network tends to be on a non commercial basis. In fact that seems to be the unwritten norm underpinning activity within the social network environment – non commercial use by each other is permitted.

However once the material created and distributed through the social network is deposited into or utilised within a commercial domain or enterprise for financial reward then this norm subsides and compensation may be sought. Likewise material utilised or distributed by the social network that is taken from the commercial domain or network, eg Hollywood, under current law, will need to be fair use, licensed and/or paid for. More so, the social network is underpinned by a technological platform and the provider of such platforms will often seek “revenue” through advertising and subscription fees. These commercial platform operators such as Google (YouTube), Yahoo (Flickr) and News Corporation (MySpace) are some of the largest corporations in the world and they are profiting handsomely off the

¹³ On this concept see: T O’Reilly, *What is Web 2.0* (2005) <<http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>> at 25 January 2008.

¹⁴ See generally: ‘Social Network’ in *Wikipedia* <http://en.wikipedia.org/wiki/Social_network> at 25 January 2008; ‘Social Network Service’ in *Wikipedia* <http://en.wikipedia.org/wiki/Social_network_service> at 25 January 2008.

¹⁵ <<http://www.myspace.com>>.

¹⁶ <<http://www.facebook.com>>.

¹⁷ <<http://www.flickr.com>>.

¹⁸ <<http://www.youtube.com>>.

social network. It remains unclear to what extent they should be sharing profits with the creatives of the social network (which sites like Revver¹⁹ do) or where commercially released material has been utilised how much they should be paying the commercial sector from where it is sourced e.g. Hollywood – the substance of the issue being litigated in *Viacom v YouTube and Google*.²⁰

The following diagram highlights these complex new relationships between the non commercial and commercial domains.

¹⁹ <<http://www.revver.com>>.

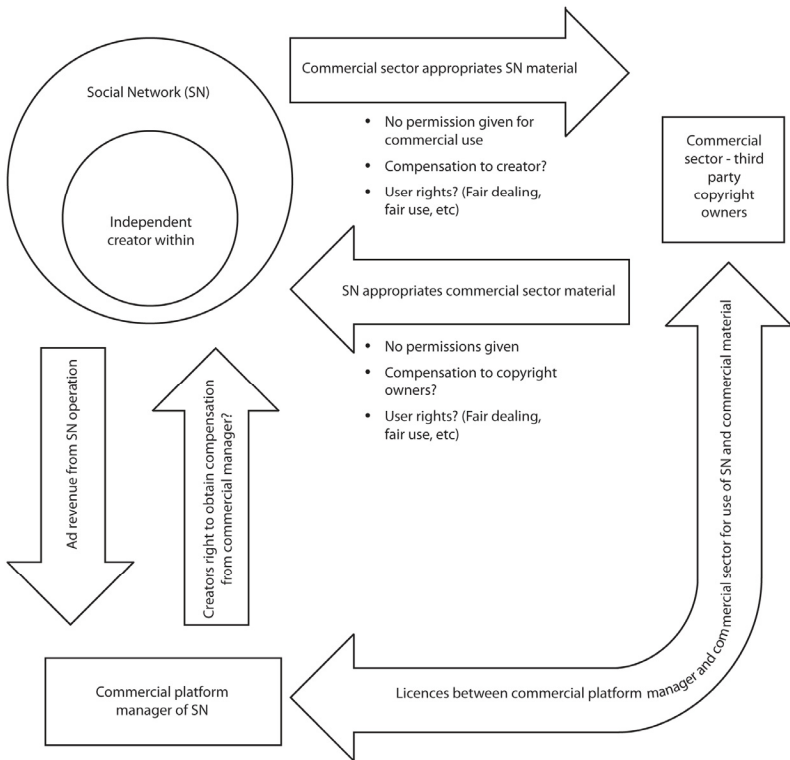
²⁰ *Viacom International Inc v YouTube Inc*, (SD NY, filed 13/3/2007). The Viacom complaint is here <www.paidcontent.org/audio/viacomtubesuit.pdf> at 25 January 2008 and the Youtube and Google response is here

<http://news.com.com/pdf/ne/2007/070430_Google_Viacom.pdf> at 25 January 2008. For a debate between their respective lawyers see:

<<http://thetubeblog.com/2007/04/15/viacom-v-youtubegoogle-their-lawyers-debate-lawsuit>> at 25 January 2008. A critical issue in this litigation will be the application of the *Digital Millennium Copyright Act 1998 (DMCA)* so called ‘safe harbours’ for intermediaries: see further *Perfect 10 Inc v CCBill LLC* (9th Cir, 2007)

<[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/08468E0D5E386A2F882572AC0077AD1A/\\$file/0457143.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/08468E0D5E386A2F882572AC0077AD1A/$file/0457143.pdf)>; L Lessig, ‘Make Way for Copyright Chaos’, *New York Times*, 18 March 2007,

<<http://www.nytimes.com/2007/03/18/opinion/18lessig.html?ex=1331870400&en=a376e7886d4bcf62&ci=5088&partner=rssnyt>> at 25 January 2008.



This large scale implementation of social activity along with the commercial consumption of entertainment in an online digital world where reproduction and communication is both ubiquitous and automated by use brings the need for a fundamental rethinking of copyright law.

ELEVEN POINTS FOR 2010

The following are eleven points that (at very least) should be examined or taken into consideration in any copyright reform agenda. An agenda that one would hope will be well under way by 2010. For every day we

stand entrenched in the legacy models of the past we are denying the opportunity of the future.

The Law

1. International treaties: Do they reflect the needs of the networked information society we now live in? How will the access to knowledge and development agenda currently before the World Intellectual Property Organisation (WIPO) change the way these treaties are drafted? By 2004, WIPO was facing increasing demands from developing countries for intellectual property regimes to reflect a more appropriate balancing of interests, to better serve health, education and culture. These demands are summarised in the *Draft Access to Knowledge Treaty* (2005).²¹ At the first meeting of WIPO's Provisional Committee on Proposals Related to a Development Agenda (PCDA) in February 2006, the participants listed a total of 111 proposals for strengthening the focus on development in WIPO's work. At the third session of the PCDA, held in Geneva in February 2007, participants agreed on an initial set of proposals for inclusion in the final list of proposals to be recommended to the 2007 WIPO General Assembly. The recommendations are clustered under six headings relating to WIPO's work in the areas of technical assistance and capacity building; norm-setting, flexibilities, public policy and public domain; technology transfer, information and communication technologies (ICT) and access to knowledge; assessment, evaluation and impact studies; institutional matters including mandate and governance and certain other issues.²²

²¹ *Draft Access to Knowledge Treaty* (2005) <<http://www.access2knowledge.org/cs/a2k>> at 25 January 2008.

²² See World Intellectual Property Organisation (WIPO), 'Member States Make Significant Headway in Work on a WIPO Development Agenda' (Press Release 2007/478, 26 February 2007) <http://www.wipo.int/pressroom/en/articles/2007/article_0011.html> at 25 January 2008; WIPO Director General Welcomes Major Breakthrough following Agreement on Proposals for a WIPO Development Agenda Geneva' (Press Release 18 June 2007) <http://www.wipo.int/pressroom/en/articles/2007/article_0037.html> at 25 January 2008; 'Member States Adopt a Development Agenda for WIPO' (Press

2. Subject Matter, Exclusive rights and Ownership: Has the digital era transformed the existing exclusive rights of the copyright owner into something too broad and all encompassing? Is there scope for the development of an attribution only copyright (attribution being the only enforceable exclusive right) within the social network where non commercial reuse is the underlying principle? Who is an author in the interactive and iterative wiki blog based user generated world which we now inhabit?²³ To what extent does changing the scope of the exclusive rights fall outside the Berne Convention's "three step test"?²⁴ Should copyright subject matter be narrowed or extended to include, for example, "webcasting"?²⁵ Should it require fixation?²⁶ Do ownership rights carry any sense of obligation to the "information environment"?²⁷ What should we do with

Release 1 October 2007)

<http://www.wipo.int/pressroom/en/articles/2007/article_0071.htm> at 25 January 2008.

²³ See Erez Reuveni, 'Authorship in the Age of Conducer' (2007) 54 *Journal of the Copyright Society of the USA*, 286.

²⁴ *Berne Convention for the Protection of Literary and Artistic Works 1886*, art 9(2) provides: 'It shall be a matter for legislation in the countries of the (Berne) 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.' See also WIPO *Copyright Treaty 1996 (WCT)* art 10, *WIPO Performances and Phonograms Treaty 1996 (WPPT)* art 16, *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS)* art 13.

²⁵ See the proposed *WIPO Broadcasting Treaty*; WIPO, 'Negotiators Narrow Focus in Talks on a Broadcasting Treaty' (Press Release 2007/473, 22 January 2007)

<http://www.wipo.int/pressroom/en/articles/2007/article_0003.htm> at 25 January 2008; 'Briefing Paper on the Proposed WIPO Broadcasting Treaty, Second Special Session of SCCR', Electronic Frontier Foundation, 18 June 2007

<http://www.eff.org/IP/WIPO/broadcasting_treaty/EFF_wipo_briefing_paper_062007.pdf> at 25 January 2008.

²⁶ P Samuelson, 'Preliminary Thoughts on Copyright Reform' forthcoming (2007) *Utah Law Review* <<http://people.ischool.berkeley.edu/~pam/papers.html>> at 25 January 2008.

²⁷ J Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?* Duke University School of Law <<http://www.law.duke.edu/boylesite/Intprop.htm>> at 25 January 2008.

- traditional cultural expression (TCE) and other indigenous cultural issues?²⁸
3. User rights or limitations: To what extent should user rights continue to be seen as subservient to owner rights?²⁹ What new user rights are needed for this new environment?³⁰ For example, there is a growing need to sensibly articulate the right to engage in transformative reuse of copyright material in international and national laws.³¹
 4. Crown, government or publicly funded copyright: In countries where government or publicly funded copyright exists there should be close consideration given to expressly allowing broad rights, of at very least, non commercial dissemination and reuse.³²

²⁸ WIPO, *Draft Provisions on the Protection of Traditional Cultural Expressions/Folklore and Traditional Knowledge* <www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html> at 25 January 2008; B Fitzgerald and S Hedge, 'Traditional Cultural Expression and the Internet World' in C Antons (ed), *Traditional Knowledge, Traditional Cultural Expression and Intellectual Property in South East Asia* (2007).

²⁹ Consider: *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 <<http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>> at 25 January 2008; J Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham Law Review* 347.

³⁰ Consider: *Authors Guild v Google Print Library Project* <<http://www.boingboing.net/images/AuthorsGuildGoogleComplaint1.pdf>> at 25 January 2008; *McGraw-Hill Companies Inc, Pearson Education Inc, Penguin Group (USA) Inc, Simon & Schuster Inc and John Wiley & Sons Inc v Google Inc* <http://www.boingboing.net/2005/10/19/google_sued_by_assoc.html> at 25 January 2008; J Band, *The Authors Guild v The Google Print Library Project* (2005) LLRX.com <<http://www.llrx.com/features/googleprint.htm>> at 25 January 2008.

³¹ See: *Gowers Review of Intellectual Property* (2006) 67-8 <http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf> at 25 January 2008; *Perfect 10 Inc v Amazon Com Inc* 487 F 3d 701 (9th Cir, 2007)

³² See generally: B Fitzgerald et al, *Internet and E Commerce Law: Technology, Law and Policy* (2007) Ch 4; Intrallect Ltd and AHRC Research Centre, *The Common Information Environment and Creative Commons*, Final Report (2005), Ch 3.6 <<http://www.intrallect.com/cie-study>> at 25 January 2008; Open Access to Knowledge (OAK) Law Project, *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors*, Law Report No 1 (2006) <<http://www.oaklaw.qut.edu.au>> at 5 March 2007; Queensland Spatial Information Council (QSIC), *Government Information and Open Content Licensing: An Access and Use Strategy* (2006)

5. Non Commercial Use: How far should we be allowed to reuse material for designated non commercial purposes?³³ How does non commercial distribution occur in a world which allows such good quality and broad scale distribution – doesn't it all impact on the commercial return? Is sharing in a social network really non commercial – don't major corporations benefit financially from this and what price should they pay? Is non commercial use an issue of more closely defining exclusive rights which do not at present distinguish between commercial and non commercial uses or an issue for exceptions, limitations or user rights?
6. Intermediary liability: Today we have a plethora of intermediaries, yet the "safe harbours" were designed in an era where ISPs were the dominant intermediary. As we now have so many different levels of intermediary the whole landscape of liability for the messenger needs to be reviewed.³⁴ In doing so the concept of "notice and take down" (as embodied in the *Digital Millennium Copyright Act* 1998 (DMCA)) or "notice and notice", as a form of copyright compliance needs to be more closely considered.
7. Secondary, authorisation or contributory liability: The more we expand this type of liability the more we risk chilling diversity of opportunity and innovation: see Justice Stephen Breyer of the US Supreme Court in *Grokster*.³⁵ We need to closely assess the scope and role of legislation in this regard and ask whether this is an activity where the market would be the better point of regulation as in Schumpeterian terms

<<http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE>> at 25 January 2008.

³³ J Litman, *Digital Copyright* (2001) Ch 12.

³⁴ M Lemley, 'Rationalising Internet Safe Harbours' (Working Paper No 979836, Stanford Public Law, 2007)

<<http://www.law.stanford.edu/publications/details/3657/Rationalizing%20Internet%20Safe%20Harbors>> at 25 January 2008; Brian Fitzgerald, Damien O'Brien and Anne Fitzgerald, 'Search Engine Liability for Copyright Infringement' in Amanda Spink and Michael Zimmer (eds), *Web Searching: Interdisciplinary Perspectives* (2008).

³⁵ *MGM Studios Inc v Grokster Ltd* 545 US 913 (2005).

innovation is fundamentally about how the market reshapes itself through new ways of doing things.³⁶

The Context

8. Licensing Models: We also need to encourage and devise new licensing models to fit the technologies – Apple iTunes (direct licensing),³⁷ NOANK Media (ISP level licensing)³⁸ and Creative Commons (open licensing)³⁹ provide recent examples. Never again should we allow everyday people to be put in the position of facing criminal charges because industry has been unwilling to provide new business models.⁴⁰ The notion of compulsory licensing and collective administration of copyright will also be implicated in this discussion.⁴¹
9. New Business Models: As part of the way of solving copyright issues in the digital environment and moving with the technology, commerce must explore new business models that facilitate access in the name of creativity and knowledge.

³⁶ J Schumpeter, *Capitalism, Socialism and Democracy* (1942).

³⁷ <<http://www.apple.com/itunes>>.

³⁸ <<http://www.noankmedia.com>>.

³⁹ <<http://www.creativecommons.org>>; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)

<<http://www.free-culture.cc/freeculture.pdf>> at 25 January 2008; B Fitzgerald, J Coates, and S M Lewis (eds) *Open Content Licensing: Cultivating the Creative Commons* (2007)

<<http://eprints.qut.edu.au/archive/00006677>> at 25 January 2008.

⁴⁰ Consider: W Fisher, *Promises to Keep: Technology, Law and the Future of Entertainment* (2004);

N Netanel, 'Impose a Non Commercial Use Levy to Allow Free P2P File Sharing' (2003)

17 *Harvard Journal of Law and Technology* 1.

⁴¹ Consider the recent activities of the European Commission in relation to CISAC:

European Union, 'Competition: Commission sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA Members' (Press Release MEMO/06/63, 7 February 2006)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/63&format=HTML&aged=1&language=EN&guiLanguage=en>> at 25 January 2008; European Union,

'Antitrust: Commission Market Tests Commitments from CISAC and 18 EEA Collecting Societies Concerning Reciprocal Representation Contracts' (Press Release IP/07/829, 14 June 2007)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/829&type=HTML&aged=0&language=EN&guiLanguage=en>> at 25 January 2008.

In some instances, by allowing broader access we open up more social and economic opportunity – downstream multipliers that are otherwise choked by revenue seeking too early in the process. In the words of Varian and Shapiro from *Information Rules* we need to “maximise value not protection”.⁴²

10. Creator Utopia: The rise of the user generated phenomenon has led some to suggest that the copyright law of the future might be more effectively utilised by creators. In the last 300 years the copyright regime while built around the romantic notion of the author has largely facilitated the wealth of the commercialising agents such as publishers, movie studios and recording companies. Will this change as a result of any new found independence of and distribution/communication networks for 21st century authors?
11. World Trade and Politics: There can be little doubt that the dominance of the US led “pay for every use” “maximalist” view of copyright has been seriously questioned. Countries like India and Brazil are challenging the status quo and the role China will play in influencing the new contours of copyright cannot be underestimated. It seems inevitable that China as the country with the largest number of internet users – over 100 million – will learn how to harness the power of We-Media before many others. It is no surprise that in late 2007 the subject of copyright is a matter of contention between the hegemonic forces of the US and China before the World Trade Organisation (WTO).⁴³

⁴² Carl Shapiro and Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* (1999) 4.

⁴³ Dispute Settlement DS362, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (Complainant: United States of America) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm> at 25 January 2008; Dispute Settlement DS363, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (Complainant: United States of America) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm> at 25 January 2008.

CONCLUSION

The forgoing discussion highlights some⁴⁴ of the key areas that need to be considered in any process of copyright reform. In my view by 2010 we should be moving beyond the limited conceptual framework of copyright to a legal framework that looks more closely at the relationships any individual or entity has with information, knowledge, culture or creativity. A crude name would be Information or Cultural Relationship Law. By focussing on the information or cultural resource and how we nurture and allocate it for social and economic good we open up the politics and economy of the rights to access, reuse and communicate information, knowledge, culture or creativity.

The momentum in this process will not only be driven by the members of the new online social network and communities but also by the mega access corporations that underpin this new space. These access corporations – such as Google, Yahoo – work on a business model in which the more access to content that is available the wealthier they become. While the *Viacom v YouTube and Google* case may only be the first iteration of the political dynamic at play we are seeing a

⁴⁴ Many others issues could be raised, e.g., the length of copyright term, the scope and rationale for moral rights, the criminalisation of copyright infringement, the intersection of copyright and contract/licensing, digital rights management and technological protection measures and proposals for registration and simplification: see *Eldred v Ashcroft* 537 US 186 (2003); *Golan v Gonzales* 501 F. 3d 1179 (10 Cir. 2007); *Chan Nai Ming v HHSAR* (Court of Final Appeal, Hong Kong Special Administrative Region, 18 May 2007); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 <<http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>> at 25 January 2008; P Samuelson, 'Preliminary Thoughts on Copyright Reform' forthcoming (2007) *Utah Law Review* <<http://people.ischool.berkeley.edu/~pam/papers.html>> at 25 January 2008; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) <<http://www.free-culture.cc/freeculture.pdf>> at 25 January 2008; P E Geller, 'Copyright History and the Future: What's Culture Got To Do With It?' (2000) *Journal of Copyright Society of the USA* 209, 235; B Fitzgerald et al, *Internet and E Commerce Law: Technology, Law and Policy* (2007) Ch 4; K Giles, 'Mind the Gap: Parody and Moral Rights' (2005) 18 *Australian Intellectual Property Law Bulletin* 69; W Fisher, 'Property and Contract on the Internet' (1999) 73 *Chicago-Kent Law Review* 1203; Copyright Law Review Committee, *Simplification of the Copyright Act: Part 2* (1999) <<http://www.clrc.gov.au/agd/www/Clrhome.nsf/HeadingPagesDisplay/Past+Inquiries?OpenDocument>> at 25 January 2008; Z Chafee, 'Reflections on the Law of Copyright' Parts I and II (1945) 45 *Columbia Law Review*, 503, 719.

fundamental reshaping of copyright politics. No longer is the access or user or development agenda being championed solely by people or entities that are seen as the less powerful challengers or outsiders, but now it is being championed by heavy hitting mainstream US based western corporations.

In short, the future of copyright provides a dynamic and challenging topic for discussion and action as we move towards 2010.

THE NEW RIGHT OF COMMUNICATION THROUGH THE INFORMATION NETWORK IN THE PEOPLE'S REPUBLIC OF CHINA

Qian Wang

INTRODUCTION

While China has not joined the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) or the WIPO Performances and Phonograms Treaty (WPPT), China amended its Copyright Law in 2001 in accordance with Article 8 of the WCT and Articles 10 and 14 of the WPPT. As a result, a new exclusive right of communication through the information network (hereafter referred to as the 'right of network communication') was introduced into the *Copyright Law 1990 (amended 2001)* for the benefit of copyright owners and performers and producers of sound and video recordings.

The adoption of the right of network communication has raised the level of copyright protection as required by Article 8 of the WCT and Articles 10 and 14 of the WPPT. Consequently, uploading a work or recording onto a website for unauthorised distribution through the Internet will infringe the copyright owner, producer and performer's (if the recording embodies the performance) right of network communication, unless the distribution constitutes fair use.

However, since the provision on the right of network communication in the *Copyright Law* has a liberal application, more needs to be done to properly apply this right in complicated cases. In addition, the new technologies and business models appearing in China bring new challenges which call for clarification on the meaning of the network

communication right, and either creating or improving provisions in the *Copyright Law*.

For example, when a website provides hyperlinks to infringing MP3 files, or ‘pirated’ sites containing a number of infringing files, will the website operator be directly responsible for infringing the right of network communication, or for indirectly contributing to the infringing act done by the linked sites? Moreover, if the copyright owner sues the website providing the hyperlinks, but does not give a written notice warning it of the infringing nature of the linked files or sites in advance, can the court determine that the website has actual knowledge of the infringing act occurring on the linked site? There are no clear answers to these questions in the *Copyright Law*.

To deal with these new challenges the State Council drafted the *Regulation on the Protection of the Right of Communication through the Information Network* (“*Communication Right Regulation*”),¹ and the Supreme Court is trying to give interpretations on the right of network communication in specific cases. Nevertheless there are still disputes over the application of this new right. The competing interest groups, which include major record labels and the Internet industry, have opposing views, which makes it difficult for new legislation and judicial interpretation.

This paper explores the nature of the new right of network communication in China and discusses its relationship with other exclusive rights, in particular the right of reproduction and the right of distribution. This paper also identifies the hotly debated questions in relation to applying the right of network communication and attempts to provide answers. In addition, the paper provides a proposal to introduce specific provisions of indirect copyright infringement and insights on the judicial test that should be applied by the courts in determining an act of indirect infringement.

¹ Since this chapter was written, the State Council of PRC has promulgated the *Regulation on Protection of the Right of Communication via Information Networks* on 18 May 2006 as Decree No. 468, effective as of 1 July 2006.

THE BACKGROUND TO THE NETWORK COMMUNICATION RIGHT IN CHINA

The first *Copyright Law* in the People's Republic of China was adopted in 1990. Unlike most Western copyright laws, it provides without any definitions an open list of exclusive economic rights:

Article 10: Copyright includes the following moral rights and property rights:

- (5) The right of exploitation and the right to remuneration, that is, the right of exploiting work by means of reproduction, performance, broadcasting, exhibition distribution, making cinematographic film, television or video, adaptation, translation, annotation, compilation and the like, and the right of authorising others to exploit one's work through the above-mentioned means, and of receiving remuneration as a result.

When the Internet became a major means of disseminating work in China, the courts had to consider whether Article 10 granted copyright owners an exclusive right to control the act of uploading their works to a website for browsing or downloading. In 2000, Wang Men and five other well-known writers discovered that their novels could be freely downloaded from a website without their consent. The six writers sued the website and the case was referred to as 'the first copyright case in the network environment' (hereafter referred to as the '*Six Writers' case*').

It should be noted that the *Copyright Law 1990* did not provide a general right of communication to the public. Furthermore, the broadcasting right provided in Article 10 does not cover on-demand transmission on a point-to-point basis through the Internet. This is because the *Regulation for the Implementation of the Copyright Law* issued by the State Council in 1991 (hereafter referred to as the '*Copyright Implementation Regulation 1991*') clearly states that:

Broadcasting is the communication of works through wireless radio waves and cable television system.²

² *Regulation for the Implementation of the Copyright Law* (1991) art 5 [3].

Since the transmission occurred on the Internet it is technically different from wireless radio waves and the cable television system, which means that communicating works on-line is more than an act of broadcasting. Thereafter, it is practically impossible for the court to interpret the broadcasting right widely because of the strict wording in the *Copyright Implementation Regulation 1991*.

Nevertheless it may be possible to treat the website's act as a 'distribution' of work since the *Copyright Implementation Regulation 1991* defines 'distribution' as the:

provision of copies of a work to the public by means such as sale and rental etc, in so far as the number of copies satisfy the reasonable need of the public.³

Since the result of uploading a work onto an openly accessible website is to make copies of the work available to the public, it is arguable that uploading the work is an act of providing copies of the work by a new means, in addition to sale and rental.⁴ Moreover, the United States Information Infrastructure Task Force stressed that 'the transmission results essentially in the distribution', and supports the view that the existing right of distribution encompasses transmitting copies through the Internet.⁵

However the terms 'sale' and 'rental' have specific meanings, which are different to the meanings these terms have in common law countries such as the United States. It is well-established that 'sale' in legal terms involves the transfer of ownership of a real thing, while 'rental' is the delivery of a real thing to another.⁶ A 'real thing' in most cases indicates

³ *Regulation for the Implementation of the Copyright Law* (1991) art 5 [5].

⁴ Even after the new network communication right was introduced into the *Copyright Law* in 2001, some people still argue that making works available through the Internet is an act of distribution that should be controlled by the right of distribution. See Gui Run, 'Comment on Wang Men vs. Beijing OnLine', *China Intellectual Property Right Newspaper*, 13 August 2003.

⁵ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure* (the Report of the Working Group on Intellectual Property Rights), Washington DC (1995) 219-20.

⁶ 'Sale' is defined by *Contract Law* as the transfer of ownership of an object, while 'rental' is defined as a delivery of an object for another's use. See *Contract Law* (PRC) art 130 and art 212.

a tangible thing, and intangible information embodied in a medium is not a 'thing'. As a consequence, although network users can download a copy of a work from a website, this process does not involve the transferring of ownership, or delivery of any 'real thing'. Most academics and judges find it strange that online-transmission, which does not lend itself to any physical movement of a real thing, can be combined with sale and rental as a form of distribution.

Uploading a work to the network server produces a new digital copy of the work and as a consequence this may involve the right of reproduction. The *Copyright Implementation Regulation 1991* defines 'reproduction' as:

Reproduction is the act of making one or more copies of a work by means like printing, photocopying, copying by hand, rubbing, audio-recording, video-recording, re-recording or photographing etc.⁷

Unlike the definition of 'reproduction' in the United States and Australian copyright acts which describe a test to determine whether certain acts constitute a reproduction,⁸ the definition in the *Copyright Implementation Regulation 1991* only lists various means of reproducing works. However there is no difficulty in interpreting the act of uploading as an act of reproduction because a new copy of the work is made and the list given in the definition is not closed. The most important consequence of uploading a work onto an open website is not that a new copy is created, but that the new copy is accessible by the public who are able to browse or download the copy. Thus, while the act of uploading a work does involve reproducing the work, it is not appropriate to say that the act only infringes the exclusive right of reproduction. The contrary conclusion will equate to the act of communicating a work through the Internet to the mere act of photocopying it.

Since none of the exclusive rights in Article 10 of the *Copyright Law 1990* were applicable to the act of communicating works through the Internet,

⁷ *Regulation for the Implementation of the Copyright Law* (1991) art 5[1].

⁸ 17 USC 101; *Copyright Act* (Cth), s 31(1)(a)(i).

a new exclusive right would have to be inferred from the Article and invoked by the court.

In the *Six Writers' case* judges were enlightened by Article 8 of the *WCT*. The judges formed the view that through judicial interpretation any new right may be added to the list of exclusive rights in Article 10, since the list is open to future development.⁹ The decision delivered by the Beijing Haidian District Court states that:

The explicitly listed ways of exploiting works in Paragraph 5, Article 10 of the *Copyright Law 1990* does not close the possibility of other ways by which works might be exploited . . . Thus the communication of works through the Internet should be determined as a new way of exploiting works. The copyright owner has the right to decide whether or not to allow the work to be communicated via the Internet . . . Despite the differences that exist between the communication of works on the Internet and the publication, distribution, public performance and broadcasting of works, all of them in nature are for the purpose of realising communication (works) to the public and the exploitation of works, thus allowing the audience or viewers to have access to the content of works. The difference in the means of communications does not affect the right of copyright owners to control such communications.¹⁰

The court made the decision in favor of the six writers and this was confirmed by the Beijing Number 1 Intermediate Court. However only laws passed by the People's Congress can create exclusive rights for the author of works, so the legal basis for the broad interpretation of Article 10 has been widely questioned.¹¹ Under these circumstances new legislative action became the only solution to eliminate the doubts surrounding the application of copyright law to the Internet.

⁹ Zhang Hui, (*The Analysis of Six Writers vs. Beijing On-line on Copyright Dispute* <<http://www.cnnic.net.cn/html/Dir/2003/11/17/1311.htm>> at 25 January 2008; the author is also a judge in the Supreme Court.

¹⁰ Civil Judgment (1999) No 57, Intellectual Property Branch, First Instance, Beijing Haidian District Court. The wording of this judgement has been slightly modified.

¹¹ Zhang Guangliang, 'The Analysis of Six Writers vs. Beijing On-line on Copyright Dispute' (2000) Spring *Journal of Science, Technology and Law*, 88; Zhang Pin, 'The Effect of Copyright Law in the Internet' (2000) Spring *Journal of Science, Technology and Law*, 92.

THE NATURE OF THE RIGHT OF NETWORK COMMUNICATION IN CHINA

The right of network communication is a primary exclusive right in China

In 2001 the People's Congress amended the *Copyright Law 1990* and a new right of communication through the information network was explicitly granted to copyright owners, performers and producers of sound and video recordings. The relevant provisions are:

Article 10: Copyright includes the following moral rights and property rights:

(12) The right of communication through the information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them.

Article 37: The performer shall, in respect of his or her performance, enjoy the following rights:

(6) To authorise making his or her performance available to the public through the information network, and receive remuneration as a result.

Article 41: The producer of a sound recording or video recording shall enjoy the right to authorise . . . reproducing, distributing or renting the sound recording or video recording or making it available to the public through the information network and to receive remuneration as a result

It should be noted that although Articles 37 and 41 use the term the 'right to authorise', the two articles grant the performer and producer an exclusive primary right, rather than a secondary authorisation right in terms of the 'right to approve, countenance or sanction' as is provided in

common law jurisdictions.¹² Unlike the United Kingdom, the United States and Australia, there is no general concept of a ‘secondary right’ in Chinese copyright law theory. ‘The right to authorise’ in the *Copyright Law 1990* means that the owner has the right to do certain acts by him or herself and has the right to authorise others to do the same. As such, the right to authorise is actually a sub-right inherent to any exclusive right enjoyed by the copyright owner. The six rights granted to performers in Article 37 and the four rights granted to producers of sound and video recordings in Article 41 are defined as ‘the right to authorise others to do’ certain acts. Even seen from the perspective of the legislature in common law countries it is absurd that a copyright law would only create various secondary rights for performers and producers, without first creating a primary right.¹³

The right of network communication is a new exclusive right in China

It is obvious that Article 10 of the *Copyright Law 1990 (amended 2001)* originates from Article 8 of the *WCT*. However Article 8 of the *WCT* is the result of a compromise between the competing positions of the United States and the European Union delegations on the wording of the right to control on-demand communication.¹⁴ Article 8 has been referred to as an ‘umbrella solution’ because it does not order member states to adopt a new right, but rather gives member states the power to decide which exclusive right should be used to cover the act of making works available through the Internet.¹⁵ In implementing Article 8 of the

¹² US17 USC 106; *Copyright Act C* s 3(1); *Copyright Act 1968* (Cth) s 13(2). See also *Falcon v Famous Players Film Co* [1926] 2 KB 474, *Muzak Corp v Composers, Authors and Publishers Association of Canada Ltd* [1953] 2 SCR 182, *Moorhouse v University of New South Wales* [1976] RPC 151.

¹³ For the same reason, Professor Andrew Christie and other commentators argue that Article 8 of the *WCT* embodies an exclusive primary right despite the fact that Article 8 grants an exclusive right of authorising communication to the public. See Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27 *Sydney Law Review* 237, 244.

¹⁴ See World Intellectual Property Organisation, *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*, August 30 1996, Article 10, CRNR/DC/4.

¹⁵ Mihály Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Treaties, Their Interpretation and Implementation* (2002) 493.

WCT many member states chose to use one or more existing traditional rights to encompass the relevant acts of network transmission. For example, the United States did not add any new exclusive right in its *Copyright Act* after it ratified the *WCT*. Instead the combination of the right of distribution, reproduction, public performance and public display are applied by courts in the United States to control the act of network transmission.¹⁶

In China the ‘umbrella’ itself became a single new exclusive right in the *Copyright Law 1990 (amended 2001)*. There are two reasons for this. Firstly, as indicated by the *Six Writers’ case*, judges have refused to apply traditional exclusive rights to the Internet environment. Secondly, there is no general right of communication in the *Copyright Law 1990* that can be appropriately expanded to cover on-line communication. As a result the legislature could choose to create a new right, and the easiest way to do so would be to make any new right an additional new right for Chinese copyright owners, pursuant to Article 8 of the *WCT*.

As a result the definition of the new right of network communication in Article 10 paragraph 12 of the *Copyright Law 1990 (amended 2001)* is virtually a verbatim translation of part of the second half of Article 8 of the *WCT*. This kind of borrowing allows the Chinese copyright legislation to be consistent with the *WCT*.

The application of the right of network communication in China

Since the *Copyright Law 1990 (amended 2001)* came into force anyone without authorisation who uploads copyrighted work onto an openly accessible Internet site infringes the right of network communication. Once the work is uploaded anybody can browse it online, or download it onto a computer connected to the Internet. Such an act falls within the definition of the right of network communication and is precisely what the new right is designed to cover.

In the first case involving the right of network communication *Chen Xingliang v National Digital Library Ltd*, the defendant without consent

¹⁶ DMCA, *Section 104 Report: A Report of the Register of Copyrights Pursuant to 104 of the Digital Millennium Copyright Act*, (August 2001) 94.

scanned three books written by the plaintiff and provided an on-line reading and downloading service to its registered users. The plaintiff sued for infringement on his right of network communication and was awarded a favourable judgement with damages. The Beijing Haidian District Court differentiated between the traditional paper-based library and the digital library that involves communication of digital work. The court stressed that communicating work through a network enlarges the scope of communication to such an extent that it goes beyond what the author would expect in publishing the work in the traditional way, and therefore such communication should be restricted by the right of network communication. The case is significant in that the defendant is a national and government-supported digital library under the direct control of the National Library of China.¹⁷ The decision also fully implemented the *Copyright Law 1990 (amended 2001)* without any undue influence by the defendant.

In *Zheng Chengsi v Sursen Digital Technology Inc* the defendant operated an online digital library that provided the plaintiff's scanned books for registered users to read.¹⁸ Although the defendant employed measures preventing users from downloading its digital books and only allowed three users to read the same book at the same time, the Beijing Haidian District Court found against the defendant. The court declared that the technological restrictions did not change the nature of the defendant's infringing acts in making the plaintiff's works available for users' through the Internet, without authorisation.¹⁹

In *Warner Music v Rongsbuxia Computer Inc* the defendant operated a popular, literature website which provided MP3s for on-line sampling. Ten of these MP3s came from CDs produced by the plaintiff. The defendant argued that its act was fair use since it was for personal use and the defendant did not charge any fee from its users. The Shanghai

¹⁷ See the introduction to the National Digital Library of China on the website of the NDLC and National Library of China, <<http://www.d-library.com.cn/index.jsp>> at 25 January 2008, <<http://www.nlc.gov.cn/>>.

¹⁸ Zheng Chensi is a Professor and Director of the Intellectual Property Center in the Chinese Academy of Social Science. There are five other professors who brought a lawsuit on the same facts and legal grounds against Sursen Digital Technology Inc. The defendant lost all of these lawsuits both in the first and appellate court.

¹⁹ See Beijing Haidian District Court, Civil Judgment (2004) No 12509.

Number 2 Intermediate Court rejected the fair use defence by emphasising the potential harm the defendant caused on the plaintiff's economic interests.²⁰

Since Article 8 of the *WCT* does not specify what exactly constitutes the act of making a work available, the direct translation of this article without further clarification can lead to ambiguity and confusion.

THE NEW PROBLEMS WITH THE RIGHT OF NETWORK COMMUNICATION IN CHINA: WHEN DOES AN ISP INFRINGE THE RIGHT?

Background

At present, the most prominent question is: who makes the communication? As mentioned, the definition of the network communication right in *Copyright Law 1990 (amended 2001)* is an exact translation of Article 8 of the *WCT*. The latter does not shed light on who is the person making the communication, but does exclude the possibility that the provider of physical facilities that enable or creates a communication makes the communication.²¹

It is evident from previous cases involving infringement on the right of network communication that uploading works onto an open Internet site is an act of communicating works.²² However it is unclear whether merely providing hyperlinks to works residing on other Internet sites amounts to a communication of that work.

The answer to this question is significant in that copyright owners are trying to sue hyperlink providers for infringing their rights of network

²⁰ See Shanghai No 2 Intermediate Court, Civil Judgment (2003) *Er Min Chu Zi No. 21*.

²¹ The Agreed statement concerning Article 8 of the *WCT* states, 'It is understood that the mere provision of physical facilities does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)'. See further <http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf> at 15 January 2008.

²² See the above mentioned civil judgments.

communication. If the act of providing hyperlinks is not deemed communication then the provision of hyperlinks is not a direct infringement on the network communication right.

ISP's liability of joint tortfeasor in China

In copyright theory a direct or primary copyright infringement is commonly understood as doing something that only the copyright owner has the right to do, without the consent of the copyright owner.²³ In other words, if an act is explicitly restricted by an exclusive right, doing such an act without the copyright owner's authorisation constitutes a direct or primary copyright infringement. If an act is not under the direct control of any exclusive right, it is not a direct or primary copyright infringement.

This does not mean that acts which are not directly restricted by exclusive rights cannot lead to a copyright infringement. If a person materially contributes to the infringing conduct of another, with knowledge of the infringing nature of the conduct, that person's act may be considered a contributory infringement (or indirect or secondary infringement).²⁴

In common law countries merely providing hyperlinks to infringing files stored on other sites is not a direct or primary copyright infringement.²⁵ The *Digital Millennium Copyright Act of 1998* (hereinafter referred as to the *DMCA*) provides a 'safe harbor' to service providers who link users to an online location containing infringing material, provided the service providers do not have actual knowledge of the infringing material, or are

²³ A typical example is the definition of 'copyright infringement' in the *Copyright Act C s 27(1)* which states, 'It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.'

²⁴ *Gershwin Publishing Corp v Columbia Artists Management Inc*, 443 F 2d 1159, 1162 (2nd Cir, 1971). It should be noted that the embodiment of the theory of indirect infringement in the United States is different from that in the United Kingdom, Canada and Australia. In the United States there is no explicit provision of indirect infringement in either the 1909 or 1976 *Copyright Act* and the US courts have developed the rule of contributory copyright over the years. In a contrast, the UK *Copyright Act* enumerates various secondary infringement acts: see *Copyright Act (UK)* ss 22-26.

²⁵ B Melville and David Nimmer, *Nimmer on Copyright* (2003) ch 12B.05 [A][2].

unaware of the circumstances from which the infringing activity is apparent, and that they act expeditiously to disable access to the material after being notified or becoming aware of the infringement.²⁶

The concept of ‘indirect copyright infringement’ does not appear in either the 1990 or 2001 *Copyright Law* of China. However the legal rule that a person should take liability for a third person under some circumstances, does exist in civil law. Article 130 of the *General Principles of the Civil Law* (hereafter referred to as the ‘*Civil Law*’) states that:

If two or more persons jointly infringe upon another person's rights and cause damage, they shall bear joint liability.

Furthermore the *Supreme Court's Interpretation of the Civil Law* (hereafter referred to as ‘*Civil Law Interpretation*’) states that:

Any person who incites or assists another to commit a tort is the joint tortfeasor.

‘To assist’ has a similar meaning as that of ‘to contribute’, which makes it reasonable to claim that the concept of ‘contributory infringement’ exists in China. As a matter of fact, Article 130 of the *Civil Law* and its accompanying judicial interpretation is the legal ground on which the service provider's liability is based. Article 4 of the *Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright (Networks Copyright Interpretation)* provides that:

In case an Internet Server Provider participates in any other person's act of infringement on copyright through networks, or abets any other person to commit, or assists any other person in committing an act of copyright infringement, the court shall impose joint liability of the Internet Server Provider with the others directly committing the infringement act according to the provisions of Article 130 of the *General Principles of the Civil Law*.

²⁶ 17 USCS § 512(d). It should be noted that paragraph [2] also provides that the service provider ‘does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity’. This is the embodiment of the ‘vicarious liability’ theory, but not of ‘contributory infringement’.

Article 5 goes on to state that:

In the event that an Internet Server Provider in providing content services has actual knowledge of the internet users' acts of infringement on other people's copyright through networks, or who has been given warnings with good evidence by the owner of the copyright, but fails to take measures including removing the infringing content etc, to eliminate the infringement, the people's court shall, in accordance with the provisions of Article 130 of the *General Principles of the Civil Law*, impose joint liability on the Internet Server Provider and the Internet users.

Article 5 of the *Networks Copyright Interpretation* is a Chinese version of 'notice and takedown' and the second safe harbor as provided by Article 512, subsection (c) of the *DMCA*. However, two questions remain after the Supreme Court issued the *Networks Copyright Interpretation*. First, Article 5 only covers the activities of content service providers who store material on their network system at the direction of the users. The act of providing hyperlinks to material stored on other network systems is not included within the scope of the application of Article 5.

Second, Article 5 only imposes joint liability on those content service providers who 'have actual knowledge' of the users' infringing activities, but it is silent on how to determine what constitutes 'actual knowledge'. It is highly unlikely that when the service provider is served with good evidence through a notice of claimed infringement, that the service provider then has 'actual knowledge' of the possible infringement. But is the notification the only way to give the service provider actual knowledge of the existence of others' infringement? In addition, should court make a determination that a service provider 'should have known' of others' infringing activity, if it would be apparent to a reasonable person under the same circumstances?

Conflicting views amongst Chinese courts

Universal Music Group v chinamp3.com

The first question was first discussed in *Universal Music Group v chinamp3.com*.²⁷ The defendant operated a professional music website, but did not store any music files on its web server. Instead, it created categories of music files on its site such as 'Hong Kong and Taiwan Zone' and 'US and European Zone', in which the names of artists were displayed by alphabetical order. When a user clicked the name of an artist, it displayed hyperlinks to the artist's songs. By clicking those hyperlinks, a user could directly download music files stored on other Internet sites.

The plaintiff was the producer of sound recordings which were available to download through the defendant's hyperlinks. The plaintiff had never authorised a website to provide a downloading service, and claimed that the thirty-five song titles linked by the defendant were infringing. The plaintiff sued the defendant for infringing its 'legitimate right' and requested the defendant to stop providing communication and downloading services through the network.

The cause of action was somewhat ambiguous since the plaintiff did not clarify whether it sued the defendant for directly infringing the network communication right, or for assisting the linked website to commit the direct infringement. The Beijing No1 Intermediate Court, in the judgement handed down in favour of the defendant, claimed that the focus of the dispute was 'whether the act of communicating works to the public by means of providing hyperlink is an infringement of the plaintiff's right'.²⁸

In its analysis the court first noted that the defendant not only searched other websites for music files, but also aggregated, arranged and organised hyperlinks to the selected and recommended files. Secondly, the court stressed the fact that users can directly search and download

²⁷ Warner Music Co. and Sony BMG Music Entertainment (Hong Kong) Ltd also brought a lawsuit against the operator of <<http://www.chinamp3.com>> on the same legal grounds and similar factual backgrounds. All of the three lawsuits had the same outcomes both in the first and second instance.

²⁸ See Beijing No 1 Intermediary Court, Civil Judgment (2004) *Yi Min Chu Zi No 400*.

songs by visiting the defendant's website, rather than visiting the linked websites. In the court's view the defendant's website was in the position of communicating works from beginning to end, while the linked websites only functioned as 'periphery storage'. The court determined that the defendant had a duty of care on the legality of its downloading service and was negligent for not screening the linked resources. The court declared that 'the defendant's act of providing hyperlinks did not provide a corridor' to the works, but was rather 'an act of communicating works to the public'.²⁹

It is apparent that the court treated the defendant's act of providing links to the infringing files as communicating works to the public, not assisting others to communicate works. This position is confirmed by the legal grounds on which the court based its conclusion. The court quoted Article 41 (the right of network information granted to producers of sound recordings) and Article 47 of the *Copyright Law 1990 (amended 2001)* (liability for infringement on the exclusive rights including the right of network information), but did not mention Article 130 of the *Civil Law* regarding joint tortfeasors.

On appeal the Beijing High Court overruled the judgement given by the district court. The High Court pointed out that (emphasis added):

'The appellant (the defendant in the first instance) was not able to fully control the linked resources. If the linked website operator changes the URL address or employs a code to restrict access, then access to the linked resources will be denied. Therefore, in nature, *the service provided by the appellant in the present case is still a service of providing a corridor*. The appellant does not reproduce or *communicate to the public the linked sound recordings*. Nevertheless, the appellant's act of creating links facilitates communication of the infringing sound recordings. By enabling users to download infringing sound recordings, the appellant causes infringing activities on the linked websites to be performed and extended. As a result, the appellant objectively *participates in and assists* the infringing activities that were

²⁹ Beijing No. 1 Intermediary People's Court, Civil Judgment (2004) *Yi Zhong Min Chu Zi No. 400*.

performed on the linked websites and thus harms the legitimate interests enjoyed by the respondent.³⁰

Clearly the High Court did not agree that providing links to infringing works constituted a communication of works. Instead the High Court held that the act contributed to the directly infringing activity which occurred on the linked websites. In addition, the High Court cited Article 130 of the *Civil Law* and Article 4 of the *Networks Copyright Interpretation* on ‘joint tortfeasor’ in determining the contributory infringing nature of the appellant’s act, and its subsequent liability.

The High Court also addressed the appellant’s knowledge of the infringing nature of the linked files. The appellant had argued that Article 5 of the *Networks Copyright Interpretation* should be applied to the present case. In accordance with Article 5, only when the content service provider has ‘actual knowledge’ or notice of the claimed infringement, can the service provider’s failure to remove or disable access to the infringing materials be regarded as an act of assisting another’s infringing activity. In this sense, it could be argued that since Article 5 does not include the words ‘should have known’, even if the directly infringing activity performed by others would have been obvious to any reasonable person in that position, the service provider is not responsible for its act which contributed to the direct infringement, unless the copyright owner can prove the service provider had ‘actual knowledge’.

In that case, the respondent (the sound recording producers) did not serve a notice on the appellant before commencing proceedings. Therefore, if Article 5 was applied to the case, it is likely the appellant would have been successful due to the lack of evidence regarding its ‘actual knowledge’. However, the High Court was of the view that Article 5 was an inappropriate clause to resolve the dispute. The High Court stated (emphasis added):

‘(Article 5) does not apply to all kinds of service providers . . . It only applies to those service providers that cannot monitor the information (transmitted through the network) through a duty of care. Nevertheless, as far as the service provided by the appellant is concerned, the appellant selected the websites and

³⁰ See Beijing High People’s Court, Civil Judgment (2004) *Gao Min Zhong Zi No. 713*.

resources to be linked . . . It is apparent that the appellant is capable of scrutinising the legality of the linked files one by one. At the same time, since the appellant is a professional profit-making music website, it should have a higher duty of care placed on the legality of its service. Therefore, *the above Article 5 cannot be applied to determine the appellant's fault and liability* . . . Should the duty of care of similar service providers be exempted, those service providers might ignore the right owners' legitimate interests and indulge others' infringing activity, and public interest will be harmed in the end'.³¹

The High Court was of the opinion that the appellant should have known that the linked music files were infringing, since the appellant selected the music files to be linked, and had the chance to review whether those files were authorised to be communicated through the network.

Universal Music Group v Jining's Window Information Ltd

The Beijing High Court's position was not followed by the Supreme Court. In 2005 Universal Music Group sued Jining's Window Information Ltd, a service provider that also provided links to sound recording files stored on other publicly available websites. The plaintiff did not notify the defendant of the claimed infringing nature of the linked music files before commencing the lawsuit.

The judges in the Jining Intermediate Court were divided over whether the defendant had infringed the plaintiff's right of network communication. Some judges supported the views of the Beijing No 1 Intermediate Court in *Universal Music Group v chinamp3.com* in that providing links to infringing works was not merely providing a corridor to the works, but was a communication of the works. These judges believed that because the defendant was negligent in reviewing the legality of the linked resources, the defendant was therefore responsible

³¹ Ibid.

for its act of communicating works to the public through the Internet.³² Other judges opposed the above view and stated that (emphasis added):

‘Providing links involves neither uploading music files (to a website server) nor communication (of works through the Internet). Since Internet websites are publicly accessible, interconnected and provide numerous types of information, it is impractical to request that the service provider identify and filter infringing files from among its linked resources. Thus the act of providing links itself is not an infringement of others’ copyright. However since the link providers are technically capable of controlling the linkage between its website and others’ websites, the link providers are obliged to take measures to disable the link immediately after becoming aware that the linked files are infringing. Only when the link provider does not disable the link in good time, and this results in the infringing files being further communicated, is the link provider liable for infringement. In the present case, *the plaintiff did not warn the defendant in any manner*, and the defendant disabled the links immediately after it was served by the claimant. In accordance with the *Networks Copyright Interpretation*, the defendant should not be liable for infringement.’³³

Since the judges were divided in the Jining Intermediate Court, they asked for instruction from the Shandong High Court, which in turn referred the inquiry to the Supreme Court. On 2 June, the Supreme Court made a reply to the Shandong High Court and then forwarded the reply to all the other courts. The reply states that (emphasis added):

‘When the Internet service provider has *actual knowledge* of the infringing activity (of others), or continues to provide links (to infringing files) after the copyright owner sent it a warning of claimed infringement with good evidence, (the courts) may

³² (Supreme Court’s) Instruction: *Whether Jinning Window Information Ltd’s Act of Providing Links Infringes the Right of Network Communication Owned by the Sound Recording Producer and How to Calculate the Amount of Damages*, Document No 7 (2005), Shandong High Court.

³³ *Ibid.*

impose liability on the service provider in accordance with Article 4 of the *Networks Copyright Interpretation*.³⁴

The reply from the Supreme Court left alone the question of whether the act of providing links to works is an act of communicating works to the public. The reply did affirm that the service provider's 'actual knowledge' of the infringing nature of the linked resources, which can only be proved by serving a notice in advance, is necessary to impose any liability on the service provider. In other words, even if the service provider is fully aware of the facts or circumstances from which the infringing nature of the linked resources is apparent, and the service provider 'should have known' or 'must have known' of the infringement, no liability can be imposed on the service provider unless the copyright owner issues a notice.

This position contradicts the Beijing High Court's decision in *Universal Music Group v chinamp3.com*. However since the Supreme Court's official reply is binding on the lower courts, the reply remains effective unless it is overruled by new legislation adopted by the National Peoples' Congress or the State Council, or a new judicial interpretation is issued by the Supreme Court. Thus the only way to establish that the service provider has 'actual knowledge' of the infringing activity that occurs on the linked website is to send a notice to the service provider providing the linking service. Also damages can only be calculated from the date the service provider refused to disable the links to the infringing resources, no matter how obvious the infringing nature of the linked resources is, or how much profit the service provider made before receiving the notice.

The implication of the new question on linking service and P2P service

Since the key question of 'who communicates works to the public through the network' is not clearly answered by the *Copyright Law 1990 (amended 2001)* or the Supreme Court, the Chinese courts have a difficult task in deciding challenging cases.

³⁴ Reply No 2, the Third Court of Civil Branch, Supreme Court (2005).

Push Sound Co v Baidu

Baidu.com is not only a NASDAQ-listed firm, but also the biggest web search engine in China. In addition to maintaining an ordinary search mechanism similar to Google and Yahoo, Baidu also provides an 'MP3 search service' (<http://mp3.baidu.com>). When a user types the titles of popular songs in the search box, a list of links to sound recording files with the same or similar titles is displayed, along with a description of the size, format (MP3, WMA or RM) and connection speed of the linked files. After clicking the link, the linked music files would be downloaded from the remote website on which they were stored onto the user's computer.

Below the search box there are also music charts including New Singles Top 100, Singles Top 500, MP3 Chart and Chinese Singles Chart, as well as a catalogue of popular artists. After clicking on a chart a user would see a list of music files ranked in order of popularity. By clicking the artist's name a user could then view music files arranged in alphabetical order by song title. By clicking a song title the user could begin downloading the linked music file onto their personal computer.

Push Sound - an EMI subsidiary company - found that 46 songs from sound recordings it had produced could be downloaded through the links located on Baidu's website. In June 2005 Push Sound sued Baidu for infringing its exclusive right to communicate sound recordings to the public through the Internet. As the factual background of this case is very similar to *Universal Music Group v chinamp3.com*, the court had the opportunity to clarify whether the link provider communicates the linked work to the public.

However the Beijing Haidian District Court's analysis of the case was ambiguous. On one hand, the court pointed out that 'the act of providing links only involves the titles of songs and the names of artists, not the content of the song which should not be deemed an infringement'. On the other hand, the court emphasised that the defendant's service was not 'introducing the artistic value of the music files in question and providing information', but for 'making profit by exploiting MP3 files', which 'goes beyond what a search engine should do'. The court said that the defendant in providing the linking service did not confirm the legality of the MP3 file sources in advance or obtain

the plaintiff's consent, and that since the service 'impedes the plaintiff in communicating its sound recordings through the Internet', the defendant's act was infringing.³⁵

No clear legal grounds for the judgement can be inferred from the above reasoning, and the language used by the court could impose copyright liability on any search engine. For example, since Google's 'image search engine' can 'introduce the artistic value' of an image and enable a user to locate and download the image file itself, Google could be considered to be 'exploiting' image files. It should be noted that Google does not seek the consent of the copyright owner of on-line images or confirm the legality of the on-line images in advance either. Should Google be liable for infringement of copyright in the images simply because it provides an image searching service and 'impedes the plaintiff communicating its image through the Internet'?

It appears that the only possible basis for the judgement is the fact that when the music file begins to download, a pop-up window claims that the MP3 file comes from mp3.baidu.com. It is reasonable for the court to assume that the downloaded files are stored on the defendant's server and that the defendant uploaded these infringing music files onto its server.³⁶ If this were the case, the defendant would be held to have communicated sound recordings to the public through the Internet and would have thus violated the plaintiff's copyright in the sound recordings.

On appeal it would be easy for Baidu to overthrow this assumption by proving that all the downloadable music files are stored on remote websites.³⁷ Without first clarifying whether Baidu communicates music files to the public by providing links to the music files, it is nearly impossible for the court to give a sound judgement.

³⁵ Beijing Haidian District People's Court, Civil Judgment (2005) *Hai Min Chu Zi No. 14665*.

³⁶ Regrettably, although the judgment mentioned this fact, it did not clarify its legal significance. Thus the real legal ground of the judgment is still questionable.

³⁷ Baidu has already appealed the ruling of the first instance to Beijing No. Intermediate Court, but at the time of writing, no decision had been delivered.

*Push Sound Co v Fashionow*³⁸

The Fashionow Company is China's version of Napster. Like Napster, Fashionow facilitates the transmission of MP3 files between its users through its free distribution of the P2P music share software 'Kuro'. Any user who has installed Kuro and paid the service fee necessary for registration can search for and download MP3 music files stored on other users' computers through the Internet. After the user has downloaded the MP3 files, these files are then available for downloading by other Kuro users, provided the user is logged onto the Kuro system. Kuro appears to operate in a similar manner to Napster rather than Grokster, since it depends on Fashionow's server to search for MP3 files.³⁹ The trial court, Beijing No. 2 Intermediary People's Court, held that the two defendants should be liable for copyright infringement because they were providing the 'Kuro' software and platform and making profits through the platform.⁴⁰

In what was the first case in China to involve copyright infringement of a P2P service provider, Push Sound claimed that Fashionow infringed its right of network communication. Interestingly the claim in this case is the same as that in *Universal Music Group v chinamp3.com* and *Push Sound Co v Baidu*, and the plaintiff did not allege that the defendant assisted or contributed to the users' copyright infringement. As a result there still remains the question of whether the defendant communicates music to the public through the Internet. Here the defendant only facilitated communication by providing the Kuro software and 'search index' service through its server. There is no clear answer to the whether such facilitation is deemed communication.

³⁸ See Beijing No. 2 Intermediary People's Court, Civil Judgement (2005) *Er Zhong Min Chu Zi No. 13739*.

³⁹ This is disclosed by the criminal judgment delivered by Taiwan Taipei District Court, since the Kuro software distributed in Taiwan and Mainland China is the same. However, this conclusion has not been affirmed by the court in Mainland China. For more information, see the Taiwan Taipei District Court Criminal Judgement 92 *Nian Du Su No. 2146*.

⁴⁰ See Beijing No. 2 Intermediary People's Court, Civil Judgement (2005) *Er Zhong Min Chu Zi No. 13739*.

SUGGESTION ON APPROPRIATELY IMPLEMENTING THE WCT ARTICLE 8 IN CHINA

Only the uploader communicates works to the public through the network

One of the keys to resolving the above two cases and future cases involving Internet service providers liability is to determine whether and when a service provider communicates works to the public through the Internet. As mentioned, the Beijing No 1 Intermediate Court and some judges in the Jining Intermediate Court argued that when a service provider enables users to directly download music files by clicking links to these files, the service provider communicates the music to the public through the Internet.

This conclusion, which is wrong, is the result of misunderstanding the wording of ‘makes work available’ in Article 8 of the *WCT*. If the act of providing links was communication, then the act falls under the direct control of the right of network communication. It follows that anybody who provides a link to an infringing file is directly infringing the right of network communication, regardless of their intent.

The judge responsible for delivering the opinion for the Beijing No 1 Intermediate Court in *Universal Music Group v chinamp3.com*⁴¹ wrote a commentary in which he declared that ‘the defendant *directly* performed the infringing act’.⁴² If that was the case, the court’s discussion of negligence in concluding that the service provider (the defendant) infringed upon the copyright would be redundant, because the intent to infringe is not a condition necessary to constitute a direct infringement. Obviously, that conclusion is not only absurd, but also a disaster for search engines since it is impossible for search engines to avoid providing links to infringing works.

⁴¹ Go East Entertainment Co., Ltd (A Universal Music Company) v. Beijing Centry Yuebo Technology Co., Ltd (owner of chinamp3.com) See Beijing No. 1 Intermediary People’s Court, Civil Judgement (2004) *Yi Zhong Min Chu Zi No.400*, <http://bjgy.chinacourt.org/public/detail.php?id=9868&k_w=chinamp3> at 16 January 2008.

⁴² Liu Yong, *The Determination of Infringing Act among Network Linkages and the Application of Law* (in Chinese), <<http://www.bjd.com.cn/fghd/fghd-8.htm>> at 1 February 2006.

In my view, only the act of uploading or otherwise copying works onto a publicly accessible server or ‘shared directory’ on a personal computer hard drive, which the public can access at a place and time chosen by them, is the act of communicating works to the public. Any other acts which facilitate this act, including providing links to these works and distributing P2P software with a ‘search index’ service, would not fall within the category of communicating works to the public.

In the case of links, even if all of the users access the work stored on a remote website through the links provided, it is those responsible for uploading the works to the remote website that have communicated the works to the public through the Internet. Link providers only facilitate the existing communication; they do not make new communication.

In *Universal Music Group v chinamp3.com* the Beijing No 1 Intermediate Court made an analogy between a remote website to which links are provided and a ‘periphery storage’ (like a removable hard disk drive) to which a personal computer is connected.⁴³ Just like the operator of the personal computer, who in choosing content from the removable hard disk to display on the computer is responsible for what the computer screen shows, the service provider in choosing specific files on the remote website and creating links to those files communicates them to the public.⁴⁴

The analogy for ‘periphery storage’ is flawed: but for the act of the personal computer operator, others would have no access to the content stored in the removable hard disk. In sharp contrast to this, even if the service provider removed or disabled all the links to the files stored on the remote website, users are still able to log on to the remote website and access those files. As the Beijing High Court noted in the *Universal Music Group v chinamp3.com* appeal, if the remote website employs a code to restrict access to the files or deletes the files, the links to these files will no longer enable users to get them.

⁴³ See Beijing No. 1 Intermediary People’s Court, Civil Judgement (2004) *Yi Zhong Min Chu Zi No.400*, <http://bjgy.chinacourt.org/public/detail.php?id=9868&k_w=chinamp3> at 16 January 2008.

⁴⁴ Beijing No 1 Intermediate Court does not say this specifically in *Universal Music Group v chinamp3.com*, however this is what the analogy means.

A new analogy might be useful to clarify who is the communicator of works. In the traditional paper environment, if a bookshop sells pirated books it distributes works to the public by selling pirated copies without the copyright owner's consent, and thereby infringes on the exclusive right of distribution. If another shop sells a map with the location of the 'pirated bookshop' clearly marked, or drives customers to the 'pirated bookshop', this shop does not directly infringe the right of distribution of the copyright owner. Provided the shop does not sell pirated books itself, the shop's actions, including providing the map or sending customers over, only *facilitates and contributes to* the act of distribution performed by the pirated bookshop. It is only a contributory infringement of the right of distribution if the shop knows, or should have known that the other bookshop is infringing upon others copyright.

The Federal Court of Australia recently confirmed this reasoning in *Universal Music Australia Pty Ltd v Cooper*.⁴⁵ Like the Chinese *Copyright Law 1990 (amended 2001)* the Australian *Copyright Amendment (Digital Agenda) Act 2000* introduced a new 'right to communicate the work to the public'.⁴⁶ 'Communicate' is defined as including '(to) make available online a work or other subject matter'.⁴⁷

The factual background of this Australian case is very similar to that of *Push Sound Co v Baidu*, in that a music website provided highly structured links to music sound recording files stored on remote websites. The copyright owner claimed that the operator of the music website (Mr Cooper) directly infringed on the copyright in the music sound recordings by communicating these recordings to the public.⁴⁸ In reply Judge Tamberlin stated that:

I am not satisfied that the Cooper website has "made available" the music sound recordings within the meaning of that expression. It is the remote websites which make available the sound recordings and

⁴⁵ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 [57].

⁴⁶ *Copyright Act* (Cth) ss 31(1)(a)(iv), 31(1)(b)(iii). In relation to second recordings copyright, see s 85.

⁴⁷ *Copyright Act* (Cth) s 10(1).

⁴⁸ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 [57], see further B Fitzgerald et al, '*Internet and E-Commerce Law*' (2007), Chapter 4.

from which the digital music files are downloaded as a result of a request transmitted to the remote website.⁴⁹

'The music sound recordings have initially been made available to the public by being placed on the remote websites . . . the digital music files to which links were provided on the Cooper website were also available to users through the Internet generally.'⁵⁰

There is no reason why the same conclusion cannot be reached by Chinese courts since the 'right of network communication' in China and the 'right to communicate the work to the public' in Australia both originate from Article 8 of the *WCT*.

'Red flag' test should be applied to determine ISP's knowledge of infringement

Article 4 of the *Networks Copyright Interpretation* requires content service providers to have 'actual knowledge' of the infringement before imposing liability on the service provider as the joint tortfeasor. The reply given by the Supreme Court in *Universal Music Group v Jining's Window Information Ltd* extends this rule to service providers who have created or maintained links to other websites. As a result, the copyright owner of the linked work cannot succeed in a lawsuit against the website operator who has provided the links, unless the copyright owner has already sent a warning to the website operator.

In my opinion, such interpretations do not strike a proper balance between the policy of protecting the interest of the copyright owner and promoting information technology. A notice sent by the copyright owner is not the only way to prove the service provider had actual knowledge of the infringing activities that occurred on remote websites. On many occasions, either the surrounding circumstances or common sense would cause a reasonable person in the same position to have known that infringing activities were taking place. When a service provider should have known of the infringing nature of the files stored on remote websites but has still created or maintained the links to these files, it is unfair to overlook the obvious fault of the service provider and

⁴⁹ Ibid [63].

⁵⁰ Ibid [64].

exempt its liability for contributory infringement, while allowing the service provider to make a profit from facilitating communication of the infringing files from the remote website.

In the United States Senate Report on the The Digital Millenium Copyright Act 1998 (DMCA),⁵¹ the so-called 'red flag' test is described as the 'applicable knowledge standard':

'If the service provider becomes aware of a "red flag" from which infringing activity is apparent, it will lose the limitation of liability if it takes no action . . . in deciding whether those facts or circumstances constitute a "red flag" - in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances - an objective standard should be used.'⁵²

The Report goes on to apply the red flag test to 'information location tools' including the directories or indexes of on-line sites or material (emphasis added):

'A service provider would qualify for this safe harbor if, among other requirements, it "does not have actual knowledge that the material or activity is infringing" or, in the absence of such actual knowledge, it is "not aware of facts or circumstances from which infringing activity is apparent." Under this standard, a service provider would . . . not qualify for the safe harbor *if it had turned a blind eye to "red flags" of obvious infringement.*'⁵³

'The important intended objective of this standard is to exclude sophisticated "pirate" directories which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted from the safe harbor . . . Because the infringing nature of such sites

⁵¹ United States Senate Report 105-190, 105th Congress 2d.

<http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr190.105> at 16 January 2008.

⁵² United States Senate Report 105-190, 105th Congress 2d Session, 44.

<http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr190.105> at 16 January 2008.

⁵³ Ibid 48.

would be apparent from *even a brief and casual viewing*, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate.⁵⁴

“The common-sense result of this ‘red flag’ test is that . . . if, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a “red flag”⁵⁵

In a digital era where the standard of ‘knowledge’ or ‘fault’ of Internet service providers is highly harmonised across the world, if the Chinese legislature and courts were to deny the ‘red flag’ test this would not allow for the effective protection of copyright over the Internet.

Taking Baidu’s case as an example, Baidu manually created such categories as ‘list of artists’ and organised links to the sound recording files. When the name of an artist is clicked, all the song titles contained in the album will be displayed. Clicking a title will begin the process of downloading the sound recording file from a remote website. Since these artists are the most popular singers in China and work for major record labels it is highly unlikely that these record labels would consent to a website making their sound recordings freely available for downloading. Baidu, after having *a brief and casual viewing* of the artists’ names and song titles would have realised the infringing nature of the linked sound recording files. In other words, the artists’ names and song titles which were displayed in Baidu’s categories constitute ‘red flags’ which Baidu should have noticed. However, Baidu turned a blind eye to the ‘red flags’ of what was obviously linked, pirated sound recording files. As a result, Baidu should be held liable, because it was through providing or maintaining links that Baidu contributed to the direct infringement of the right of network communication that was performed by remote websites.

In contrast, the ‘search box’ provided by Baidu is specially designed to search audio files over the Internet and does not constitute an act of contributory infringement. Before a user types a keyword in the ‘search box’, the results of automatic searching remain unknown. The links

⁵⁴ Ibid.

⁵⁵ Ibid.

displayed might point to popular sound recording files which were uploaded onto remote websites without authorisation, but they might also refer the user to lawful audio files, such as sound clips of a speech given by President Bush. Without the copyright owner sending a notice stating that the URL is associated with allegedly infringing files, it is unjustified to assume that Baidu intended to facilitate the communication of infringing sound recordings. Apparently Baidu's 'audio files search box' is just like a Sony Betamax VCR which is 'capable of commercially significant non-infringing uses'.⁵⁶ Without further evidence of Baidu's intent to promote infringement occurring on remote websites, as Grokster and StreamCast Networks did, the court should not hold Baidu liable for copyright infringement.

Fortunately the *Communication Right Regulation* does not seem to base the liability of contributory infringement on 'actual knowledge' of the infringement. In Article 22 it provides (emphasis added):

'A network service provider which provides an information storage space to a service recipient, thus enabling the service recipient to make available to the public through information network a work, performance, or sound or video recording, and which meets the following conditions, bears no liability for compensation:

...

(3) it does not know or *has no reasonable grounds to know* that the work, performance, or sound or video recording made available by the service recipient is an infringement;

...'

Article 23 further provides (emphasis added):

'A network service provider which provides searching or linking service to a service recipient and which, upon receiving a written notification of the right owner, disconnects the link to an infringing work, performance, or sound or video recording in accordance with the provisions of these Regulations bears no

⁵⁶ 442, 78 L Ed 2d 574, 104 S Ct 774.

liability for compensation; however, if it knows or *has reasonable grounds to know* that the linked work, performance, or sound or video recording is an infringement, it shall bear the liability for contributory infringement.’

Compared to the *Networks Copyright Interpretation* and the Supreme Court’s reply in *Universal Music Group v Jining’s Window Information Ltd*, the *Communication Right Regulation* shifts the burden of proof to the service provider. In other words, when the website operated by the service provider provides infringing materials or links pointing to infringing materials, the service provider should bear the burden of proving that it does not know these materials are infringing. In addition, the copyright owner is able to prevail by proving that the service provider ‘has reasonable grounds to know’ the infringing materials and has failed to take down or disable access to the material. If the *Regulation* is adopted it would be a great step forward in protecting copyright in the digital environment. However, the standard of ‘should have known’ requires further clarification either through future judicial interpretation or specific cases.

CONCLUSION

As this chapter highlights, China has done much to meet international standards by introducing the network communication right. In the next few years, we will see the scope and meanings of this right further refined in China.

COPYRIGHT CHALLENGES FOR USER
GENERATED INTERMEDIARIES:
VIACOM V YOUTUBE AND GOOGLE

Damien O'Brien*

INTRODUCTION

YouTube, the video sharing website has risen to be one of the most popular and profitable websites on the Internet. What was first created in February 2005 as a platform for people all over the world to share videos, has now developed into a billion dollar business, that is an integral part of the Google corporation. However, while the success and popularity of YouTube is clear, the associated copyright issues which lie at the very core of the YouTube platform, are far from settled. Evidencing the legal uncertainty surrounding the operation of YouTube, is the recent high profile litigation which has been brought by entertainment company, Viacom International. The case filed in the United States District Court for the Southern District of New York and any subsequent appeals, have the potential to be one of the most influential copyright decisions in the digital era.

YouTube is not the only user generated intermediary to have encountered legal difficulties, rather it exemplifies the copyright challenges facing user generated intermediaries. Indeed, the evolution of Web 2.0 and other new digital technologies have enabled digital content to be easily reproduced and communicated online, without the permission of the copyright owner. The following chapter will provide an analysis of the recent *Viacom v YouTube* litigation, including the claims

* The law as it appears in this chapter is current as of August 2007.

brought by Viacom, both party's arguments and an examination of the key issues, which are likely to decide the outcome of the case. The chapter will also consider copyright challenges for other user generated intermediaries, such as blogs and wikis. Finally, the chapter will provide an analysis from an Australian perspective of some of the copyright challenges which user generated intermediaries are likely to encounter under Australian copyright law.

VIACOM v YOUTUBE

Viacom's complaint

On 13 March 2007, Viacom International Inc, one of the largest media corporations in the United States brought an action for copyright infringement in the United States District Court for the Southern District of New York against YouTube Inc and its parent company, Google Inc.¹ The complaint begins with an analysis of the technological landscape. In essence, Viacom assert that the emergence of new digital technologies over the past decade have revolutionised the way people inform and entertain themselves. Viacom claims, while many people have used these technologies to express themselves creatively, these very same digital technologies have also been misused to fuel an explosion of copyright infringement. In Viacom's view, YouTube is one such entity. In paragraph two of the complaint Viacom allege that:

YouTube has harnessed technology to wilfully infringe copyright on a huge scale, depriving writers, composers and performers of the rewards they are owed for effort and innovation, reducing the incentive of America's creative industries, and profiting from the illegal conduct of others as well. Using the leverage of the Internet, YouTube appropriates the value of creative content on a massive scale for YouTube's benefit

¹ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007). For a copy of the complaint see Evan Brown, *Viacom sues YouTube* (2007) Internet Cases <http://www.internetcases.com/archives/2007/03/viacom_sues_you.html> at 30 June 2007; also see Greg Sandoval, *Viacom sues Google over YouTube clips* (2007) CNET News <http://news.com.com/Viacom+sues+Google+over+YouTube+clips/2100-1030_3-166668.html> at 30 June 2007.

without payment of license. YouTube's brazen disregard of the intellectual property laws fundamentally threatens not just the Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy.²

Viacom further allege in the complaint that the:

Defendants actively engage in, promote and induce this infringement. YouTube itself publicly performs the infringing videos on the YouTube site and other websites. Thus, YouTube does not simply enable massive infringement by its users. It is YouTube that knowingly reproduces and publicly performs the copyrighted works uploaded to its site. YouTube deliberately built up a library of infringing works to draw traffic to the YouTube site, enabling it to gain a commanding market share, earn significant revenues, and increase its enterprise value. YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site. Because YouTube directly profits from the availability of popular infringing works on its site, it has decided to shift the burden entirely onto copyright owners to monitor the YouTube site on a daily or hourly basis to detect infringing videos and send notices to YouTube demanding that it "take down" the infringing works.³

At the heart of the complaint, Viacom alleges six causes of action of copyright infringement against YouTube and Google. The first three causes of action attempt to hold YouTube and Google liable for primary or direct copyright infringement. They are for:

1. Public performance – the defendants have, without permission of the copyright owner, publicly performed and authorised the public performance of the infringing uploaded videos;
2. Public display – the defendants have, without permission of the copyright owner, publicly displayed and authorised the public display of the infringing uploaded videos; and
3. Reproduction – the defendants have, without permission of the copyright owner, reproduced and authorised the reproduction of the infringing uploaded videos through the YouTube website.

² *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [2].

³ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [4]-[6].

The final three causes of action all attempt to hold YouTube and Google liable under the doctrine of secondary or indirect copyright infringement. These claims include:

4. Inducement of copyright infringement – the defendants are liable for inducing the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.
5. Contributory copyright infringement – the defendants are liable for contributing to the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.
6. Vicarious copyright infringement – the defendants are vicariously liable for the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.

Countering the claims by Viacom, YouTube and Google in their defence claim that:

Viacom's complaint in this action challenges the careful balance established by Congress when it enacted the Digital Millennium Copyright Act (DMCA). The DMCA balances the rights of copyright holders and the need to protect the Internet as an important new form of communication. By seeking to make carriers and hosting providers liable for Internet communications, Viacom's complaint threatens the way hundreds of millions of people legitimately exchange information, news, entertainment and political and artistic expression. Google and YouTube respect the importance of intellectual property rights, and not only comply with their safe harbor obligations under the DMCA, but go well and beyond what the law requires.⁴

YouTube and Google's defence, essentially denies each of the allegations in Viacom's complaint and raises 12 defences in their favour. These defences include the safe harbors, licence, fair use, failure to mitigate, failure to state a claim, innocent intent, copyright misuse, estoppel, waiver, unclean hands, laches and substantial non-infringing uses.

⁴ See Elinor Mills, *Google denies Viacom copyright charges* (2007) CNET News <http://www.news.com/2100-1026_3-6180387.html> at 30 June 2007.

The key issues likely to decide the case

A 'volitional act'

Viacom v YouTube Inc and Google Inc is likely to be decided on the basis of three key issues, which are in question in the case. The first issue concerns the allegations of primary or direct copyright infringement against YouTube and Google. In particular, whether the necessary element of volition is present in YouTube's operations. In order to establish an action for primary or direct copyright infringement under United States copyright law, there must first be a volitional act committed by the defendant in regard to the infringement.⁵ Generally, the courts in the United States have held that the automated copying by machines, occasioned by others, is insufficient to establish a volitional act. Importantly, in *Religious Technology Center v Netcom On-Line Communications Service Inc*,⁶ the Court held that '[a]lthough copyright is a strict liability statute, there still should be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.' This issue of volition was more recently examined in *Parker v Google Inc*,⁷ where the Court held '[w]hen an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing.'

In the present case, the question will be whether the manner in which the uploaded videos are performed, displayed and created is sufficiently automated enough, so as to negate any active volitional involvement by YouTube in each act. This issue is likely to come down to a technical analysis of YouTube's involvement in the uploaded videos, for example whether transcoding the uploaded videos into Flash format – so that they can be viewed on the YouTube website – constitutes a volitional act, or is simply an automated process without any active, volitional involvement. However, it should be noted that most of the decisions

⁵ Whilst under the *Copyright Act* (US) a person need not intentionally infringe copyright, it does require conduct by a person, who causes in some meaningful way an infringement. *Costar Group Inc v LoopNet Inc*, 373 F3d 544, 549 (4th Cir 2004).

⁶ 907 F Supp 1361, 1368-1370 (ND Cal 1995).

⁷ 422 F Supp 2d 492, 497 (ED Pa, 2006).

involving a ‘volitional act’ have concerned the caching and archiving of data by an Internet service provider. In this regard, the Court may well apply the same reasoning applied in *Playboy Enterprises Inc v Frena*,⁸ where the defendant was found liable for hosting images uploaded by others, despite the defendant claiming there was no active, volitional involvement.

The Digital Millennium Copyright Act

Assuming the necessary element of volition can be established, the second issue likely to be heavily contested is the application of the safe harbor provisions under the *Digital Millennium Copyright Act 1998* (US)⁹. These provisions limit liability for qualifying service providers from monetary relief for direct, vicarious and contributory copyright infringement.¹⁰ The relevant safe harbor in question is § 512(c)(1)¹¹ which provides:

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

⁸ 839 F Supp 1552 (MD Fla 1993).

⁹ 17 USC § 512.

¹⁰ *Perfect 10 Inc v Cybernet Ventures Inc*, 213 F Supp 2d 1146, 1174 (CD Cal 2002).

¹¹ 17 USC.

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

The 'red flag' provision

In particular, two provisions will be crucial to the case, § 512(c)(1)(A)¹² the 'red flag' provision and § 512(c)(1)(B)¹³ the financial benefit provision. Under § 512(c)(1)(A),¹⁴ a service provider will be disqualified from the safe harbors, if they had actual or 'red flag' knowledge of the infringing material. Under this provision, a service provider, such as YouTube, is not under a positive obligation to remove material, which infringes copyright. However, they will lose their safe harbor, where they become aware of 'red flags', that is facts or circumstances from which infringing activity is apparent, and they fail to act.

In this regard, Viacom asserts that YouTube does have the requisite knowledge of copyrighted material uploaded to their website.¹⁵ They claim that YouTube actively monitors uploaded videos, for example, they remove obscene or offensive videos and create 'channels' and 'featured videos' sections.¹⁶ This aspect of the case is likely to require an analysis, into just how much actual or constructive knowledge YouTube have in regard to the infringing videos, including the technology which YouTube currently uses. It should also be noted, that the comments made by YouTube chief executive, that YouTube will use filtering technology to identify and remove infringing videos for copyright owners who have entered into agreements with YouTube, is likely to count in Viacom's favour.¹⁷

¹² 17 USC.

¹³ 17 USC.

¹⁴ 17 USC.

¹⁵ Michael Fricklas, *Our Case Against YouTube* (2007) The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301451.html>> at 30 June 2007.

¹⁶ *Ibid.*

¹⁷ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [7], [45].

The 'financial benefit' provision

The second provision which is likely to be heavily litigated, is the financial benefit provision.¹⁸ Under this provision, a service provider will be disqualified from the safe harbor, where they receive a financial benefit, which is directly attributable to the infringing activity, where they have right and ability to control that activity.¹⁹ Generally, a service provider conducting a legitimate business will not be considered to have received a 'financial benefit directly attributable to the infringing activity'. For example, receiving a one-time set-up fee and flat periodic payments from customers, whether they be engaging in infringing activities or not, would not constitute a 'financial benefit'. However, the situation in YouTube's case is quite different, as their main form of revenue is through advertisements which feature on search pages, licensed videos and previously above the videos themselves, including infringing videos.

This provision was recently considered in *Perfect 10 Inc v CCBill*,²⁰ where the United States Court of Appeals for the Ninth Circuit held that the relevant enquiry to make when considering whether a service provider has received a 'direct financial benefit', is 'whether the infringing activity constitutes a draw for subscribers, not just an added benefit'.²¹ Similarly, in a recent summary judgment hearing in *Tur v YouTube Inc*,²² the Court held that a provider's receipt of a financial benefit is only implicated where the provider has the right and ability to control the infringing activity.²³ The Court held that the 'right and ability to control' the activity refers to something more than just the ability of a service provider to remove or block access to material posted on its website or stored in its system.²⁴ Rather, the Court held the requirement

¹⁸ 17 USC § 512(e)(1)(B).

¹⁹ 17 USC § 512(e)(1)(B).

²⁰ 481 F 3d 751 (9th Cir, 2007).

²¹ *Ellison v Robertson*, 357 F 3d 1072, 1079 (9th Cir 2004).

²² cv-06-04436 (CD Cal, filed 14/7/2006).

²³ *Perfect 10 Inc v CCBill*, 481 F 3d 751 (9th Cir. 2007).

²⁴ *Hendrickson v Ebay Inc*, 165 F Supp 2d 1082, 1093 (CD Cal, 2001); *Perfect 10 Inc v Cybernet Ventures Inc*, 213 F Supp 2d 1146, 1183 (CD Cal 2002); *Corbis Corp v Amazon.com Inc*, 351 F Supp 2d 1090 (WD Wash, 2004).

presupposes some antecedent liability to limit or filter copyrighted material.²⁵

In Viacom's view, YouTube is an entertainment destination. 'The public at large are not attracted to YouTube's storage facility or technical functionality – people are attracted to the entertainment value of what's on the site'.²⁶ In this regard, Viacom claim that YouTube will lose their safe harbor, as they are receiving a direct financial benefit from infringing videos, where they have the right and ability to control the activity, through the sale of advertisements. This may potentially be one of Viacom's strongest arguments in the case, as previously YouTube operated banner advertisements directly above the videos, including videos which infringed copyright. Arguably, the effect of this may be that YouTube was not receiving a one-time set-up fee and flat periodic payments, rather a direct financial benefit, every time a user viewed an infringing video.²⁷

COPYRIGHT ISSUES FOR OTHER USER GENERATED INTERMEDIARIES

YouTube is not the only user generated intermediary to encounter difficulties with copyright law. Currently other user generated intermediaries, including MySpace, Veoh, Grouper and Bolt are all the subject of ongoing litigation for copyright infringement.²⁸ It should be

²⁵ *Fonovisa v Cherry Auction Inc*, 76 F 3d 259, 263 (9th Cir, 1996); *MGM Inc v Grokster*, 545 US 913, 926.

²⁶ Fricklas, above n 15.

²⁷ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [37]. Note that in July 2007 a French Court held online video sharing website, DailyMotion liable for copyright infringement, despite concluding that the website was a mere 'hosting service'. See David Ardia, *French court finds DailyMotion liable for copyright infringement* (2007) Citizen Media Law Project <<http://www.citmedialaw.org/french-court-finds-dailymotion-liable-copyright-infringement>> at 20 July 2007.

²⁸ For example see Greg Sandoval, *Universal sues MySpace for copyright violations* (2007) CNET News

<http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html> at 30 June 2007; *Tur v YouTube Inc*, cv-06-04436 (CD Cal, filed 14/7/2006); *Io Group Inc v Veoh Networks Inc*, cv-06-3926 (ND Cal, filed 23/6/2006);

noted, that YouTube is also the subject of a number of other actions for copyright infringement.²⁹ In particular, a recent class action filed against YouTube and Google by the English Premier League and independent music publisher, Bourne Co.³⁰ The copyright issues associated with these user generated intermediaries also have the potential to extend to more participatory intermediaries, such as blogs and wikis.³¹ Indeed, in many cases the copyright issues involved are likely to be more prevalent, given the highly personalised form of content production which blogs and wikis provide. In this regard, it should be noted that thus far, there is yet to be a major reported decision involving issues of copyright infringement on a blog or wiki, although there have been a number of cases filed against blogs and bloggers, which have failed to proceed to trial.³²

Universal Music Group Recordings Inc et al v Grouper Networks Inc, No 06-6561 (CD Cal, filed 16/10/2006); *Universal Music Group Recordings Inc et al v Bolt Inc*, No 06-6577 (CD Cal, filed 16/10/2006); *Universal Music Group Recordings Inc et al v MySpace Inc*, No 06-7631 (CD Cal, filed 17/11/2006). Note also that in July 2007 the Motion Picture Association of America Inc filed suis in a United States District Court in Los Angeles against YouTVpc.com and Peekvid.com on behalf of a number of film studios. See Kevin Delaney, *Web sites face film studios' copyright suits* (2007) *The Wall Street Journal Online* <http://www.online.wsj.com/article/SB118298577921950757.html?mod=googlenews_sj> at 16 July 2007.

²⁹ *The Football Association Premier League Limited and Bourne Co v YouTube Inc, YouTube LLC and Google Inc*, 07 CV-3582 (United States District Court for the Southern District of New York, filed 4 May 2007); *Tur v YouTube Inc*, cv-06-4436 (CD Cal, 2006); *Cal IV Entertainment v YouTube Inc*, cv-00617; also see Greg Sandoval, *French sports join suit against YouTube* (2007) *CNET News* <http://news.om.com/French+sports+groups+join+suit+against+YouTube/2100-1030_3-6188948.html> at 20 July 2007.

³⁰ For more information see <http://www.youtubeclaimaction.com>.

³¹ For an overview of the legal issues involving blogs see Damien O'Brien, 'Blogs and the Law: Key Legal Issues for the Blogosphere' (2007) 12 *Media and Arts Law Review* 141; also see Peter Black, Hayden Delaney and Brian Fitzgerald, 'Legal issues for wikis: The challenges of user-generated and peer-produce knowledge, content and culture' (2007) 14 *eLaw Journal* 245.

³² For example a Maine advertising agency in May 2006 filed a copyright infringement suit against a local blogger who had posted a number of draft advertisements from the Maine Department of Economic and Community Development website, to his blog. The case was eventually withdrawn by the advertising agency. See *Warren Kremer Paino Advertising v Duston*, Civil No 06-047 (5 May 2006); Harry Wessel, *Orlando lawyer is Web hero after defending blogger* (2006) *Orlando Sentinel* <<http://www.orlandosentinel.com/business/orl->

USER GENERATED INTERMEDIARIES UNDER AUSTRALIAN COPYRIGHT LAW

While user generated intermediaries are afforded a degree of certainty and protection under the safe harbor provisions in the United States. The situation is less clear in other jurisdictions, like Australia. While the Australian *Copyright Act 1968* (Cth) contains similar safe harbour provisions to the United States, their operation is significantly narrower. In addition to this, Australian courts have also interpreted the legislative provisions regarding authorisation liability (secondary liability) strictly. Further uncertainties arise in regard to the multiple levels of potential liability under copyright law, for user generated intermediaries.

Authorisation of copyright infringement

Under the *Copyright Act 1968* (Cth) a person or organisation that authorises another person to do an infringing act, without the licence of the owner, will themselves infringe copyright.³³ In determining whether a person or organisation has authorised the doing of an act which infringes copyright, it is necessary to consider:

- (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; and
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.³⁴

However, in order to protect the position of intermediaries, such as carriage service providers (CSPs), a defence to authorisation liability was

blogsuit1206may12,0,2087986.story?track=rss> at 30 June 2007; Robert Weisman, *Blogger who criticized Maine tourism office faces lawsuit* (2006) *The Boston Globe* <http://www.boston.com/business/articles/2006/04/28/blogger_who_crititized_main_e_tourism_office_faces_lawsuit/> at 30 June 2007. Also see *NXIVM Corporation and First Principles Inc v The Ross Institute*, WL 22298756 (NDNY 2003); *NXIVM Corporation and First Principles Inc v The Ross Institute*, F 3d 471 (2nd Cir 2004); *NXIVM Corporation and First Principles Inc v The Ross Institute*, 543 US 1000 (2004).

³³ *Copyright Act 1968* (Cth) ss 36(1), 101(1).

³⁴ *Copyright Act 1968* (Cth) ss 36(1A), 101(1A); *University of New South Wales v Moorhouse and Angus & Robertson* (1975) 133 CLR 1.

introduced under ss 39B and 112E of the *Copyright Act 1968* (Cth). This defence provides that a person, including CSPs, will not be held to have authorised copyright infringement merely because the facilities provided by them for making a communication, are used by someone else to infringe copyright.³⁵ The effect of this defence was first considered in *Universal Music Australia Pty Ltd v Cooper*, where the Federal Court held that s 112E did not apply, as Cooper had done more than simply provide the facilities for the making of communications, by encouraging users to download infringing music files.³⁶ Similarly, in *Universal Music Pty Ltd v Sharman Licence Holdings* the Federal Court held that the defence under s 112E did not apply to the defendants, as they had committed positive acts designed to encourage copyright infringement.³⁷

There remains little judicial guidance on the interpretation of ss 39B and 112E of the *Copyright Act 1968* (Cth). However, from the decided cases it would appear that where the person or organisation is intimately involved with the infringing content then this defence to authorisation will not apply. For example, in *Universal Music Pty Ltd v Sharman Licence Holdings* Wilcox J held that something more is required than simply providing the facilities for someone else to infringe copyright to be held liable for authorisation.³⁸ Notably, Wilcox J held that the legislative intention of s 112E was to ‘protect the messenger’, ie CSPs and Internet service providers.³⁹

In this regard, the critical question for user generated intermediaries under Australian copyright law will be firstly, whether they will be held liable for authorising copyright infringement for the infringing acts of their users and secondly, whether they will be entitled to the defence to authorisation of copyright infringement. Although, most user generated intermediaries do not in anyway encourage copyright infringement. Applying the reasoning of Wilcox J it would seem that some user

³⁵ *Copyright Act 1968* (Cth) ss 39B, 112E; note this also applies to moral rights under *Copyright Act 1968* (Cth) s 195AVB.

³⁶ [2005] FCA 972 (Tamberlin J, 14 July 2005) [97]-[99]; Affd *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (French, Branson and Kenny JJ, 18 December 2006).

³⁷ [2005] FCA 1242 (Wilcox J, 5 September 2005) [405].

³⁸ [2005] FCA 1242 (Wilcox J, 5 September 2005) [401].

³⁹ *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 (Wilcox J, 5 September 2005) [398], [418].

generated intermediaries, for example YouTube, are more than a mere 'messenger'; as they are essentially providing a content service to the public, which extends beyond traditional services offered by CSPs or Internet service providers. Furthermore, the level of involvement by some user generated intermediaries, which for example transcode uploaded content into different formats or offer users additional services, may mean that they will be found liable for authorising copyright infringement and the defence under s 112E denied.⁴⁰

Safe harbour provisions

As a result of the *US Free Trade Agreement Implementation Act 2004* (Cth), a number of changes have been made to the *Copyright Act 1968* (Cth) concerning the liability of CSPs for the infringement of copyright.⁴¹ These new provisions are an attempt to bring Australian copyright law in line with the 'safe harbor' provisions in the United States under the *Digital Millennium Copyright Act 1998*. Notably, these provisions do not provide a complete defence for CSPs for copyright infringement; instead they act to mitigate liability by limiting the remedies available against CSPs for copyright infringement in certain circumstances.

There are four categories of online activities outlined in ss 116AC to 116AF which will qualify for a limitation of remedies for the authorisation of copyright infringement under the *Copyright Act 1968* (Cth). Generally, most user generated intermediaries will fall within the 'Category C Activity' under s 116AE, which refers to the storing of copyright material at the direction of the user on a system or network operated by or for the CSP. Under this category in order for a CSP to qualify for the limitation of remedies they must comply with each of the conditions outlined in s 116AH of the *Copyright Act 1968* (Cth), including adopting and implementing a policy to terminate the accounts of repeat infringers, complying with relevant industry codes, not receiving a financial benefit directly attributable to the infringing activity where they have the right and ability to control the activity and expeditiously

⁴⁰ Other indicative factors include, exercising discretion in removing infringing content and obtaining a financial benefit from the infringing content. See *Copyright Act 1968* (Cth) ss 36(1A), 101(1A); *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 (Wilcox J, 5 September 2005) [404].

⁴¹ *Copyright Act 1968* (Cth) s 116AA.

removing or disabling access to infringing material they are hosting when they become aware of it, or facts that make it apparent that the material is infringing.

The key question to be determined in considering whether user generated intermediaries will be entitled to the limitation of remedies under the 'safe harbour' provisions, will be whether they fall within the definition of a CSP. Under s 87 of the *Telecommunications Act 1997* (Cth), a CSP is defined narrowly as a person supplying a carriage service to the public using a network. It would seem unlikely that user generated intermediaries would fall within this definition, as they do not per se supply a carriage service to the public, unlike Internet service providers or CSPs. User generated intermediaries do not provide Internet access or any other carriage services, they simply provide the facility to host user generated content. Therefore, user generated intermediaries are unlikely to be classified as a CSP and thus will not be entitled to the benefit of the 'safe harbour' provisions under the *Copyright Act 1968* (Cth).

It should be noted that under the equivalent 'safe harbor' provision under § 512(c) of the *Digital Millennium Copyright Act 1998* (US)⁴² in the United States, that user generated intermediaries will be entitled to the protection of the 'safe harbor' provisions, providing they comply with the necessary pre-conditions. This provision in the United States has broader operation, due to the fact that it applies to not only service providers, but also online service providers. An online service provider is defined broadly under § 512(k)(1)(b) as a provider of online services or network access, or the operator of facilities therefor. This broad definition will therefore include virtually every online service.⁴³ The courts have also endorsed the expansive nature of the definition of an online service provider, holding that peer to peer file sharing services, Amazon and eBay all fall within the definition of an online service provider.⁴⁴ Indeed, in *Re Aimster Copyright Litigation*,⁴⁵ the United States

⁴² 17 USC.

⁴³ Fred von Lohmann, 'DMCA "Safe Harbors" for Online Service Providers' (2006) 237 *InfoSys* 1, 3.

⁴⁴ *Corbis v Amazon.com*, 351 F Supp 2d 1090 (WD Wash 2004); *Hendrickson v Amazon.com*, 298 F Supp 2d 914, 915 (CD Cal 2003); *Re Aimster Copyright Litigation*, 252 F Supp 2d 634

District Court for the Northern District of Illinois held that the term online service provider ‘is defined so broadly that we have trouble imagining the existence of an online service that would not fall under the definitions...’.

CONCLUSION

Copyright law by its very nature fundamentally challenges the operation of user generated intermediaries, such as YouTube. The rapid development of Web 2.0 and other new digital technologies have enabled consumers to easily reproduce and communicate digital content online, without the permission of the copyright owner. These challenges are highlighted in the recent *Viacom v YouTube and Google* litigation, which has the potential to redefine copyright law in the digital era. This litigation will also be a vital test case for other user generated intermediaries, such as blogs and wikis which face similar copyright challenges. While, it is impossible to predict how the court will decide in the *Viacom v YouTube and Google* case, assuming it does not settle, there are certainly strong arguments in favour of Viacom.

In this regard, the safe harbor provisions in the United States and similar jurisdictions, were designed to strike a balance between competing interests. Service providers are given a degree of certainty, in that they need not actively monitor their services for copyrighted material, whilst copyright owners receive the benefit of expedited procedures to remove infringing content. The safe harbors were not designed to protect service providers who fail to satisfy the necessary preconditions. Indeed, any service provider’s business model, which places such a high degree of reliance upon the judicial interpretation of a legislative provision, is fraught with legal danger. Other intermediaries have developed successful business models which minimise the risk of copyright infringement and fall safely within the safe harbors. There is no reason why YouTube should not do the same.

(ND Ill 2002); *Re Aimster Copyright Litigation*, 334 F 3d 643, 655 (7th Cir 2003); *Hendrickson v eBay Inc*, 165 F Supp 2d 1082, 1087 (CD Cal 2001).

⁴⁵ 252 F Supp 2d 634, 658 (ND Ill 2002).

COPYRIGHT LAW REFORM AND THE INFORMATION SOCIETY IN INDONESIA

Christoph Antons^{*}

HISTORY OF COPYRIGHT LAW AND ITS EXPANSION IN INDONESIA AFTER INDEPENDENCE

When Indonesia introduced a new Copyright Act in 2002,¹ copyright law in the country had an official history of 90 years, starting with the Dutch colonial *Auteurswet* of 1912 that was shortly after its enactment in the Netherlands extended to what was then the Netherlands East Indies.² However, unlike trade mark law, copyright law did not play a major role in the colony, dominated as it was by publishing houses domiciled in the Netherlands. After World War II, copyright law survived the transition to independence in 1949. It was translated into the new national language *Bahasa Indonesia* as *Undang-Undang Hak Tjipta* (literally: 'law on the right to a creation'). The terminology remained in spite of proposals from time to time to use the more literal translation of *hak pengarang* ('right of the author').³ However, the spirit of the time was not conducive to the realisation of the potential of the Dutch derived law. Indonesia was a poor developing country struggling to establish its

^{*} This is a revised and updated version of a paper originally presented at the Third Conference on European and Asian Intellectual Property Rights 'New Paradigms of Copyright Law in the Information Society', Academia Sinica, Taipei, 7-8 June 2004.

¹ Law No 19 of 2002 Concerning Copyright.

² C Antons, 'The Development of Intellectual Property Law in Indonesia: From Colonial to National Law', IIC Vol 22 No 3/1991, 363.

³ JCT Simorangkir, *Hak Tjipta*, PT Gunung Agung, Jakarta, 1961, 27.

national identity and to reduce the remaining Dutch influence in economic and political life. Antagonism towards Dutch interests during a period of tensions over West Papua as the last territory still under Dutch control led in 1958 to a withdrawal from the Berne Convention. Indonesia resented the fact that it had not been invited as an independent nation to the Brussels revision of the Berne Convention during the ongoing independence struggle between declaration of independence in 1945 and recognition of independence by the Dutch in 1949.⁴ The government cited as reasons for the withdrawal from Berne the need to copy foreign books freely in the interest of education, the inappropriateness of membership in an international convention before the country even had a national copyright law, and the fear of recognising acts of the previous Dutch colonial government in connection with the West Papua conflict.⁵

However, Indonesian was a newly promoted national language based on what had been called *Bazaar Malay* during the colonial period,⁶ a language that had been used as *lingua franca* throughout the archipelago for the dealings of indigenous traders, whereas the language of law and the colonial businesses had been Dutch. The evolving nature of the Indonesian language, the lack of skilled translators and the turbulent political times all meant that, in spite of the intentions of the government, the absence of international copyright protection did not lead to a widespread translation and distribution of foreign works. This situation remained unchanged after the military took charge of the country's affairs in 1965 and former General Suharto became President in 1967. For fear of Communist, Islamic and separatist forces within Indonesian society, the so-called 'New Order' government of Suharto throughout its reign retained tight censorship rules that were scarcely conducive to the free exchange of ideas and the fostering of creativity that is the concern and official justification of copyright law. A leftover from this period is Art 17 of the current Copyright Act, which allows the

⁴ Ibid, 53.

⁵ Ibid, 56.

⁶ It was originally adopted at a youth congress of the independence movement in 1928 using the slogan "Indonesia, satu bangsa, satu bahasa, satu tanah-air" ("Indonesia, one people, one language, one mother land"), see B Dahm, *History of Indonesia in the Twentieth Century*, Praeger Publishers, London 1971, 66.

government after hearing the Copyright Council's opinion to prohibit the publication of works that it regards as being in conflict with government policies in the fields of religion, defence and state security, morals and public order.

Interest in copyright protection during the 1960s and 1970s remained within a limited group of individuals and lobby groups such as the Indonesian Publishers Association (*Ikatan Penerbit Indonesia - IKAPI*).⁷ During the 1980s, the situation began to change. In 1982, Indonesia replaced the colonial *Auteurswet* with a new national Copyright Act. The Act was largely concerned with the material classically afforded copyright protection, although it also extended copyright protection to performances, broadcasts and cinematographic works. In his explanation of the bill to the Indonesian parliament, Justice Minister Ali Said stressed the social function of copyright and the need to limit its scope in the public interest. This explained a drastic reduction in the term of copyright protection from 50 years in the colonial legislation to only 25 years in the new law. He further mentioned the local music industry as a potential beneficiary of the new legislation.⁸ The Act was swiftly criticised at national and international level for its short period of protection, its failure to specifically include computer software and its weak protection for foreign right holders. Many provisions in the Act also reflect the centralising and developmental policies of the Suharto government. There was, for example, a provision in the Act allowing the government to publish a copyright protected work "in the national interest", while another provision declared the government as the copyright holder of folkloristic material vis-à-vis foreigners.

The first amendment of the Copyright Act in 1987 deleted the controversial appropriation provision and included batik art, computer programs, video and sound recordings in the list of protected works. For most of the material classically afforded copyright protection, the revised Act extended the protection period to the life of the author plus 50 years, while for performances, broadcasts, video and cinematographic

⁷ JCT Simorangkir, *Undang-Undang Hak Cipta 1982 (UHC 1982)*, Penerbit Djambatan, Jakarta 1982, 10-11.

⁸ 'Keterangan Pemerintah di Hadapan Sidang Paripurna Dewan Perwakilan Rakyat mengenai Rancangan Undang-Undang tentang Hak Cipta', in: JCT Simorangkir, (above note 9), 189-193.

works, orally presented works, maps, sound recordings and translations and commentaries the protection period was extended to 50 years since first publication. Photographic works, computer programs and compilations remained protected for only 25 years since first publication.

Indonesia ratified the TRIPS Agreement in 1994, re-entered the Berne Convention in 1997 and was the first nation to ratify the WIPO Copyright Treaty in the same year.⁹ The subsequent 1997 revision of the Copyright Act redefined the terms of “publication” and “reproduction”; it introduced rental rights for films, computer programs and sound recordings, included computer programs among the literary works, and expanded the notion of compilations to include generally “other works resulting from transformations”. In a rather confusing regulation of protection periods, several works were mentioned twice: once on the list of protected works as being protected for life of the author plus 50 years, and again on a separate list which indicated protection periods of 50 and 25 years since first publication. Listed here were computer programs, cinematographic works, sound recordings, performances and broadcasts (50 years) and photographs and compilations and similar works (25 years). To make matters worse, performances, sound recordings and broadcasts turned up once more under a new chapter on neighbouring rights, again with slightly different protection periods.

In 2002, Indonesia replaced its Copyright Act of 1982 with completely revised legislation consolidating the two previous amendments of the 1982 Act in 1987 and 1997. In the reference to relevant legislation following the preamble, the legislation refers to the WTO-TRIPS Agreement, but not to the WIPO Copyright Treaty (WCT). The simple reason for this is that the TRIPS Agreement was introduced by legislation,¹⁰ but the WCT only by Presidential Decree.¹¹ However, the preamble mentions among reasons for the legislation Indonesia’s membership of “several international conventions/agreements regarding intellectual property rights in general and copyright in particular which

⁹ See <http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1066C> at 16 September 2007.

¹⁰ Law No 7 of 1994 concerning the ratification of the Agreement Establishing the World Trade Organization.

¹¹ Presidential Decree No 19 of 1997.

require further manifestation within the national legal system". The preamble to the explanatory memorandum of the Indonesian Government to the legislation is even more specific and mentions the TRIPS Agreement and the ratification of the Berne Convention and the WCT.¹² The explanatory memorandum continues that the previous revisions of the 1982 Act had already brought various provisions into line with the TRIPS Agreement, but that the legislation needed further improvement "to foster the development of works that result from the diversity of art and culture" in Indonesia. There were further provisions in the conventions that should properly be applied. Apart from that, it was necessary to explain and distinguish more clearly the status of copyright on the one hand from that of neighbouring rights on the other hand. As was pointed out above, the previous legislation was rather confused in this regard, in particular when it came to the protection periods for various types of "works". As will be explained in detail below, the new Act has redefined the publication and reproduction right, prohibited parallel importation, clarified the protection of rental rights and databases and introduced provisions on electronic rights information management, anti-circumvention measures and government licences and conditions for works using so-called high technology production tools, such as optical disks.

The introduction of the new Copyright Act came at a time when Indonesia was preoccupied with solving its political problems. In publicising details of the new Act, the Indonesian media largely focused on piracy of computer software¹³ and optical disks, as this was at the forefront of international criticism of Indonesia's copyright law. Enforcement efforts were concentrated on optical disk piracy in particular. Government Regulation No 29 of 2004 regarding high technology production facilities for optical disks was promulgated. The

¹² For an Indonesian text of the Copyright Act that integrates the explanatory memorandum see Tim Redaksi Tatanusa (eds), *7 Undang-Undang: Rahasia Dagang, Desain Industri, Desain Tata Letak Sirkuit Terpadu, Paten, Merek, Hak Cipta, Perlindungan Varietas Tanaman*, PT Tatanusa, Jakarta 2005, 293-355. For English translations of the Copyright Act see Yasmon Rangkyo Sati, *Laws of the Republic of Indonesia on Intellectual Property Rights*, shortcut gagasan imaji, Jakarta 2003, 147-177; Yasmon Rangkyo Sati, *Indonesian Intellectual Property Directory*, shortcut gagasan imaji, Jakarta 2006, 43-83.

¹³ See for example 'New copyright law to boost local software industry', *Jakarta Post*, 20 September 2002.

International Intellectual Property Alliance has criticised the Regulation as deficient, but has noted progress in enforcement.¹⁴ Prospects for more efficient enforcement were further strengthened with the formation of an IP Task Force by President Susilo Bambang Yudhoyono in March 2006.¹⁵ In addition, the transfer of most of the jurisdiction in intellectual property matters to a Commercial Court specialising in bankruptcy and intellectual property matters has raised the quality of court decisions and the speed with which cases have been decided.¹⁶ A first volume of intellectual property decisions of the Commercial Court was published in 2005.¹⁷ A closer examination of this case material reveals, however, that most cases concern overlaps between copyright and industrial property protection. Therefore, isolated cases involving copyright issues are also published in compilations of trade mark cases.¹⁸ The implications of the new Act for the internet industries are as yet little discussed or tested in the courts. At the international level, Indonesia acceded to the 1996 WIPO Performances and Phonograms Treaty in 2004.¹⁹

INTERNET TRADE, DIGITAL WORKS AND PARALLEL IMPORTS

It is in the preamble to the explanatory memorandum, but not in the actual legislation, that we find the fundamental principle of copyright as restated in Article 2 WCT that copyright extends only to expressions and not to ideas. Earlier versions of the Indonesian copyright legislation

¹⁴ International Intellectual Property Alliance (IIPA), *2007 Special 301 Report: Indonesia*, 276, 279, 281-283, 288-289.

¹⁵ Presidential Decree No.4 of 2006 on the Establishment of the National Task Force for Intellectual Property Rights Infraction Prevention, see IIPA, above note 16, 283-284.

¹⁶ See C Antons, 'Specialised Intellectual Property Courts in Southeast Asia', in: A Kur, S Luginbühl and E Waage (eds), *"...und sie bewegt sich doch!" – Patent Law on the Move*, Berlin 2005, 287-299.

¹⁷ Tim Redaksi Tatanusa, *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Hak Cipta*, PT. Tatanusa, Jakarta 2005.

¹⁸ For details see footnote 28.

¹⁹ Presidential Decision No 74 of 2004, published in *Lembaran Negara Republik Indonesia* 2004 Mo 93.

conveyed the impression that there was less emphasis than in Anglo-American jurisdictions²⁰ on the requirement that a work must have found a permanent form and that Indonesia was, in this regard, following Continental tradition.²¹ Art 12(3) of the current Act, however, requires that the work already appears in a unified form that can be perceived and that allows the reproduction of the work. Art 2 of the Copyright Act grants the author or copyright holder the exclusive right to publish or reproduce the work. Publication is further defined in Art 1 No 5 as the “reading, broadcasting, exhibition, sale, distribution or dissemination of a work, by utilising whatever means including the internet, or by any manner so that such work is capable of being read, heard or seen by another person”. That this definition is meant to include the right of communication to the public required by Article 8 of the WCT can be collected from the explanatory memorandum of the Indonesian Government to Art 2(1) of the Copyright Act. According to the memorandum, the terms “to publish and to reproduce” have to be understood as including the activities of “translating, adapting, arranging, transforming, selling, renting, borrowing, importing, exhibiting, showing to the public, broadcasting, recording and communicating the work to the public by using any means”. That reproduction of a work can also occur in transient form can be concluded from the definition of “reproduction” in Art 1 No 6. According to the definition, reproduction is the “increase in the number of works, either as a whole or in substantial parts by using either the same or different material, including its permanent or temporary transformation”.

As can be seen from the explanatory memorandum to Art 2(1) of the Copyright Act, although not covered in the Copyright Act itself, parallel importation of copyrighted works into Indonesia is prohibited, as it is included in the exclusive publication and distribution right of the copyright owner. When the new Copyright Act was discussed in the Indonesian Parliament, the issue of parallel importation did not become an issue. Indonesian commentators have attributed this to a widespread understanding among members of Parliament that parallel importation

²⁰ See W Cornish & D Llewelyn, *Intellectual Property: Patents, Copyright, Trade Mark and Allied Rights*, Sweet & Maxwell, London 2003, 404-406.

²¹ See L Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, WEJ Tjeenk Willink, Zwolle 1993, 255-256; M Reh binder, *Urheberrecht*, 12th ed, CH Beck, Munich 2002, 78-79.

was equal to illegal importation.²² Pressure by US industry associations and a mistaken interpretation of the TRIPS Agreement with regards to the exclusive rights of the copyright owner are further reasons cited for the inclusion of parallel importation.²³ Equally important is perhaps that the issue is hidden in the explanatory memorandum to Art 2(1) of the Copyright Act and is not visible on the face of the legislation. Because the issue has so far not been raised in court and it is not quite clear how Art 2(1) of the Copyright Act will be interpreted by the courts, there is very little public awareness of the matter. Therefore, the situation in relation to copyright is very different from the question of parallel importation in patent law, which was much more intensively debated because of its impact on the price of pharmaceuticals and on public health.

Art 2(2) of the Copyright Act further grants the author and/or copyright holder rental rights for cinematographic works and computer programs. The explanatory memorandum of the government to Art 12(1)k further defines the category of “cinematographic works” and notes that despite the use of ‘old fashioned’ terminology,²⁴ this category of works is not confined to celluloid material. It includes cinematographic works on celluloid tape, videotape, videodisk, optical disk and/or other media that enable the material to be shown in a cinema, on broad screen, or its presentation on television or another medium. Works of this kind may be produced by film producing enterprises, television stations or by individuals. Rental rights for sound recordings were previously provided together with those for cinematographic works and computer programs (Art 2(3) of the amended Copyright Act of 1982), but are now protected separately in Art 49(2) in the chapter on neighbouring rights in accordance with the clear separation of neighbouring rights and copyright proper in the new Act.

Under the amended Copyright Act of 1982, the protection of databases remained somewhat insecure, although it was easy to argue that it was

²² M Hawin, *Parallel Importation in Selected Asian Countries: A Suggested Solution for Indonesia*, PhD thesis, TC Beirne School of Law, University of Queensland 2003 (on file with the author), 108.

²³ *Ibid*, 106-107.

²⁴ See W Cornish and D Llewellyn (above note 22), 400-401 on the shift in the UK from “cinematographic films” to simply “film”.

included in anthologies or compilations that were listed specifically as copyright protected.²⁵ The new legislation has now clarified the situation and indeed included databases in the same provision (now Art 12(1)l) among the translations, commentaries, adaptations “and other works resulting from transformations”. In the same provision, it is further explained that the compilation or database work is of course protected separately from its components, which may themselves attract copyright protection (Art 12(2)). While Indonesian copyright law requires originality in its definition of what constitutes a “work” (Art 1 No 3), the standard for this is low. The explanatory memorandum to the equivalent provision in the 1982 legislation (Art 1(a)) explained that “the creator must create something original in the sense that this creation does not constitute an imitation”, which is a faithful expression of the Anglo-American standard of originality. The low originality requirement is confirmed by the registration practices of the Copyright Directorate of the Directorate General of Intellectual Property Rights, which has also registered such things as wallpaper, wrappers, packaging designs and technical drawings,²⁶ leading to the famous copyright/design overlap problems with which lawyers in the common law world are all too familiar.²⁷ As for the “skill, judgment and labour” to be employed, what remains to be seen is whether Indonesian courts will follow the stricter views taken in cases such as *Feist Publications Inc v Rural Telephone Service*

²⁵ C Antons, ‘Indonesia’, in: C Heath (ed), *Intellectual Property Law in Asia*, Kluwer Law International, London 2003, 415-416.

²⁶ See in general on the question of originality in Indonesian copyright law C Antons, *Intellectual Property Law in Indonesia*, Kluwer Law International, London 2000, 58-61.

²⁷ See W Cornish and D Llewelyn (above note 22), 536, 538-540. For an example of a case concerning a technical drawing that crossed an entire range of intellectual property laws, see Commercial Court Central Jakarta No. 07/Merek/2002/PN.NIAGA.JKT.PST of 8 May 2002, ‘Eskade’, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Merek*, Volume 2, PT Tatanusa, Jakarta 2002, 177-211. The decision was later overturned by the Supreme Court, No 011K/N/HaKI/2002 of 30 September 2002, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Mahkamah Agung dalam Perkara HaKI*, PT Tatanusa, Jakarta 2003, pp. 109-151 and the appeal decision was upheld after further review, Supreme Court No 02PK/N/HaKI/2003, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Mahkamah Agung dalam Perkara HaKI*, Vol. 3, PT Tatanusa, Jakarta 2004, 285-308.

Co,²⁸ in the US and Canada or the more liberal interpretation of the Australian Federal Court.²⁹

Statistics of the Association of Indonesian Internet Service Providers (*Asosiasi Penyelenggara Jasa Internet Indonesia - APJII*) indicate a steep increase in both internet subscription and internet use in Indonesia since 1998, though starting from a very low base. Subscriptions to the internet increased from 134 000 subscribers in 1998 to 1 087 428 in 2004 and an estimated 1.5 million in 2005. Over the same period, internet user numbers went up from 512 000 in 1998 to 11 226 143 in 2004 and an estimated 16 million users in 2005. Domain name registrations went up from 1 479 in 1998 to 21 762 in 2004. APJII further reported that 232 internet service providers were active in Indonesia in 2005.³⁰ Distribution of internet services, however, is very uneven. In 2003, more than 86% of telecommunication infrastructures were located on the three most densely populated islands of Java, Sumatra and Bali.³¹ Internet cafés have long been the most popular way to access the internet, but here again the distribution is highly uneven and about 50% of them are to be found in Jakarta.³²

The government has long been working on a draft bill on electronic information and electronic transactions and on a draft law covering criminal acts in the field of information technology. The draft law on criminal acts³³ in the field of information technology penalises a large number of activities that either make use of information technology

²⁸ 499 US 340 (1991).

²⁹ As to this distinction and the current situation in the UK, see W Cornish and D Llewelyn (above note 22), 392.

³⁰ See the statistics on <<http://www.apjii.or.id/dokumentasi/statistik.php?lang=ind>> at 30 August 2007.

³¹ The European Union's Asia IT&C Programme for Indonesia, *Promoting Internet policy and Regulatory Reform in Indonesia – Assessment Report, February 2003: Status of Information and Communication Technology Development in Indonesia*, at <<http://www.internetpolicy.net/about/indonesia-assessment.pdf>> at 7 August 2007.

³² Onno W Purbo, *An Indonesian Digital Review – Internet Infrastructures and Initiatives*, UN Online Network in Public Administration and Finance, at <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN007779.pdf>> at 13 August 2007.

³³ A first version of the draft law was available at the following website: <<http://www.gipi.or.id/download/RUU-TiPITI-V.014.htm>> at 27 May 2004.

(chapter V) or that are targeted at information technology (chapter VI). Into the first category fall activities such as intercepting, hacking, distribution of pornographic material, identity fraud, and terrorist activities. The second category covers activities such as the damaging or destruction of encryption systems, the misuse of domain names and privacy violations. This part of the draft also contains a further provision penalising the violation of copyright by using information technology. The act must be an intentional violation of the law, which will attract penalties at least in accordance with the Copyright Act or, alternatively, the much higher penalties of at least five and a maximum of ten years in jail. The status of this draft is currently unclear.³⁴ If the draft is enacted, it will be interesting to see from the government memorandum what kind of cases the provision intends to cover and how precisely it will relate to similar provisions in the Copyright Act. The same is true for the draft law on electronic information and transactions,³⁵ an essential part of the Five Year Action Plan for the Development and Implementation of Information and Communications Technologies (ICT) in Indonesia, the Government of Indonesia's Action Plan to Overcome the Digital Divide.³⁶ It covers areas such as electronic transactions, domain names, privacy protection, bank and credit card fraud, but it again contains a few provisions that could partly overlap with provisions in the Copyright Act. A first version of the draft law, for example, included a prohibition against intentional and unauthorised acts that cause damage to state protected program transmissions, information, code or commands, computer and/or electronic systems. It foresaw private claims in the Commercial Court as well as criminal penalties of up to ten years jail and/or fines of up to 2 billion Rupiah. Apparently, the new government amended the draft further³⁷ and it was finally submitted to the

³⁴ IIPA, above note 16, 288.

³⁵ A first version of this draft law was obtained from the following websites: <<http://www.gipi.or.id/page.php/Halaman%20Depan/Rancangan%20Kebijakan/53.html>> at 27 May 2004) and <<http://www.kimpraswil.go.id/itjen/hukum/ruuite.htm>> at 3 June 2004.

³⁶ IIPA, above note 16. See also Instruksi Presiden Republik Indonesia Nomor 6 Tahun 2001 tentang Pengembangan dan Pendayagunaan Telematika di Indonesia, at <http://dikti.org/inpres_no_6_2001_telematika.htm> at 10 September 2007).

³⁷ IIPA, above note 16.

Indonesian House of Representatives (DPR) in July 2005³⁸ and had reached the Special Committee of the House by July 2006.³⁹

COLLECTIVE EXERCISE OF COPYRIGHT

Karya Cipta Indonesia (KCI) is the collecting society for musical works and performances in Indonesia. To date, there are no other collecting societies. KCI developed out of the Indonesian Recording Music Arrangers and Composers Association (PAPPRI), which decided to set up a collecting society in 1987. The society was set up in 1988 originally under the name INCOS (Indonesian Collecting Society), which was later changed to Yayasan Karya Cipta Indonesia (YKCI – Foundation for Indonesian Works) and finally simply to KCI. KCI became operative at an international level with the signing of a reciprocal agreement with the Dutch collecting society BUMA/STEMRA for the managing of each other's repertoire in early 1991.⁴⁰ Since then, KCI has signed similar agreements with collecting societies in 86 countries representing a very large number of foreign composers. Approximately 1500 Indonesian composers have registered their songs with KCI.⁴¹ KCI collects the rights for public performances and broadcasts, for the the mechanical reproduction by record companies, the so-called synchronization rights of visuals or graphics combined with music (as in video clips, movie soundtracks and Karaoke LDs) and for the printing of musical works, for example in books.⁴²

KCI approaches television and radio broadcasters, airlines and other transport companies, businesses such as shopping malls and offices, and entertainment venues such as hotels, bars, pubs, cafes, restaurants, karaoke bars, cinemas etc. KCI pursues a number of methods to

³⁸ See <<http://www.cybercrimelaw.net>> at 31 August 2007.

³⁹ See <http://i-policy.typepad.com/informationpolicy/legal_/index.html> at 31 August 2007.

⁴⁰ As to the history of KCI, see its website at <<http://www.kci.or.id/profile.html>> at 11 September 2007.

⁴¹ See <<http://www.kci.or.id/copy.html>> at 11 September 2007.

⁴² See <<http://www.kci.or.id/task.html>> at 11 September 2007.

calculate appropriate royalties and these methods may be based on the number of rooms in a hotel, a percentage of income from concerts, and a set percentage of royalties from businesses such as ring-tone providers. Following payment of fees, users are issued with a Music Usage License Certificate. The royalties are deposited in a trust account for further distribution to the copyright holders. KCI faces various difficulties, such as a lack of knowledge among users about obligations with regards to copyright. Users have difficulties understanding, for example, why they have to pay a further amount of royalties after they have bought a legal copy of a CD or a tape. Furthermore, the standard upon which the calculation of royalties is based is often disputed.⁴³ A tribunal similar to the Copyright Tribunal in Australia, Singapore or the UK seems to be needed. Such a mediating institution is also required by the licensing provisions of the Copyright Act. Art 45(4) states that the royalty that the licensee has to pay to the copyright holder will be agreed upon by the parties with the “guidance of a professional organisation”. Neither the Act nor the explanatory memorandum gives any indication as to what kind of organisation is meant. However, there is some hope that the Copyright Council, provided for in art. 48 of the Copyright Act and established originally by Government Regulation No 14 of 1986, could fulfil this role. The Copyright Council is a council of experts, whose main tasks under the legislation is to be heard in cases involving either compulsory licences for the translation and/or reproduction of works in the interest of education, science and research and development (Art 16), or the prohibition of works that contradict government policies in the field of religion, defence and state security, morals and public order (Art 17). Government Regulation No 14/1986, however, gives the Council general advisory and promotional tasks with regards to copyright, including to present “its thoughts and viewpoints for the purpose of settling a dispute upon request of the disputing parties” (Art 3 e of the Government Regulation No 14/1986).⁴⁴ Therefore, it is possible that the Copyright Council will be approached in the future for recommendations about royalties fixed by collecting societies such as KCI. Finally, it is important to note that according to KCI’s website, the

⁴³ Observations of KCI staff in communication with the author, November 2003.

⁴⁴ On the various roles and tasks of the Copyright Council in general see C Antons, (above note 28), 107-108.

earlier change of name from a collecting society for musical works to Karya Cipta Indonesia was undertaken with the vision that the society might one day also collect the royalties for other categories of works, with music, therefore, acting as a pilot project in this area.⁴⁵

THE LAW ON ANTI-CIRCUMVENTION AND DIGITAL RIGHTS MANAGEMENT

With an eye on Articles 11 and 12 of the WCT, the new legislation contains provisions regarding technological measures and rights management information. The unauthorised removal of electronic rights management information is prohibited by Art 25(1) as part of Chapter II, Part 7 of the Copyright Act, which deals with moral rights. The provision is brief and, as often in Indonesia, for further details refers to a yet to be issued Government Regulation (Art 25(2)). The International Intellectual Property Alliance (IIPA) reports in its 2007 Special 301 Report on Indonesia that the implementing Regulation was finalised in 2005,⁴⁶ but it is not yet available from the usually up-to-date website of the Directorate General of Intellectual Property Rights, indicating that it still has not been issued. If one scrutinises Chapters X and XI of the Copyright Act dealing with dispute settlements and provisional remedies, one finds claims for damages involving infringement of moral rights, but the infringement of electronic rights management information is not covered in this section. Civil remedies are, therefore, currently unavailable. However, criminal sanctions against the intentional removal of electronic rights management information are provided by Art 72(7). The penalties are a jail term of two years maximum and/or a fine of up to 150 million Rupiah.

Article 25 of the Copyright Act mentions with the actual removal or alteration of electronic rights management information, only the first of the prohibitions required by Art 12(1) (i) of the WCT and for which the WCT requires 'active and effective legal remedies'. Article 25(2) of the Copyright Act anticipates the issue of a Government Regulation in

⁴⁵ See <<http://www.kci.or.id/profile.html>> at 11 September 2007.

⁴⁶ IIPA, above note 16, 286-287.

regard to matters under Art 25(1). However, Art 12(1)(ii) of the WCT further requires remedies against the unauthorised distribution, importation for distribution, broadcast or communication to the public of works or copies of works with the knowledge (or in relation to civil remedies the reasonable grounds for knowledge) that electronic rights management information has been removed or altered. Interestingly, the matter contained in this second alternative of Art 12(1) of the WCT is not actually regulated in the Copyright Act, but is described as prohibited in the explanatory memorandum of the Indonesian Government to Art 25. Such matters as those listed in Art 12(1)ii of the WCT are apparently regarded as a variant of the removal of rights that is included in the activity prohibited by Art 25(1) and their regulation is also anticipated in 25(2). Quite clearly, however, the two alternatives deal with very different circumstances: on the one hand active removal of electronic information relating to right ownership (Art 12(1)(i) of the WCT), and on the other hand, the mere distribution etc. of material where such information has been removed by another (Art 12(1)(ii) of the WCT). While the explanatory memorandum to a piece of legislation fulfils an important role in Indonesian law and is regarded by judges almost as law in itself, this only holds true as far as it provides missing details or helps to explain the terminology of the provisions of the Act. Therefore, it cannot provide original regulations that are not contained in the Act itself. The confusion of the two alternatives in the explanatory memorandum to Art 25 of the Copyright Act is clearly a mistake and it means that the alternative contained in Art 12(1)(ii) of the WCT is currently unregulated in Indonesia. However, the draft Government Regulation reviewed by the IIPA for its 2007 Special 301 Report⁴⁷ includes the alternative of Art 12(1)(ii) of the WCT and this will settle the matter, once it is enacted.

The circumvention of technological measures for copyright protection that is the subject of Art 11 of the WCT is covered in Art 27 of the Indonesian Copyright Act. It is one of two provisions in a newly introduced Part 8 of Chapter II of the Act under the heading 'Technological Control Measures'. The provision states that, unless authorised by the author, technological control measures meant to safeguard his/her rights may not be damaged, removed or made to

⁴⁷ IIPA, above note 16, 287.

malfunction. As in the case of Art 25 of the Copyright Act, the sections of the Act covering civil remedies contain no reference to violations of Art 27 Civil remedies against the circumvention of technological measures for copyright protection remain, therefore, unavailable. Criminal sanctions are available under Art 72(8) of the Copyright Act. The penalty is the same as for the removal of electronic rights management information, namely imprisonment of up to two years and/or a maximum fine of 150 million Rupiah. The government memorandum to the provision gives as examples of such technological measures secret codes, passwords, bar codes, serial numbers and decryption and encryption technology. The memorandum continues that violating acts include the production, import or rental of any kind of equipment that is especially designed to remove measures for technological control or for the prevention and limitation of copying of a work. The IIPA believes that the provision needs to be more detailed and specific to fully comply with the WCT and the WPPT and has requested further implementing legislation.⁴⁸

The second provision under the heading of technological control measures relates to the problem of rampant optical disk piracy and is actually not primarily a technological but rather an administrative control mechanism. Article 28 of the Copyright Act states that works that use high technology production tools, in particular in the field of optical disks, must fulfil all regulations related to licences and conditions for the production, which will be issued by an authorised agency. The explanatory memorandum of the government to the provision explains further that conditional regulations for high technology production tools refers, for example, to permits related to the location of the production, the responsibility to keep record of the production, and to affix a sign recognising the producer on the product, and it refers further to taxes and tariffs and the fulfilment of conditions for inspections by the authorised agencies. As in the instance of Art 25 of the Copyright Act, Art 2(2) refers to a Government Regulation, which has been issued in the form of Government Regulation No of 2004. As in the case of the electronic rights management information and the anti-circumvention provision of the Act, only criminal remedies are available. The penalties,

⁴⁸ IIPA, 2002 *Special 301 Report: Indonesia*, 151; IIPA, above note 16, 287.

however, are much higher. Article 72(9) of the Copyright Act prescribes a maximum jail term of five years and/or a maximum fine of 1.5 billion Rupiah.

In summary, the new legislation provides criminal sanctions in cases of removal or destruction of technological devices and rights management information. Details will still have to be worked out via Government Regulations, at least with regards to the rights management information provision of Art 25. Neither the law nor the discussion so far has indicated how potential frictions concerning people seeking legitimate access will be resolved.

COPYRIGHT CONTRACTS AND PUBLIC POLICY

Contract law in Indonesia is still based on the Civil Code (*Burgerlijke Wetboek*) inherited from the Netherlands East Indies and it has changed little since independence. An assessment of shrink-wrap licences would, therefore, occur by applying similar principles as in Continental European jurisdictions. Accordingly, unless the licensing terms are clearly brought to the attention of the purchaser prior to the purchase, Indonesian courts are unlikely to find the coincidence of offer and acceptance that is necessary for the conclusion of a valid contract.⁴⁹ Click-wrap licences are in future likely to be covered also by the Electronic Information and Transaction Act, if this finally is enacted. The current draft law foresees detailed regulations on contracts concluded via the internet that complement general contract law, including provisions on offer and acceptance. The complementary character of the draft law finds its expression in a provision which states that commercial customs and practices not in conflict with the Act remain unaffected. Because of the ample time and opportunity given to licensees to read the conditions of click-wrap licences carefully before acceptance, it can be concluded that Indonesian courts will follow international practice and find no difficulties in accepting the validity of click-wrap licences from a contractual viewpoint.

⁴⁹ See S Gautama, *Indonesian Business Law*, Penerbit PT Citra Aditya Bakti, Bandung 1995, 81.

An additional requirement for licensing agreements in Indonesia is, however, that they must be recorded at the Directorate General for Intellectual Property Rights, where they shall be scrutinised for provisions that could be harmful to the Indonesian economy or lead to unfair business competition (Art 47(1) of the Copyright Act). Because the implementing Presidential Decree with details of the procedure is missing, this provision has been inoperative, although the Directorate General of Intellectual Property Rights has apparently accepted informal notifications, in particular in the context of joint venture agreements.⁵⁰ In any case, registration of the agreement is only required to make it effective vis-à-vis third parties (Art 47(2) of the Copyright Act). Under the principle of freedom of contract, the missing registration has no effect on the immediate contractual relationship between licensee and licensor, so that the typical home user of works downloaded after accepting a click-wrap licence would still be bound by the terms of the licence.

Since 1999, Indonesia has a Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.⁵¹ However, Art 50(b) of the Act expressly excludes from its scope “agreements connected with intellectual property rights such as licence, patent, trade mark, copyright, industrial product design, integrated electronic circuit, and trade secrets, and agreements related to franchising”.

⁵⁰ Winita E Kusnadar, ‘Post-Crisis Dilemma for Foreign Investors and Regulators’, *IP Review*, September 2004, at <<http://www.asialaw.com/default.asp?Page=20&PUB=68&ISSO=11138&SID=439665>> at 24 January 2005).

⁵¹ Law No 5 of 1999. For a detailed commentary drafted with assistance of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) see K Hansen, P.W. Heermann, W Kartte, HW Micklitz, W Pfletschinger, FJ Säcker and H Sauter, *Undang-Undang Larangan Praktek Monopoli dan Persaingan Usaha tidak sehat – Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition*, GTZ/Penerbit Katalis, Jakarta 2002.

CONTRIBUTORY AND VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT

The only provision in the Indonesian Copyright Act of 2002 covering secondary liability is Art 72(2). This provision in the criminal part of the Act foresees penalties of up to five years jail and/or a maximum fine of 500 million Rupiah for anyone who “intentionally broadcasts, exhibits, distributes or sells to the public a work or goods resulting from an infringement of copyright or related rights”. It is difficult to conclude otherwise than that actual knowledge of the infringement is required here. This must be contrasted with Art 57, which specifically excludes civil remedies otherwise available in Art 56 of the Copyright Act, if the work is in the hands of a *bona fide* party that obtained the work exclusively for its own purposes and has no commercial interests.

COPYRIGHT LAW IN THE INDONESIAN COURTS

Most of Indonesia’s new intellectual property legislation, including the Copyright Act, has transferred responsibility for first instance cases from the general District Courts to the Commercial Court, a specialised subdivision of the District Court with exclusive responsibilities for intellectual property and bankruptcy cases.⁵² The transfer has increased the quality and speed of the decisions and the transparency of the decision-making process in intellectual property law, because a large number of cases have been published since the Court started to operate in 2002. However, most of these cases are related to trade marks.⁵³ If the

⁵² For details see C Antons, *Doing Business in Indonesia: enforcement of contracts in the general courts and the creation of a specialized commercial court for intellectual property and bankruptcy cases*, Attractivité Economique du Droit – Programme international de recherches, Working Paper AED-EAL-2007-4, available at <<http://www.gip-recherche-justice.fr/aed/publications/working-papers-sydney/04-Antons.pdf>> at 16 September 2007); C Antons, ‘Specialised Intellectual Property Courts in Southeast Asia’, in: A Kur, S. Luginbühl and E Waage, above note 18.

⁵³ Tim Redaksi Tatanusa (ed), *Himpunan Putusan-Putusan Pengadilan Niaga dalam Perkara Merek*, PT Tatanusa, Jakarta, Vol 1 and 2 (2002), Vols 3 (2004), Vols 4, 5 and 6 (2005), Vols 7, 8 and 9 (2006) and Vol 10 (2007).

cases from the first volume of copyright decisions of 2005⁵⁴ are indicative of the use of copyright principles in Indonesia, then the Copyright Act seems frequently to be used to prevent the acquisition or enforcement of other intellectual property rights. Cases concerned the copyright ownership of logos,⁵⁵ a video licensing agreement,⁵⁶ the attempt to use the copyright registration of a technical description to protect a method of developing holograms for cigarette revenues stamps⁵⁷ or the copyright registration of a technical proposal submitted during a tender process.⁵⁸

CONCLUSION

In comparison with the previous legislation, the Copyright Act of 2002 is a significant step forward in the direction of the information society. It includes essential elements required by Indonesia's membership in the WCT and WPPT. However, as often is the case in Indonesia, further implementing decrees are necessary for some provisions to become operative. If Indonesia wants to move further in the direction of the information society, there are also many issues, other than copyright legislation, which must be addressed. Telecommunications infrastructure is still basic and unevenly distributed throughout the country, and it has proven difficult to overcome the monopolistic positions of the

⁵⁴ Tim Redaksi Tatanusa (ed), *Himpunan Putusan-Putusan Pengadilan Niaga dalam Perkara Hak Cipta*, above note 19.

⁵⁵ Decision of the Commercial Court of Central Jakarta of 3 February 2004, No.74/Hak Cipta/2003/PN.Niaga.Jkt.Pst., "Logo Trisakti", in: Tim Redaksi Tatanusa (ed), *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Hak Cipta*, above note 19, 1-38; Commercial Court of Central Jakarta of 28 September 2004, No. 28/Hak Cipta/2004/PN.Niaga. Jkt.Pst., "Lambang/Logo Kesatuan Pelaut Indonesia (KPI)", *ibid*, 217-249.

⁵⁶ Decision of the Commercial Court of Central Jakarta of 15 March 2004, No. 81/Hak Cipta/2003/PN.Niaga.Jkt.Pst., "The Adventures of Tin Tin", in: Tim Redaksi Tatanusa (ed), above note 19, 39-109.

⁵⁷ Decision of the Commercial Court of Central Jakarta of 15 April 2004, No. 04/Hak Cipta/2004/PN.Niaga.Jkt.Pst., "Holgramisasi pada pita cukai tembakau/rokok", in: Tim Redaksi Tatanusa (ed), above note 19, 111-147.

⁵⁸ Decision of the Commercial Court of Central Jakarta of 7 July 2004, No. 05/Hak Cipta/2004/PN.Niaga.Jkt.Pst., "Deskripsi teknikal penggantian katalis (Catalyst Change Out) di kilang minyak Pertamina UP-IV Balongan", in: Tim Redaksi Tatanusa (ed), above note 19, 149-216.

traditional providers. Fundamental legislation necessary for electronic transactions is only slowly being developed. The frequent changes of governments have led to the redrafting of essential laws, so that Indonesia has yet to implement many of the measures foreseen in its 2001 Five-Year Action Plan.

CHINESE COPYRIGHT LAW, PEER
PRODUCTION AND THE
PARTICIPATORY MEDIA AGE: AN OLD
REGIME IN A NEW WORLD

Samsung Xiaoxiang Shi*

I DON'T WANT TO SAY I'M A CHICKEN

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 tone² and singing the song on KTV.³ The flash song is the lament of a chicken that was happy to be a source of eggs and meat, but is now facing extermination because of the threat of bird flu.⁴ Although the lyrics of the 'Chicken Song' are creative and humorous, the melody of the song is lifted entirely from a famous Chinese song *I Don't Want to Say*,

* Samsung X Shi is most appreciative of the feedback he has received on drafts of this chapter from Professor Brian Fitzgerald and Dr Anne Fitzgerald.

¹ This song can be accessed at <<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 ring tone 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.

written by Li Haiying. As a result Li has sued the wireless content provider Kongzhong.com where the 'chicken song' first appeared, for copyright infringement.⁵ Li believes he is 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 created by a Chinese blogger triggered a hot 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 than Chen Kaige's movie *The Promise*⁶ (hereafter referred to as the *Steamed Bun Case*).⁷ The video pokes fun at the premise of 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 threw stones at Hu and threatened to seek litigation against him.

COPYRIGHT LAW IN A NETWORKED INFORMATION SOCIETY

The aforementioned cases are just two examples of disputes involving copyright infringement in the context of a network information society and economy.

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 online.

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 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 <http://en.wikipedia.org/wiki/The_Promise_%282005_film%29> at 19 August 2007.

⁷ See <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, United States of America), 28 March 2006.

When the World was *Being Digital*

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 was not only an effective way of disseminating the works, but was also uncontrollable. In the age of ‘selling wine without bottles’, John Perry Barlow has argued that ‘almost everything we think we know about intellectual property is wrong’.⁹ However in light of current legislation¹⁰ and the successful cases brought by major US-based entertainment companies against 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 To meet the copyright protection challenges posed by the Internet the Supreme People’s Court of the People’s Republic of China (PRC) in 2000 issued the *Judicial Interpretation regarding Various Issues on the Application of Laws while Adjudicating Disputes relating to Computer Network Copyright (Networks Copyright Interpretation)*.¹³ China, to bring itself in line with the World Trade Organisation, amended the *Copyright Law 1990* in 2001 and

⁹ John Perry Barlow, ‘Selling Wine without Bottles: The Economy of Mind on the Global Net’ in P Ludlow (ed), *High Noon on the Electronic Frontier* (1996) 9.

¹⁰ The *Digital Millennium Copyright Act* of the United States of America (*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 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 It was passed by the Adjudication Committee of the Supreme People’s Court on 22 November 2000, and was amended on 23 December 2003 and 20 November 2006.

introduced a new exclusive right of communication via the information network (Communication Right);¹⁴ and the State Council of the PRC issued the new *Regulations for the Implementation of the Copyright Law* in 2002 (*Copyright Implementation Regulation 2002*).

In 2002 a Chinese District Court heard the first case involving digital copyright infringement. In *Chen Xingliang v National Digital Library Ltd*¹⁵ the defendant scanned three books written by the plaintiff and provided on-line reading and downloading services for registered readers without authorisation, and as a result, was accused of copyright infringement. The court made a favourable judgment for the plaintiff and awarded damages. The court determined 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 number of people that it was outside the expectation and authorisation of the plaintiff. Furthermore, the court decided 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.

However, the amended *Copyright Law 1990* and the *Copyright Implementation Regulation* only provide broad provisions on the ‘Communication Right’, and issues such as ISPs liability, TPMs, DRMs and left the enforcement of the right unresolved. Meanwhile, various new information technologies and business models were appearing in the information industry sector and creating new legal challenges. In response, on the 18 May 2006, the State Council issued the *Regulations on the Protection of the Right of Communication via the Information Network*

¹⁴ One of the difficult issues addressed during the preparatory work of the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* was how to create a legal mechanism to regulate online interactive and on-demand digital transmissions. As a compromise between the United States and the European Union delegations, an ‘umbrella solution’ was adopted, leaving member states to decide which exclusive right should cover the act of making works available to the public through the Internet. See *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, Article 10 CRNR/DC/4 (30 August 1996). China chose to create a new exclusive right for copyright owners when amending the *Copyright Law* in 2001.

¹⁵ (2002) Hai Min Chu Zi No. 5702.

(*Communication Right Regulation*).¹⁶ 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,¹⁷ and addresses the protection for DRMs, while prohibiting the circumvention of TPMs.¹⁸ The regulation also establishes the fair use exceptions for libraries, archives, memorial museums, art galleries and nine-year compulsory education providers.¹⁹

On 29 December 2006, China formally joined the *WIPO Copyright Treaty (WCT)*²⁰ and the *WIPO Performances and Phonograms Treaty (WPPT)*.²¹ 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.²²

¹⁶ It was made by the State Council as Decree No. 468, and came into effect on 1 July 2006.

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

¹⁸ See *Regulations on the Protection of the Right of Communication via Information Network of PRC* arts 4-5.

¹⁹ See *Regulations on the Protection of the Right of Communication via Information Network of PRC* arts 6-8.

²⁰ 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.

²¹ 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.

²² 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 Danny Friedmann, *Paper Tiger or Roaring Dragon* (LLM Thesis, University of Amsterdam, 2007).

Now, the Networked World is *Being Human*

We are now on the threshold of the post-digital age.²³ As John Maeda observed: 'If we are to consider the book by Nicholas Negroponte *Being Digital* as an affirmation that 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*.'²⁴ Being human in my opinion, means that *networked individuals*²⁵ are becoming more involved in cultural creativity, innovation and communication through the use of information technology and the Internet. This tendency has increased as a result of the growing public digital literacy, and the rise of a 'participative web'.²⁶ The production of arts and literature works is no longer considered a 'privilege' of social and cultural elite, but a daily engagement for mass individuals, which is enjoyable and provides for instance, communication, entertainment, creative play and self-development.

²³ Post-digital is a term which has recently come into use in the discourse of digital artistic practice. This term points significantly to our rapidly changed and changing relationships with digital technologies and art forms. John Maeda says 'If we are to consider the book by Nicholas Negroponte *Being Digital* as an affirmation that 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*.' See Wikipedia <<http://en.wikipedia.org/wiki/Postdigital>> at 17 August 2007.

²⁴ 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 Mark Curtis, *Distraction: Being Human in the Digital Age* (2005).

²⁵ Barry Wellman et al, 'The Social Affordances of the Internet for Networked Individualism' (2003) 8(3) *Journal of Computer-Mediated Communication*.

²⁶ 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 Graham Vickery, Sacha Wunsch-Vincent, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (Organisation for Economic Co-operation and Development Report, October 2007).

While the prevalence of digital technologies and information networks has enabled any individual to positively participate in cultural creativity, it is altering the traditional relationship between the creators, disseminators and users/consumers of culture and knowledge. On the other hand, the relationship between technology and art forms has also been changed profoundly. Kim Cascone observed that in the music producing sector the 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 in themselves but rather the new horizons of artistic possibility that they provide.²⁷

When Hu Ge was blamed for copyright infringement by Chen Kaige, he defended 'Steam 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 was widely spread over the Internet. Chen sought to commence legal action against Hu, which ironically 90% of netizens criticised as '*violating the spirit of the Internet*'.

Under the PRC *Copyright Law*, individuals are immune from copyright infringement for some private use of copyrighted works.²⁸ Such private use includes the use of creative works for the purpose of study, research, self-entertainment and sharing works among family or friends. This rule is problematic in the new networked information society. To what extent could networked individuals make use of copyrighted works? To what extent could they share and communicate their interests within their social networks? How can the growing tension between the 'spirit of the Internet' and the interests of various stakeholders be harmonised?

²⁷ See 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.

²⁸ See the PRC *Copyright Law* 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: (1) 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.

In the academic sector, some scholars have advocated that the ‘Steam Bun’ is a kind of literature comment which enjoys the fair use exemption under Chinese *Copyright Law*.²⁹ Others argue that the short video is parody, which is a new form of creative work and is legally protected in various countries, for instance the United States, the United Kingdom and Australia. However parody is not currently covered by Chinese copyright law and this has caused demands for the copyright law to be amended to include parody as a fair use exception.³⁰ Parody and other fair use rules regarding copyright infringement defences derived from the print and mass media age, when literature creativity and the use of copyrighted works could be determined case by case.

Nowadays, the increased mass participation and interaction of users to create, express themselves and communicate through the participative web has undermined that mechanism. The current copyright regime lacks explicit rules regarding the access right of the public and the right of users of copyrighted works. It was not an issue when intellectual property rights (IPR) were exceptions instead of rules; however when IPRs are rules instead of exceptions, it becomes problematic.³¹

Moreover, the advance of technology and development of new business models has increased the complexity of stakeholders. 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 for 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.

²⁹ See the *Copyright Law* 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’.

³⁰ See Suli, ‘The Legal Protection of Parody and Limitation: from the The Bloodbath That Began with a Steamed Bun Case’ (2006) 3 *Chinese Jurisprudence (Zhong Guo Fa Xue)*; and Wang Qian, ‘A Study on the legal rules of Parody as Fair Use’ (2006) 1 *Science, Technology and Law (Ke Ji Yu Fa Lv)*.

³¹ Peter Yu, ‘TRIPs: discontent from undeveloped countries and answers’ in Wu Handong (ed), *Intellectual Property Rights Annual Journal* (2006) 53.

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.³² The *Communication Right Regulation* addresses safe harbours for ISPs who provide information storage space and search or link services;³³ 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.³⁴

Therefore, doubts are raised by those in practice 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,³⁵ 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 the popular taste of the public. As a result of being encompassed by such a legal framework, creative works³⁶ generated by creators are marketed as products and property of media entrepreneurs.

³² 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.

³³ See the *Regulations on the Protection of the Right of Communication via Information Network of PRC* arts 14-17.

³⁴ 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, 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 'Yahoo! China loses music download court case, must pay damages' at <<http://www.cctv.com/program/bizchina/20070425/101094.shtml>>.

³⁵ As Prof. 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 Lawrence Lessig, *Free culture: how big media uses technology and the law to lock down culture and control creativity* (2004) 7.

³⁶ They are referred to as literary, artistic and scientific works in the *Copyright Law* art 1: "This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-

The ‘new’ world is accessible through peer production, collaborative creativity and social networks which are spawned in the participatory media and interactive information environment. It is a new world, characterised by a non-commercial culture and a non-market based/user-led innovation. This chapter will examine to what extent the current copyright regime has been challenged by the power of the participatory media and propose solutions to the issues raised.

FUNDAMENTALS OF PARTICIPATORY MEDIA

The terms participatory media, citizen media, social media, we-media and democratic media are used interchangeably.³⁷ They include (but are not limited to) blogs, wikis, RSS, tagging and social book-marking, music-photo-video sharing, mashups, podcasts, participatory video projects and videoblogs.³⁸ Official figures show that 53 million of China’s 123 million internet citizens are BBS users and 20 million are bloggers,³⁹ and sites driven by user-generated media constitute 50% of the top 10 sites in China.⁴⁰

related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilisation, and of promoting the development and prosperity of the socialist culture and science.’

³⁷ Such terms as media, old media, new media and we media, I used to describe the various stages of communicating information and knowledge as they have occurred in the history of human society.

³⁸ These distinctly different media share three common, interrelated characteristics: (1) Peer-to-peer media now makes it possible for every person connected to the network to broadcast and receive text, images, audio, video, software, data, discussions, transactions, computations, tags, or links to and from every other person. The asymmetry between the broadcaster and audience which was dictated by the structure of pre-digital technologies has changed radically. This is a technical-structural characteristic. (2) Participatory media is social media whose value and power derives from the active participation of many people. This is a psychological and social characteristic. One example is StumbleUpon. (3) Social networks amplified by information and communication networks enable broader, faster, and cheaper coordination of activities. This is an economic and political characteristic. See Wikipedia, <http://en.wikipedia.org/wiki/Participatory_Media> at 3 July 2007.

³⁹ According to the ‘*20th Statistical Report on China’s Internet Development*’ released by the China Internet Network Information Center (CNNIC) on 18 July, 2007, blog writing is booming in China with 19.1% of Internet users, or 30.94 million persons, have interest in

From Creative Expression to Communication

Supported by the application of interactive information technology and participative web infrastructure, the participatory media has founded an interactive information environment which is now dominant in virtual communities and Internet social networks.

In the history of media, the single direction of information flow from producers to consumers has been a remarkable feature. Propertization of creative expression is important for avoiding under-production of information, and is even more crucial for its dissemination. It is the exclusive control of copyrighted works that makes it possible to recover the up-front cost of producing and disseminating information. Therefore, intermediaries are used as a necessary condition for creative expression, and proprietorship over the creative works compensates the producers and disseminators for their costs.

However, in the participatory media age such cost has dramatically decreased in the digitally networked information environment,⁴¹ and media (participatory media) is used not only for creative expression of selected individual heroes but more importantly for communication of any individual users. The technological development of computer networks and the flourishing social networks promote the rise of networked individualism in a positive feedback loop.⁴² People no longer passively ‘consume’ media but actively participate in it, usually through the creation of content, in whatever form and on whatever scale.⁴³

While the information flow is not only driven by creative expression of social and cultural elites but more profoundly by communication of the

writing a web blog <<http://www.cnnic.net.cn/download/2007/20thCNNICreport-en.pdf>> at 6 October, 2007.

⁴⁰ ‘China: User-Generated Content Takes Off’, *Business Week*, 9 January 2007, <http://www.businessweek.com/globalbiz/content/jan2007/gb20070109_559223.htm> at 11 February 2007.

⁴¹ Jack Balkin, ‘Digital Speech and Democratic Culture: a Theory of Freedom of Expression for the Information Society’ (2004) 79(1) *New York University Law Review*.

⁴² Barry Wellman et al, ‘The Social Affordances of the Internet for Networked Individualism’ (2003) 8(3) *Journal of Computer-Mediated Communication*.

⁴³ A Kluth, ‘Among the Audience’, *The Economist*, 22 April 2006 <http://www.economist.com/surveys/displaystory.cfm?story_id=6794156> at 8 January 2007.

users, and the cost of information production and dissemination are significantly reduced, the following question has been raised: is the copyright regime, based on romantic authorship and proprietization of creative expression, still fit for this new world?

Peer Production, Non-market Based Innovation and the New Creativity Model

Being blessed with Web 2.0⁴⁴ technology and strengthening network infrastructure, some companies and websites, such as YouTube,⁴⁵ Revver,⁴⁶ Wikipedia,⁴⁷ Myspace⁴⁸ and JumpCut⁴⁹ have received ample praise and amazing Clicks Ratio. These websites have produced a 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.

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

⁴⁴ 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 Wikipedia, <http://en.wikipedia.org/wiki/Web_2.0> at 30 December 2006.

⁴⁵ 'YouTube' is a popular free video sharing website which allows users to upload, view, and share video clips.

⁴⁶ '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.

⁴⁷ '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.

⁴⁸ 'MySpace' is a social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos.

⁴⁹ '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.

infringement',⁵⁰ 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'.⁵¹ In this model, innovation has been democratised as Eric Von Hippel described,⁵² 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'.⁵³ The distinction between 'works of mine' and 'works of yours' is blurred, whilst new cultural movements envision a third position, 'ours'.⁵⁴

Sharing Culture and Non-Commercial Culture

The possibility of sharing creative works increases with the advance of media technology; meanwhile, ironically, restrictions on sharing grow with the expansion of the copyright owner's exclusive rights. It was not until the advent of digital age, that technology seriously undermined the fundamental elements and functions of the copyright regime. The digital technology and the Internet, especially peer-to-peer networks, have posed unprecedented disruptive impacts on copyright law.⁵⁵ It has been

⁵⁰ Jessica Litman, *Digital Copyright* (2001) 25.

⁵¹ In the digitally networked environment we are beginning to see the emergence of a new, third mode of production, a mode I call commons-based peer production. Benkler distinguishes this new mode from the property and contract-based modes of firms and markets. Its central characteristic is that groups of individuals successfully collaborate on large-scale projects following a diverse cluster of motivational drivers and social signals, rather than either market prices or managerial commands. See Yochai Benkler, 'Coase's Penguin, or, Linux and the Nature of the Firm' (2002) 04.3 *Yale Law Journal*. The term 'peer production' characterises a subset of commons-based production practices. It refers to a production system that depends on individual action that is self-selected and decentralised, rather than hierarchically assigned. See also Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) 62.

⁵² '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 Eric Von Hippel, *Democratising Innovation* (2005) 1.

⁵³ Suw Charman and Michael Holloway, 'Copyright in a Collaborative Age', (2006) 9(2) *M/C Journal* <<http://journal.media-culture.org.au/0605/02-charmanholloway.php>> at 28 December 2006.

⁵⁴ *Ibid.*

⁵⁵ The Internet and relevant digital technologies have not only caused the loss of centralized control over reproduction, and dissemination, but also given rise to decentralized creation. See Raymond Shih Ray Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' (2002) 69 *U. Chi. L.*

noted that, ‘in the past, copyright has entailed seven discrete functions: creation, selection, production, dissemination, promotion, purchase, and use... Copyright controlled these functions in the past; however, we will show that with the development of digital technology, the Internet, and social software, distributed information networks are pushing content control away from commercial exploitation and toward an amateur-to-amateur model.’⁵⁶

For more than 150 years, new communication technologies have tended to concentrate and commercialise the production and exchange of information, while extending the geographic and social reach of information distribution networks.⁵⁷ This has changed with communication technologies having now led to decentralising the production of information,⁵⁸ and giving birth to the renaissance of ‘non-commercial culture’.⁵⁹

Human beings’ social structure⁶⁰ has been experiencing a shift away from neighbourhood communities towards flexible partial communities based on networked households and individuals.⁶¹ The networked individuals and households through associations bought about by, for instance, values, visions, ideas, friendship, kinship, dislikes, trade, web links, are acting as ‘nodes’ of Internet social networks. These social

Rev., 263-305; Jessica Litman, ‘War Stories’ (2002) 20 *Cardozo Art and Entertainment Law Journal*, 337-42; and Yochai Benkler, ‘Coase’s Penguin, or, Linux and the Nature of the Firm’ (2002) 112 *Yale Law Journal*, 369-99.

⁵⁶ Dan Hunter and F Gregory Lastowka, ‘Amateur-to-Amateur’ (2005) 46 *William and Mary Law Review* 951.

⁵⁷ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) 29.

⁵⁸ 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 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) 18.

⁵⁹ 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 Lawrence Lessig, *Free Culture* (2004) 7.

⁶⁰ Social structure is a term frequently used in sociology and more specifically in social theory — yet is rarely defined or clearly conceptualised. See Jose Lopez and John Scott, *Social Structure* (2000).

⁶¹ Barry Wellman et al, ‘The Social Affordances of the Internet for Networked Individualism’ (2003) 8(3) *Journal of Computer-Mediated Communication*.

networks have created a demand for collaborative communication and information sharing. Moreover, while the participative web has transformed social networks and social structure, it also has accordingly changed the social and legal implications of 'sharing'. In the context of traditional neighbourhood-based social networks, sharing information products within limitations of copyright law is a consumer's right⁶². However, given the Internet-based social networks, sharing intellectual and cultural works is not only a consumption activity, but also becomes to function as a crucial condition and premise for information selection, dissemination, promotion, adoption, and retention.

With information being produced for communication and sharing on a non-commercial basis, and not for sale, would this render the copyright regime irrelevant?

From Consumers to Users: Situated Users and How Information is Being Used

The rapid advances of media technology have not only posed a need to reform how media should be regulated,⁶³ but also how information and media are consumed or used. It has been argued that the term 'consumers' is misleading and provides inappropriate connotations about the ways that humans receive and interact with cultural goods.⁶⁴ The term 'users' would be more appropriate because it simultaneously connotes both more active involvement in the processes of culture and a

⁶² Generally speaking, under current copyright legal framework, people can share legally purchased hard copies of books, pictures, CDs, DVDs, etc. with family members, friends, neighbours.

⁶³ The focus of the policy concerns that have traditionally justified structural media regulation should, at this time, be focused on assuring that the digitally networked environment evolves into a stable system for peer users, rather than towards a system in which commercial producers and passive consumers are the primary players. See Yochai Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access' (2000) 52(3) *Federal Communications Law Journal* 561.

⁶⁴ Yochai Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access' (2000) 52(3) *Federal Communications Law Journal* 561.

residual aura of addiction that may be entirely appropriate to the age of the iPod, the Xbox and the blogosphere.⁶⁵

To describe the diversity of how information is used by a variety of users, Professor Julie Cohen introduced the term ‘situated users’. The situated user appropriates cultural goods found within his or her immediate environment for four primary purposes: consumption, communication, self-development and creative play.⁶⁶ According to Professor Cohen the term ‘situated’ is used descriptively not prescriptively, and connotes both the open-endedness and the contextual dependence of the way in which individuals experience and participate in culture. Professor Cohen correctly pointed out that users are not merely passive recipients of information products and potential future creators, but instead are cultural actors in the ‘post-digital’ age.

The participatory media age has dramatically enriched the possibilities of how information is produced, and more profoundly how it is used by individuals. The established legal framework of the copyright regime, such as the rules on private use and fair use of copyrighted works, do not comprehensively accommodate ‘situated users’.

Non-commercial v Commercial: Rivals?

From the theoretical and descriptive accounts of the amateur-to-amateur practice of producing, selecting, disseminating and using information, some scholars have concluded that ‘two parallel spheres of information production exist today. One is a traditional, copyright-based and profit-driven model that is struggling with technological change. The second is a newly enabled, decentralised amateur production sphere, in which individual author or small groups freely release their work to other amateurs for experience, redistribution, and/or transformation.’⁶⁷ The former is called the ‘Commercial Sector’ of information production and dissemination and the latter is called the ‘Non-commercial Sector’. The relationship between these two sectors should be examined regarding the positive and negative effects each sector produces.

⁶⁵ Julie Cohen, ‘The Place of the User in Copyright Law’ (2005) 74 *Fordham Law Review*.

⁶⁶ Julie Cohen, ‘The Place of the User in Copyright Law’ (2005) 74 *Fordham Law Review*.

⁶⁷ Dan Hunter and F Gregory Lastowka, ‘Amateur-to-Amateur’ (2005) 46 *William and Mary Law Review* 951.

Non-commercial sector competes against commercial domain

The non-commercial sector's information production and consumption has the potential to harm the commercial sector's market, reducing demand for information products. For example, Microsoft does not appear to appreciate Linux's success. Content produced in the commercial sector flows into the non-commercial sector without authorisation or payment, and this may threaten copyright owners' potential monetary benefits.

Non-commercial sector supplements and supports commercial sector

Historically, many innovations have been created outside the commercial sector. Information products that have been produced in the commercial sector may be utilised by commercial producers and disseminators. Furthermore, user-led innovations in a non-market based environment may become commercialised innovations. Finally, the commercial sector may increase, sustain or develop its market through non-commercial social networks. For instance, the symbiosis of online computer games and fan fiction illustrates a relationship of mutual benefit between commercial game developers and the social networks of fans.

The most difficult problems confronted by current legal system are: How can the two sectors – the non-commercial sector and the commercial sector – be reconciled? How can the information flow within and between the two sectors be regulated? Is the current copyright regime capable of accommodating these two sectors?⁶⁸

⁶⁸ Scholars have argued that the *Copyright Law* should be changed in order to better facilitate the particular benefits that amateur content provides. Or at the very least, we should do our best to prevent copyright owners attempting to destroy the emergence of amateur-to-amateur content development as a viable alternative. See Dan Hunter and F Gregory Lastowka, 'Amateur-to-Amateur' (2005) 46 *William and Mary Law Review* 951.

COPYRIGHT DILEMMA (1): WHAT ARE WE STICKING WITH?

In a world where non-commercial culture is dominant, and creative expression is a by-product of communication, it is naive to regulate the flow of information through the proprietization of creative expressions and excluding consumers/users from being involved in cultural innovation.

Moral Concerns and Notions on Copyright in China, and the Participatory Creativity

Both in the ancient Chinese society and the present, attribution to and integrity of his/her creation are primary concerns of the creator (which I call 'moral concern of the author'). The history of copyright law in China shows that the moral concern of creation has been well recognised by the law. It is notable that the participatory media age does not eliminate creators' moral concern; on the contrary, it highlights its significance because, in the virtual world (which is becoming more and more real), attribution of authorship or contributorship is not only of significance to the creator's reputation and credibility, but also to his/her identity (He/she, now, is not only a creator but a user). However, a key question will be whether the current moral right regime is suitable for participatory creativity.

It is well-known that the dominant philosophy in feudal China was Confucianism in which there was no place for Western notions of law,⁶⁹ or copyright.⁷⁰ Confucius said, 'I transmit rather than create; I believe in and love the Ancients', and believed that intellectual knowledge, as a whole, was the common heritage of all Chinese, and could not be owned

⁶⁹ In the context of Confucian philosophy, law was an instrument for maintaining social order and protecting state interests, and did not involve the Western style of individual rights that one could enforce against others or the state. See Daniel Chow, *The People's Republic of China in a Nutshell* (2003) 39-53.

⁷⁰ China's historical lack of an intellectual property culture can be attributed in part to an economic system that emphasises agriculture and thinks little of commerce. See Eric Priest, 'The Future of Music and Film Piracy in China' (2006) 21 *Berkeley Technology Law Journal* 795. It should be noted that China's concept of copyright was borrowed from Western jurisdictions. See Qu Sanqiang, *Copyright in China* (2002) 5-8.

by private individuals.⁷¹ However the creation and consumption of literary works was limited to the small class of educated elite; while engaging in creative expression was considered an exercise in moral refinement and culture.⁷² Since cultural creativity aimed to educate people, express ambition or insights and perpetuate works for moral glory, the moral rights regarding creative works⁷³ were of significant interest and importance to creators. Without being attributed, the creator would not be awarded the moral glory.

In the first place, these moral concerns were recognised when modern copyright law was being framed in China. For instance, compared to economic rights, moral rights are more easily and comprehensively appreciated under Chinese copyright law. Under the *Copyright Law 1990*, there was only one provision that dealt with economic rights and it did not provide clear-cut definitions of each specific economic right.⁷⁴ In contrast, there were four provisions providing moral rights: the right of publication, the right of authorship, the right of alteration and the right of integrity.⁷⁵

⁷¹ Qu Sanqiang, *Copyright in China* (2002) 8.

⁷² And it was 'ideally not to be sullied by monetary interests. Confucianism criticised the pursuit of immediate financial gains through moral refinement and edification'. See William Alford, *To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilisation* (1995).

⁷³ For instance, the works were expected to be properly attributed to the creator for the sake of his or her good reputation and moral glory; the works should be kept integrated instead of being distorted and mutilated.

⁷⁴ The *Copyright Law 1990* art 10(5) provided, '... 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 above mentioned means, and of receiving remuneration therefore.' However, the economic right provision was broadly expanded in the amended *Copyright Law* in 2001, and it now falls into the provisions of art 10 (5)-(17).

⁷⁵ The *Copyright Law 1990* art 10 provided, 'Copyright includes the following personal rights... (1) the right of publication, that is, the right to decide whether to make a work available to the public; (2) the right of authorship, that is, the right to claim authorship and to have the author's name mentioned in connection with the work; (3) the right of alteration, that is, the right to alter or authorise others to alter one's work; (4) the right of integrity, that is, the right to protect one's work against distortion and mutilation'. These personal rights provisions were not changed in the amended *Copyright Law 2001*.

Both the participatory media environment and traditional Chinese cultural practice are coincidentally established on non-commercial creativity and non-market based innovation. However, they exist in two different social structures. The current moral right regime is raised in the mass media age. While being applied to the participatory media age, it creates both advantages and disadvantages.⁷⁶

To some extent, strict protection of moral rights under the current copyright law⁷⁷ might be advantageous to participatory creativity. It is because that the strong concerns and protection of moral rights may encourage user's participation in the decentralised creation. Other than monetary return, participatory creators are motivated by various desires including: reputation, honour, self-development, communication with peers and creative play. The right of authorship, or at least the acknowledgement of the creator's contribution, is of immense concern to creators. For example, the practice of Creative Commons Licensing (CC) illustrates the creators' concerns regarding authorship or contributorship. Statistics show that 96.6% of works are licensed under a 'by' (attribution) licence.⁷⁸

⁷⁶ In traditional Chinese practice, the public were passively consuming cultural creativity made by guiding genius. In contrast, in the participatory media age people are not only consuming creative works but meanwhile contribute new creative content. Consumers who both consume creative works and simultaneously add creative content to those same works are known in some industries as 'conducers'. "A conductor's hybrid productive and consumptive activity is 'conductive'. Examples of conductive end-user activity are legion. Every day thousands of people log on to Massive Multiplayer Online Role-playing Games (MMORGs), or 'virtual worlds', where they not only consume creative products by playing the game, but also produce such products by independently creating content that then becomes a part of the MMORGs." See Erez Reuveni, 'Authorship in the age of Conducer' (2007) 54 (2-3) *Journal of the Copyright Society of the USA* 286.

⁷⁷ The current law has very strong concern for the right of authorship, in regards to its limitations on copyright. For instance, art 22 of the Chinese *Copyright Law* provides that a work may be used under the fair use rules provided '*the name of the author and the title of the work are indicated*'. Moreover, when comparing the protection provided by copyright law, exclusive rights are protected for a limited period of time, while moral rights are protected forever. For example, the *Copyright Law* art 20 provides "The rights of authorship, alteration and integrity of an author shall be unlimited in time."

⁷⁸ See license statistics at CC wiki <http://wiki.creativecommons.org/License_statistics> at 24 August 2007.

However, on the other side, the moral rights regime, when applied to participatory creativity, may have some disadvantages.⁷⁹ The strong protection of moral rights may hinder participatory or collaborative creativity, because modern copyright law generally assumes that copyrighted works are the product of a single, guiding author and that this single author's product will become static once fixed.⁸⁰

In the context of participatory and conductive creativity, the right of authorship which is based on the romantic author notion is problematic. Even in the pre-digital age it was observed that 'modern technologies have a tendency towards a co-operative creation; in other words, more works are accomplished through collective instead of individual efforts'.⁸¹ This led to the recognition of joint authorship over some types of collaborations, those made by two or more authors, made for hire or employment, works that have been commissioned, and works that have been compiled, adapted, translated or annotated.⁸² But none of these provisions are well-suited for participatory or conductive creativity,⁸³ because participatory and conductive activity generally includes ongoing collaboration in which the creative works will remain 'beta forever'.⁸⁴

⁷⁹ Critics of these assumptions and the romantic notion of authorship have been highlighted by scholars from various disciplines. See Michel Foucault, 'What is an Author?' (Donald F Bouchard and Sherry Simon trans) in Donald F Bouchard (ed), *Language, Counter-Memory, Practice* (1977) 124-27; James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996); and Jason Toynebee, 'Creating Problems: Social Authorship, Copyright and the Production of Culture' (2001) *Pavis Papers in Social and Cultural Research* 3. See also Julie Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham Law Review*.

⁸⁰ See Erez Reuveni, 'Authorship in the Age of the Conducer' (2007) 54 (2-3) *Journal of the Copyright Society of the USA*, 306. See also Margaret Chon, 'New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship' (1996) 75 *Oregon Law Review*, 257-76; and Dan L Burk, 'Copyright and Feminism in Digital Media' (2003) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692029> at 24 August 2007.

⁸¹ Qu Sanqiang, *Copyright in China* (2002) 81-2.

⁸² See *Copyright Law* section 2 (ownership of copyright).

⁸³ See Erez Reuveni, 'Authorship in the Age of the Conducer' (2007) 54 (2-3) *Journal of the Copyright Society of the USA*, 308.

⁸⁴ Erez Reuveni has given very comprehensive explanations on why current copyright law does not accommodate participatory/conductive creativity. See Erez Reuveni, 'Authorship in the Age of the Conducer' (2007) 54 (2-3) *Journal of the Copyright Society of the USA*, 308-10.

Furthermore, the rights of alteration and integrity may also impede upon the participatory and conductive production of creative works. Multimedia tools and technologies raise various possibilities for users and consumers to alter creative works, adding new creative content to the original works to create their own version of the work. Unfortunately, these creative and productive activities are not only unsupported but also prohibited by law. It is because the alteration and integrity rights exclude a variety of alterations and fail to differentiate between the creative use and re-use of works and malicious alteration which distorts the original work and damages the initial creator's reputation and creditability.

For instance, in both the 'Chicken Song' and the 'Steamed Bun' cases, the peer-producer appropriated numerous original clips of the copyrighted works to create the mash-ups (the new works). Unfortunately, it resulted in the defendants being accused of infringing the initial creators' moral rights, especially the right of integrity.

To summarise, the problem with the participatory production of creative works is to what extent and how should the moral rights regime be reconfigured, especially under the Chinese copyright law which houses strong moral concerns. More significantly, the exclusive rights, such as the right to make derivative works, can only be adjusted if appropriate limits are placed on the rights of integrity and alteration.⁸⁵

Economic Rights and Participatory Creativity

The growth of China's modern copyright regime has resulted from China's embrace of a market economy and foreign investment.

Historically speaking, the current Chinese copyright law was transplanted from western jurisprudence and the 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

⁸⁵ The right of making derivative works under the Chinese *Copyright Law* includes four rights, namely the right of making cinematographic work, the right of adaptation, the right of translation, and the right of compilation. See *Copyright Law* art 10 (13)-(16).

copyright law. This is especially evidenced by the amendment to copyright law and the expansion of economic rights in 2001⁸⁶ when China amended the *Copyright Law 1990*,⁸⁷ bringing China in line with *WTO Trips Agreement*.

The current copyright law enumerates and defines 12 economic rights, which are divided into three main categories, *reproduction rights*, *rights of making derivatives*, and *rights of communication to the public*.⁸⁸

Reproduction rights include the rights of reproduction,⁸⁹ distribution,⁹⁰ and rental.⁹¹ The *rights of making derivatives* encompasses the rights of adaptation,⁹² translation,⁹³ compilation⁹⁴ and making cinematographic

⁸⁶ Globally, the last major revisions to copyright law in the past half-century were 'predicated in a large part on the fact that the modes of information production were centralised in the hands of large corporate entities in several specific industries, including film, television, music and software.' See Erez Reuveni, 'Authorship in the Age of the Conductor' (2007) 54 (2-3) *Journal of the Copyright Society of the USA*, 290. See also F Gregory Lastowka and Dan Hunter, 'Amateur-to-Amateur' (2005) 46 *William and Mary Law Review* 951.

⁸⁷ The *Copyright Law 1990* only contained one vague and general term on economic rights, namely rights of exploitation and remuneration. See *Copyright Law 1990* art 10(5) which provided '... 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.'

⁸⁸ Zheng Chengsi, *Copyright Law* (1997) 151.

⁸⁹ *Copyright Law* art 10(5) provides 'the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means'.

⁹⁰ *Copyright Law* art 10(6) provides 'the right of distribution, that is, the right to make available to the public the original or reproductions of a work though sale or other transfer of ownership'.

⁹¹ *Copyright Law* art 10(7) provides 'the right of rental, that is, the 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'.

⁹² *Copyright Law* art 10(14) provides 'the right of adaptation, that is, the right to change a work to create a new work of originality'.

⁹³ *Copyright Law* art 10(15) provides 'the right of translation, that is, the right to translate a work in one language into one in another language'.

work.⁹⁵ The rights of exhibition,⁹⁶ performance,⁹⁷ presentation,⁹⁸ broadcasting⁹⁹ and communication via information networks¹⁰⁰ fall into the category of *rights of communication to the public*.

It has been shown by the ‘Steamed Bun’ case that the broad expansion of exclusive rights negatively impact on creativity and innovation.¹⁰¹

For example, compared with the historic parody case *Suntrust Bank v Houghton Mifflin*,¹⁰² the ‘Steamed Bun’ case illustrates that the current

⁹⁴ *Copyright Law* art 10(16) provides ‘the right of compilation, that is, the right to compile works or parts of works into a new work by reason of the selection or arrangement’.

⁹⁵ *Copyright Law* art 10(13) provides ‘the right of making cinematographic work, that is, the right to fixate a work on a carrier by way of film production or by virtue of an analogous method of film production’.

⁹⁶ *Copyright Law* art 10(8) provides ‘the right of exhibition, that is, the right to publicly display the original or reproduction of a work of fine art and photography’.

⁹⁷ *Copyright Law* art 10(9) provides ‘the right of performance, that is, the right to publicly perform a work and publicly broadcast the performance of a work by various means’.

⁹⁸ *Copyright Law* art 10(10) provides ‘the right of presenting, that 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’.

⁹⁹ *Copyright Law* art 10(11) provides ‘the right of broadcast, that is, 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’.

¹⁰⁰ *Copyright Law* art 10(12) provides ‘the right of communication via information networks, that is, the 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’.

¹⁰¹ In fact, scholars have criticised the mainstream copyright framework for its negative impacts. With the low costs of distributing creative works and the motivation for creativity becoming more diversified, scholars have questioned the need for copyright protection. See Stephen Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ (1970) 84 *Harvard Law Review*, 281; John Perry Barlow, ‘The Economy of Ideas’ (March 1994) *Wired*. See also Eric Schlachter, ‘The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet’ (1997) 12 *Berkeley Technology Law Journal*; Raymond Shih Ray Ku, ‘The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology’ (2002) 69 *University of Chicago Law Review*, 263; Tom W Bell, ‘Escape from Copyright: Market Success vs Statutory Failure in the Protection of Expressive Works’ (2001) 69 *University of Cincinnati Law Review*, 741.

¹⁰² See *Suntrust Bank v Houghton Mifflin Co.*, 136 F Supp 2d 1357, 1373 (ND Ga 2001); *Suntrust Bank v Houghton Mifflin Co.*, 268 F 3d 1257, 1268 (11th Cir 2001). See also Ivan

copyright regime cannot adequately accommodate the new forms of information creation, and that the participatory media age requires a new copyright regime.

The inadequate accommodation offered by the current copyright law can be explained by the following facts: (1) The 'Steam Bun' case happened in the context of the participatory media age. (2) The short video was peer-produced by an amateur who was an ordinary consumer/user of copyrighted works. (3) The production of the 'Steamed Bun' was motivated by both self-entertainment and creative self-expression. (4) The short video was not published and distributed by an entrepreneur, but by millions of networked individuals through the Internet. (5) The distribution of the creative work was not driven by monetary return, but by the eagerness of sharing and communicating with friends, family members, peers and even members of a specific social network. (6) Inspired by the 'Steamed Bun' video, other Internet users have made hundreds of versions of the 'Steamed Bun' (this refers to those video spoofs that are made by networked individuals and shared over the Internet). After the 'Steamed Bun', video spoofs became so popular that netizens have coined the slang term 'egao', to describe the act of using real film clips to create mocking mash-ups.¹⁰³

In summary, as explained above, how to avoid the disintegration or devaluation of copyright caused by information technology¹⁰⁴ and ensure the free use of creative works in the participatory age is an upcoming challenge for China and rest of the world.

Hoffman, *The Seinfeld and the Wind Done Gone Cases: Studies in Fair Use* <<http://www.ivanhoffman.com/seinfeld.html>> at 25 August 2007.

¹⁰³ See 'New regulation to monitor online video spoof craze', *Xinhua News* <http://news.xinhuanet.com/english/2006-08/17/content_4971828.htm> at 25 August 2007.

¹⁰⁴ Ji Weidong, 'Parody and Fair Competition in a Networked Society' (2006) 3 *Chinese Jurisprudence (Zhong Guo Fa Xue)*.

Copyright Limitations, Users' Rights and Participatory Creativity

Copyright in China enshrines two basic commitments: safeguarding the author's interest and promoting a socialist society.¹⁰⁵ This is a result of China's strong moral concern regarding cultural creativity, with its legislation and judicial practice on copyright protection leaning towards continental European theory (also known as the *droit d'auteur* view on copyright) and traditional notions that emphasise the social benefits of intellectual output, which leads to an appreciation of Western traditions on limiting copyright and the United States fair use principle.¹⁰⁶

Chinese copyright law exempts copyright infringement under two main cases, fair use¹⁰⁷ and statutory licensing.¹⁰⁸ To protect society's adequate access to intellectual outputs, art 22 of the Chinese copyright law allows copyrighted works to be used without permission from, and without paying remuneration to the copyright owner under 12 circumstances¹⁰⁹ of what is called 'fair use' or 'reasonable use' (*'be li shi yong'* in Chinese). However, some scholars have argued that China's seemingly similar concept of 'fair use' may have different connotations and extensions in China and Western jurisdictions.¹¹⁰ It has been argued that the rationale behind art 22 is neither fair nor reasonable use, but rather the rights of free use (without permission and payment).¹¹¹

¹⁰⁵ *Copyright Law* art 1 provides "This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilisation, and of promoting the development and prosperity of the socialist culture and science."

¹⁰⁶ Ji Weidong, 'Parody and Fair Competition in a Networked Society' (2006) 3 *Chinese Jurisprudence (Zhong Guo Fa Xue)*.

¹⁰⁷ See *Copyright Law* art 22.

¹⁰⁸ See *Copyright Law* arts 23, 32(2), 39, 42 and 43.

¹⁰⁹ See *Copyright Law* art 22.

¹¹⁰ As Professor Qu Sanqiang pointed out, in establishing its copyright regime China has dissolved many traditional legal values into the Western derived law. See Qu Sanqiang, *Copyright in China* (2002) 103.

¹¹¹ Ji Weidong, 'Parody and Fair Competition in a Networked Society' (2006) 3 *Chinese Jurisprudence (Zhong Guo Fa Xue)*. It was also pointed out by Professor Qu Sanqiang that one would expect such limitations (on the exclusive rights of copyright) to be more extensive than those in Western society, because Chinese law not only provides the state

Moreover, under the circumstances prescribed by arts 23,¹¹² 32(2),¹¹³ 39,¹¹⁴ 42¹¹⁵ and 43¹¹⁶ of Chinese copyright law, copyrighted works can be used with permission from, and remuneration paid to, the copyright owners. This is called Statutory Licensing.

It should be noted that not all of the limitations on copyright are applicable to the use of copyrighted works on the Internet. In terms of communicating to the public through information networks, copyright limitations are subject to the '*Communication Right Regulation*'.¹¹⁷

The advent of the participatory media age and conductive creativity models has brought about the question: are the existing limitations on copyright appropriate for users' freedom of expression, creativity, and self-development?

with considerable power to control or restrain the exclusiveness of the copyright subsisting in intellectual works, but also provides greater scope for others to deal freely with copyright works. See Qu Sanqiang, *Copyright in China* (2002) 107.

¹¹² 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 authorisation 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.

¹¹³ Article 32(2): 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.

¹¹⁴ Article 39: ... A producer of sound recordings may exploit a music work another person has duly made into a sound recording to produce sound recordings, without permission from, but with remuneration being paid to, the copyright owner as prescribed by regulations, such Work shall not be exploited where the copyright owner has declared that such exploitation is not permitted.

¹¹⁵ Article 42: ... A radio station or television station that broadcasts a published work created by another person does not need permission from, but shall pay remuneration to, the copyright owner.

¹¹⁶ 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.

¹¹⁷ See the *Regulations on the Protection of the Right of Communication via Information Network* ('Communication Right Regulation') arts 6, 7, 8, 9 and 10.

The advance of information communication technology (ICT) has fundamentally changed the relationship between owners and users of copyrighted works and substantially diversified the forms of use copyrighted works are subject to. These changes have fuelled the debates on both the nature and the elements of fair use.

The United States Supreme Court described fair use as an affirmative defence in *Campbell v Acuff-Rose Music, Inc.*¹¹⁸ The United States *Copyright Act of 1976* defines fair use in s 107 as a 'limitation' on copyright law and states that 'the fair use of a copyrighted work ... is not an infringement of copyright.' Mainstream scholars have viewed this statement as supporting the Supreme Court's view. However, other scholars argue that fair use of copyrighted works is a right of users.¹¹⁹ In 2004, the Canadian Supreme Court decision of *CCH Canadian Limited v Law Society of Upper Canada*¹²⁰ explicitly affirmed that fair use (or fair dealing), like other exceptions in copyright law is a 'user's right'.¹²¹

In the context of Chinese copyright law, I believe fair use and statutory licensing of copyrighted works are rights of users. It is worth mentioning that Chinese copyright law does differentiate between personal use and fair use,¹²² and that the former is covered by the latter.¹²³ Although in

¹¹⁸ See *Campbell v Acuff-Rose Music*, 510 US 569 (1994).

¹¹⁹ See Justice Stanley F Birch, 'Copyright Fair Use: A Constitutional Imperative' (Winter-Spring 2007) 54(2-3) *Journal of the Copyright Society of the USA*, 139. See also L Ray Patterson, 'Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights' (2001) 62 *Ohio State Law Journal* 703; L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of User's Rights* (2001).

¹²⁰ See *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 <<http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>> at 26 August 2007.

¹²¹ Abraham Drassinower, 'Taking User Rights Seriously' in Michael Geist (ed), *The Public Interest: The Future of Canadian Copyright Law* (2005).

¹²² Some American scholars have argued that personal use is different from fair use. 'It should be noted that personal use by consumer and fair use by a competitor are two different concepts. While a personal use should always be fair in a generic sense, it is not a "fair use" in a technical sense and should not be subject to fair-use restraints.' See L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of User's Rights* (2001) 193.

¹²³ Article 22 of Section 4 Limitations on Rights provides 'In the following cases, a work may be used without permission from, and payment of remuneration to, the copyright owner... (1) use of another person's published work for purpose of the user's own study, research or appreciation; ...'.

China's *Copyright Law* s 4 is titled '*Limitations on Rights*' instead of 'Rights of Users', this does not necessarily mean that the limitations can only be claimed as a defence to copyright infringement. Any limitation of one side's right, will to some extent, give birth to a legal interest on the other side. Whether such legal interests could be viewed by the law as a 'right' depends on the parties' legal relationships.

The arguments make sense, especially in the digital age. For example, to what extent could a copyright owner restrict access to, and use of, copyrighted works through the use of technology?¹²⁴ What tools should be available to users/consumers?¹²⁵ To what extent should users be allowed to share copyrighted works (for example through p2p networks and social networks)?

In determining whether the use made of a work in any particular case is fair use, there are generally four factors to be considered under United States copyright law.¹²⁶ In early fair use cases, American courts relied heavily on the commercial purposes regarding the use of copyrighted works. However, in 1994 the United States Supreme Court decision

¹²⁴ In 2004 the French retailer Fnac and music publisher EMI Group were sued by the French consumer association UFC-Que Choisir on behalf of purchasers of audio CDs containing a copy protection scheme. The copy protected CDs allegedly cannot be played on many home and car stereo systems or on most personal computers. EMI and Fnac are accused of 'deception over the material qualities of a product.' See *Copy Protected Audio CDs Strike Discordant Note in France* <http://lsolum.typepad.com/copyfutures/2004/09/copy_protected_.html> at 27 August 2007. In 2005 a French court ordered DVD vendors to pull copies of the David Lynch film 'Mulholland Drive' off store shelves as part of an unprecedented ruling against copy prevention techniques. The appeals court ruled that copy prevention software on the DVD violated privacy rights in the case of one consumer who had tried to transfer the film onto a video cassette for personal use. See 'French court rules against copy protection - unprecedented DVD ruling could have huge consequences', *Associated Press* <<http://www.msnbc.msn.com/id/7645680/>> at 27 August 2007.

¹²⁵ The debate about secondary copyright infringement liability for technology development is also, and necessarily, a debate about what tools will be available to users, under what conditions. See Julie Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham Law Review*.

¹²⁶ The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. See the United States *Copyright Act 1976* § 107.

Campbell v Acuff-Rose Music Inc,¹²⁷ altered the fair use inquiry by emphasising the concept of ‘transformative use’.¹²⁸

In contrast, fair use is narrowly-defined in Chinese copyright law, with the law adopting a ‘purpose-specific approach’. The fair use provision is closed and only details specific purposes such as use for personal study, research or entertainment,¹²⁹ for introducing, commenting, explaining,¹³⁰ for news reporting,¹³¹ for classroom teaching or scientific research¹³² and so on.¹³³ Chinese courts have developed some detailed rules for the application of fair use provisions in judicial practice. For example, in a recent influential case involving copyright infringement of musical works,¹³⁴ the court considered the following factors: the quantity and substantiality of the copyright works appropriated, the impact on the

¹²⁷ See 510 US 569 (1994).

¹²⁸ In focusing on transformative use, the Court drew heavily from an influential *Harvard Law Review* article by federal judge Pierre N Leval. See Matthew D Bunker, ‘Advertising and Appropriation: Copyright and Fair Use in Advertising’ 54 (2-3) *Journal of the Copyright Society of the USA*, 167; Judge Pierre Leval, ‘Toward a Fair Use Standard’ (1990) 103 *Harvard Law Review*, 1111.

¹²⁹ Article 22(1): use of a published work for the purposes of the user's own private study, research or self-entertainment.

¹³⁰ Article 22(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.

¹³¹ Article 22(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;

Article 22(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;

Article 22(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.

¹³² Article 22(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.

¹³³ See Article 22(7)-(12).

¹³⁴ See the civil judgments *Yi Zhong Min Chu Zi No. 2336* (2003) made by the first trial court - the Beijing No.1 Intermediary People's Court, and *Gao Min Zhong Zi No. 627* (2004) made by the appeal court - the Beijing High People's Court.

market value of the previous works and the harm to the further exploitation of the works.¹³⁵

China is a signatory nation on treaties that include the *Berne Convention*, *TRIPS Agreement* and *WIPO Copyright Treaty*. As such, the three-step test incorporated in such international treaties¹³⁶ should also guide the Chinese courts in their application of the fair use provisions.

However, the Chinese courts do not consider the level of transformation or productiveness in terms of how the work has been used. This has been tested by the creativity of the ‘Chicken Song’ and ‘Steamed Bun’, but the current Chinese law is not qualified to deal with new digital challenges. These creative works are believed to be ‘new and creative works’ that are not permitted by the ‘fair use’ exception of copyright law.

In the context of participatory media, the tension between controlling and using copyrighted works has been aggravated. To what extent and how should the mass participation in creative consumption/use of copyrighted works be allowed and encouraged by copyright law? The focus in fair use cases should shift from facts that focus on the ‘commercial purpose’ to facts that consider the ‘transformative/productive’ element. While this would be a start, more is required by the users.

COPYRIGHT DILEMMA (2): THE WAY FORWARD?

In terms of conductive or participatory creativity, there are three issues that concern copyright law and they relate to ‘user sharing permission’, ‘user creation permission’, and ‘user creation protection’. The way forward should be receptive to the new creativity model (which is participatory, collaborative and decentralised in nature), be supportive to

¹³⁵ See the civil judgment *Gao Min Zhong Zi No. 627* (2004).

¹³⁶ ‘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.’ See the *Berne Convention for the Protection of Literary and Artistic works 1886* art 9(2).

the new innovation pattern (which is user-led, non-commercial and non-market based), and encourage user's daily creative involvement.

A recently released OECD report has examined the rise of user-created content (UCC)¹³⁷ and the implications of a 'participative web'.¹³⁸ The report pointed out that important questions have been raised regarding intellectual property rights and UCC in the regulatory environment.¹³⁹ The general questions are what are the effects of copyright law on non-professional and new sources of creativity and whether copyright law needs to be re-examined, in order to allow market and non-market creation and distribution of content to co-exist, and spur further innovation.¹⁴⁰

User Sharing Permission

User sharing permission refers to the extent that users can freely share creative works with friends, family and social network members. This may relate to recalibrating copyright owners' rights, for instance, rights of reproduction, distribution, performance, presentation, broadcasting and communicating via information networks.

The prevalence of the participative web and social networks has changed the individual user's copyright expectations and information practice.

¹³⁷ Instead of 'User Created Content (UCC)', it is referred to as 'User Generated Content (UGC)' in this chapter.

¹³⁸ The 'participative web' represents an Internet increasingly influenced by intelligent web services based on new technologies empowering the user to be an increasing contributor to developing, rating, collaborating and distributing Internet content and developing and customising Internet applications. Consequently, new user habits where 'users' draw on new Internet-based applications to express themselves through UCC and take a more active and collaborative role in content creation and consumption. See Sacha Wunsch-Vincent, Graham Vickery, *Participative Web: User-Created Content* (Organisation for Economic Co-operation and Development Report, April 2007) <<http://213.253.134.43/oecd/pdfs/browseit/9307031E.PDF>>; see also Graham Vickery, Sacha Wunsch-Vincent, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (Organisation for Economic Co-operation and Development, October 2007), <<http://www.oecd.org/dataoecd/57/14/38393115.pdf>>.

¹³⁹ Sacha Wunsch-Vincent, Graham Vickery, *Participative Web: User-Created Content* (Organisation for Economic Co-operation and Development, April 2007) 6-8.

¹⁴⁰ Graham Vickery, Sacha Wunsch-Vincent, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (Organisation for Economic Co-operation and Development, October 2007) 81.

Now more than ever before the ability to share information is critical to many aspects of life therefore information flow must allow sharing especially in the context of social networks.

Sharing under Current Copyright Law

The Chinese copyright law provides statutory licensing for reprinting/republishing or excerpting newspaper or periodical works.¹⁴¹ It was adopted by the *Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes Relating to Computer Networks (Network Judicial Interpretation)* issued by the People's Supreme Court of PRC in December 2000. Article 3 of the *Interpretation* provided, 'those works, that have been published in newspaper or periodical, or have been disseminated on the Internet, can be re-published/reprinted by any other websites without permission from copyright owners provided remuneration is paid and authorship is indicated properly, unless otherwise declared by the copyright owners.' This allowed users to legitimately paste or upload these literature works on their blogs or BBS to share with other netizens. However, this provision was abolished when the *Interpretation* was amended on 20 November 2006, now sharing copyright works online is subject to the copyright owner's 'right of communication via information networks'.

The establishment of the 'right of communication via information networks' marked the resilience of copyright law in the digital online environment. However, this is an ill-constructed approach because it incurs substantial disobedience of the law; and such disobedience in the online environment is tolerated and even welcomed by copyright owners in some circumstances.

Empirical evidence shows that creators of user-generated content expect their creativity to be reproduced, distributed and shared. Moreover, some mainstream commercial content producers have also released a mass of recordings, videos and pictures for the public to freely access.

¹⁴¹ '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.' See *Copyright Law of PRC* art 32.

On the other hand, creators are likely to be unhappy to give up all control. This has resulted in the desire for an informal and flexible copyright regime.

This desire has not yet been incorporated into legislation; however people have resorted to using a wide variety of voluntary licensing schemes, such as the creative commons licence and BBC Creative Archive Licence. In the short-term, these licensing schemes have satisfied the current information practice. However, the voluntary licensing schemes remain legally uncertain.¹⁴²

In the long-term, the legal uncertainty of sharing creative works may cause the social network market a degree of inefficiency. In defining ‘creative industry’, John Hartley has argued that now is the time to shift the focus from ‘industry’ to ‘market’, especially the ‘social network market’.¹⁴³ Cultural production has evolved from a one-way causal chain¹⁴⁴ into a complex open system in which ‘individuals originate ideas; networks adopt them; and enterprises retain them’.¹⁴⁵ 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.¹⁴⁶ Therefore, intellectual and cultural content is not produced *for* a mass market; rather the content is produced or created *by* the market itself.

The chilling and deterring effects of the current copyright regime impede the flow of information in social networks, and impair the operation of the social network market. Therefore, a sharing-friendly

¹⁴² Further discussion of this topic, see the ‘Voluntary Licensing Scheme’ part of the chapter.

¹⁴³ 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).

¹⁴⁴ It is a closed expert linear value chain controlled by ‘industry’. Moreover, it typically goes like this: (i) producer (creation) and production (manufacture); (ii) commodity (eg text, IP) and distribution (via media); (iii) consumer or audience. See *ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

copyright regime, through not a complete answer, is a necessary precondition for the participatory media age.

Toward a Sharing-friendly Copyright Regime

The hardest obstacles to surmount in the way towards a free culture and sharing-friendly copyright regime are the old information practices, the old value chain approach to cultural production and the current legal framework. Therefore, the ultimate legal solution for freedom of sharing is very much dependent on the development of new information practices and emerging disruptive business models which embrace free flow of information.¹⁴⁷

User Creation Permission: Conductive Use of Copyrighted Works

User creation permission refers to the question: to what extent and how should users (conducers/participants) be permitted to make a transformative or conductive use of copyrighted works? This issue would only be relevant when user generated content (UGC) is based on previous or existing works, because the use of the underlying work may be subject to the control of the copyright owners. The answers to this issue may relate to the reconfiguration of the copyright owner's moral rights and the rights of reproduction, making cinematography, adaptation and translation.

From the ups-and-downs of jazz,¹⁴⁸ to the suffocated remix¹⁴⁹ and mashup¹⁵⁰ culture, to the online video spoof craze in China, the new

¹⁴⁷ See further, Eric Priest, 'Why Emerging Business Models and Not Copyright Law Are the Key to Monetizing Content Online', Chapter 6 of this book.

¹⁴⁸ A Harvard Law Review Note has demonstrated the trouble met by jazz music and the drawbacks of the current copyright law in the USA. See 'Jazz has Got Copyright Law and That ain't Good' (2005) 118 (6) *Harvard Law Review* 1940.

¹⁴⁹ A remix is an alternative version of a song, different from the original version. A remixer uses audio mixing to compose an alternate master of a song, adding or subtracting elements, or simply changing the equalisation, dynamics, pitch, tempo, playing time, or almost any other aspect of the various musical components. Some remixes involve substantial changes to the arrangement of a recorded work, but many are subtle, such as creating a 'vocal up' version of an album cut that emphasises the lead singer's voice. See <<http://en.wikipedia.org/wiki/CcMixer>> at 29 August 2007.

century has witnessed a ‘Cambrian explosion’ of creativity that has originated from users,¹⁵¹ which has, unfortunately, been impeded by the ‘old’ legal framework and its existing stakeholders. Meanwhile, the real world still keeps changing. For example, the popularity of ICT has enabled and encouraged all individuals and households to play with creativity. People are contributing (making new works) while consuming and using existing creative works (which are usually copyrighted). This phenomenon is called conductive or participatory creativity; however creation based on earlier works is not new. A good example of this is the creativity model involved in the production of jazz music.

The 20th century witnessed the bloom and glory of jazz.¹⁵² 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 in the 1930’s, 40’s and 50’s for film and Tin Pan Alley or Broadway musicals. Moreover, part of the impact of a jazz performance derives from the underlying music being familiar to the listeners.¹⁵³ Therefore, generally speaking, jazz musicians make their own spontaneous compositions, borrowing the harmonic skeleton and parts of the melody from other musical works.

In the context of the participatory age today, ‘copyrighted works are increasingly turning into “raw materials” that we use to engage in expressive activities.’ Conductive creativity is heavily dependent on such ‘raw materials’ which, unfortunately, cannot be freely used under the current copyright regime. The following approaches may make sense in

¹⁵⁰ Mashup (or mash it up) is a Jamaican Creole term meaning to destroy. In the context of reggae or ska music, it can take on a positive connotation and mean an exceptional performance or event. Mashup (music) means a musical genre of songs that consist entirely of parts of other songs. See <http://en.wikipedia.org/wiki/Mashup_%28web_application_hybrid%29> at 29 August 2007.

¹⁵¹ A Kluth, ‘Among the Audience’, *The Economist*, 22 April 2006 <http://www.economist.com/surveys/displaystory.cfm?story_id=6794156> at 8 January 2007.

¹⁵² 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.

¹⁵³ See ‘Jazz has Got Copyright Law and That ain’t Good’ (2005) 118 (6) *Harvard Law Review*, 1940. See also Barry Kernfeld (ed), *The New Grove Dictionary of Jazz* (1994).

the effort to liberate conductive, participatory and collaborative creativity from obstacles arising from the current copyright law and to facilitate the user-led innovation.

The 'Fair Use' Scheme

The first potential solution towards a conductor-friendly information society is to make a broader fair use doctrine, exempting a more extensive range of free uses of copyrighted works. A starting point for this would be to reconsider the factors that amount to fair use.

Substantiality and Fair Use

Acts done in relation to insubstantial parts of the work do not constitute an infringement of copyright, and the defence of fair dealing only operates in relation to substantial parts.¹⁵⁴ Given the current theoretical and legislative framework, expanding the interpretation of 'substantial part' would be irrelevant to the doctrine of 'fair use'; but it would exempt a wider range of acts from copyright infringement.

Unfortunately, it seems that new developments in case law have nearly closed this door, especially in the United States. The recent United States decision of *Bridgeport Music Inc v Dimension Films Inc*,¹⁵⁵ suggests that any copying of a sound recording will amount to a substantial part and infringe upon copyright, unless it can be regarded as a fair use.¹⁵⁶

Transformative Use and Fair Use

Advances in technology have allowed digital content, which is transformable by nature, to become dominant. On the other hand, the public's growing digital literacy has enabled networked individuals and households to take advantage of content, and allowed for the development of creative works.

'Transformative use' (or 'productive use'), as opposed to 'consumptive use', was coined by Judge Pierre Leval in his 1990 path-breaking article,

¹⁵⁴ See §s11.15 of S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (last updated July 2007).

¹⁵⁵ 401 F 3d 647 (6th Cir 2004); en banc rehearing and revised opinion 410 F 3d 792 (6th Cir 2005).

¹⁵⁶ B Fitzgerald et al, *Internet and E-Commerce Law* (2007) 252.

‘Toward a Fair Use Standard’.¹⁵⁷ Judge Level was of the opinion that ‘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.’¹⁵⁸ In 1994, the United States Supreme Court adopted this analysis in the far-reaching case *Campbell v Acuff-Rose Music Inc*¹⁵⁹ which stands for the proposition that commercial parody can be fair use. The Australian *Copyright Amendment Act 2006* has also introduced new provisions permitting fair dealings with copyright materials for the purposes of parody and satire.¹⁶⁰ Generally speaking, parody refers to using a work in order to poke fun at or comment on the work itself; while satire involves using a work to poke fun at or comment on something else.¹⁶¹

¹⁵⁷ He continued, ‘Transformative uses may include criticising the quoted work, exposing the character of the original author, proving a fact, or summarising 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.’ See Pierre N Leval, ‘Toward a Fair Use Standard’, (1990) 103 *Harvard Law Review*, 1105.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994).

¹⁶⁰ See *Australian Copyright Act 1968* (Cth) ss 41A and 103AA. Section 41A provides that ‘Fair dealing for purpose of parody or satire: A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.’ While s 103AA provides that ‘Fair dealing for purpose of parody or satire: A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.’

¹⁶¹ However, United States Courts have been more willing to grant fair use protections to parodies than to satires. In *Ty Inc v Publications Int'l Ltd*, 292 F 3d 512 (7th Cir 2002), Judge Posner wrote: ‘The distinction between complementary and substitutional copying (sometimes— though as it seems to us, confusingly — said to be between “transformative” and “superseding” copies... A parody, which is a form of criticism (good-natured or otherwise), is not intended as a substitute for the work parodied. But it must quote enough of that work to make the parody recognisable as such, and that amount of quotation is deemed fair use... The distinction is implicit in the proposition, affirmed in all the cases we have cited, that the parodist must not take more from the original than is necessary to conjure it up and thus make clear to the audience that his work is indeed a parody. If he takes much more, he may begin to attract the audience away from the work parodied, not by convincing them that the work is no good (for that is not a substitution

However, the general proposition of copyright law is that ‘an infringer cannot escape liability by adding original matter of their own (even if this is by far the greater part) to material which has been taken from another’s work’.¹⁶² Why then should satires and parodies be treated differently? Professor Ricketson proposed four reasons: (1) the value of free speech and criticism, (2) the value of humour, (3) the belief that copyright law should reflect the reality of our cultural traditions, and (4) the idea that satires and parodies possibly serve to promote and create interest in the original.¹⁶³

In the context of conductive creativity, do the four reasons still make sense? The answer is yes. Furthermore, in this networked society, participation in cultural activities is very important as a key way of facilitating freedom of speech, self-development, creative play, communication and even consumption itself, because they all involve conductive activities. Conductive activities, by nature, are the most prominent form of participation.

Voluntary Licensing Scheme

Empirical research on industry practices shows that a voluntary licensing scheme includes widely diverse approaches, with varying degrees of discretion reserved by the underlying copyright owners (the Licensor). Generally speaking, this scheme covers industry practices from bilateral contracts (End-User Licensing Agreement), unilateral conditional licensing (BBC Creative Archive Licence¹⁶⁴ and Microsoft Game Content Usage Rules¹⁶⁵) to GPL Licensing¹⁶⁶ and Creative Commons Licensing (CC Licensing).¹⁶⁷

effect) but by providing a substitute for it.” See further, *Ty Inc v Publications Int'l Ltd*, 292 F 3d 512 (7th Cir 2002).

¹⁶² See S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (last updated July 2007) 9.230.

¹⁶³ *Ibid.*

¹⁶⁴ <http://creativecommons.bbc.co.uk/licence/nc_sa_by_ne/uk/prov/> at 30 August 2007.

¹⁶⁵ See <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 29 August 2007.

¹⁶⁶ <<http://www.gnu.org/licenses/>>.

¹⁶⁷ <<http://creativecommons.org/>>.

To harness the growing field of machinima¹⁶⁸ Microsoft recently released 'Game Content Usage Rules'.¹⁶⁹ For those who want to use game-play footage, screenshots, music and other elements of Microsoft games ('Game Content') to make machinima, videos or other things, Microsoft grants a personal, non-transferable license. That is, users are free to create derivative works based on Game Content for non-commercial and personal use. If the users/creators want to share, distribute or communicate the works, attribution is required.¹⁷⁰

Unsurprisingly, there are numerous things that users are not allowed to do. For instance users are not allowed to sell or otherwise make a profit from the derivative works,¹⁷¹ or grant someone the right to build upon their creation.¹⁷²

Voluntary licensing, to date, is the prevalent scheme adopted by industries and individual copyright owners. This scheme has been

¹⁶⁸ Machinima is a portmanteau of machine cinema or machine animation, it is both a collection of associated production techniques and a film genre defined by those techniques. As a production technique, the term concerns the rendering of computer-generated imagery (CGI) using real-time, interactive (game) 3D engines, as opposed to high-end and complex 3D animation software used by professionals. See Wikipedia <<http://en.wikipedia.org/wiki/Machinima>> at 29 August 2007.

¹⁶⁹ See <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 29 August 2007.

¹⁷⁰ If you share your items with your friends or post them on your web site, then you also must include the following notice about the Game Content. You can put it in a README file, or on the web page from where it's downloaded, or anywhere else that makes sense so long as anyone who sees your item will also find this notice. [The title of your Item] was created under Microsoft's 'Game Content Usage Rules' using assets from GAMENAME, © Microsoft Corporation. You can also put a link to this page so people know what the Game Content Creation Rules are. See Rules at <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 29 August 2007.

¹⁷¹ 'You can't sell or otherwise earn anything from your Items. We will let you have advertising on the page with the Item on it, but that's it. That means you can't sell it, post it on a site that requires subscription or other fees, solicit donations of any kind (even by PayPal), use it to enter a contest or sweepstakes, or post it on a page you use to sell other items (even if those other items have nothing to do with Game Content or Microsoft).' See <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 29 August 2007.

¹⁷² 'You can't grant anyone the right to build on your creations. We don't mind if other people help you out, but you have to be clear with them that it's not you giving permission, it's us. (That's how we make sure everyone plays by the same rules.)' See <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 29 August 2007.

welcomed by copyright owners of the underlying works because it can ensure that they have full control over any conductive activities. For example, it gives the licensor the power to decide what kind of copyrighted works are allowed to be used, what types of derivative works are allowed to be created and what kind of rights over his/her creations the user/conducer can exercise.

The current copyright legal framework, by default, embraces the permission mechanism with very limited exceptions. As a consequence, unilateral conditional copyright licensing has significantly complemented the permission culture¹⁷³ that has resulted from this framework. However, given the growing conductive activities and the importance of information products for the freedom, self-development, communication and creativity of individual users, this scheme has scholars concerned, because it makes the re-use of information at the full discretion of copyright owners of the underlying works.¹⁷⁴

User Creation Protection: Copyright Protection for User-Generated Content (UGC)

User creation protection means to what extent and how should copyright law confer on creators (users) exclusive rights over UGC? In other words, what is the legal status of UGC under copyright law? This may relate to reframing authorship, creating new copyright subject matter and crafting a new group of exclusive rights for conducers who are acting as users and creators.

Copyright protection regarding UGC arises out of a number of aspects. At the outset, it is necessary to distinguish between different kinds of UGC. Under the current copyright legal framework, UGC can be

¹⁷³ Permission culture refers to a society in which copyright restrictions are pervasive and enforced to the extent that any and all uses of copyrighted works need to be explicitly licensed. See Lawrence Lessig, *Free culture: how big media uses technology and the law to lock down culture and control creativity* (2004).

¹⁷⁴ Nic Suzor, a researcher of virtual world governance, said on his blog 'I'm concerned about the use of copyright as a tool of private censorship, and I'm concerned about companies who encourage and benefit from fan creation but give their fans little or no certainty as to what will and will not be permitted.' See Nic Suzor, *Microsoft's new machinima licence*, <<http://nic.suzor.com/20070829-Microsoft-machinima-licence>> at 29 August 2007.

divided into three categories, namely ‘*original user works*’, ‘*authorised derivative user works*’ and ‘*unauthorised derivative user works*’.

‘*Original user works*’ refers to UGCs that are originally created by users without borrowing or appropriating any elements from previous works. ‘*Authorised derivative user works*’ are UGCs that are created by users while borrowing or appropriating some elements from existing works, which is authorised by copyright owner, or the law (if the use of the underlying work falls within a copyright exception or limitation).

Under the current copyright law, these two groups of UGCs may automatically attract copyright protection provided that the copyrightability requirements are satisfied. Copyright infringement only arises when a third party exercises one or more of the UGC creator’s exclusive rights.¹⁷⁵

‘*Unauthorised derivative user works*’ covers those UGCs that borrow and appropriate part or entire copyright works without authorisation. Under the current Chinese copyright law, these are ‘illegitimate works’ and not protected by law.¹⁷⁶

Strict control over creative output, as demonstrated above, especially in the context of the social network market, is beyond the expectations of users’ and undesired by creators. However, in reality, due to the diversity of expectation, desire and value chain approaches and the variety of subject matter (UGC or non-UGC), determining a clear-cut level of control that is appropriate to the complexity of information practice in the participatory media age, is complicated.

The following two solutions are raised with both advantages and disadvantages.

UGC as Contribution to the Intellectual Commons

¹⁷⁵ However, as discussed in this chapter, in the context of participatory media, the problem is: such automatic attraction of copyright protection may be against the expectation of users and even inconsistent with creators’ needs.

¹⁷⁶ This provision has been criticised by scholars for being “unreasonable”. It is proposed that ‘illegitimate works’ should also be protected by copyright law and meanwhile its creators should be liable for copyright infringement.

The truths regarding participatory creativity identified in the previous part of this paper have shown that in the context of the participatory media age: (i) creative expression is a by-product of users' creative play, self-development and communication; (ii) participatory creativity is non-commercial and non-market based in nature; (iii) creators and users expect and desire to share their participatory creations. It is reasonable to propose that UGC should be regarded as a contribution to the intellectual commons that are shared freely by all people.

However, empirically speaking, conductors/users want some degree of control over their works, especially in MMORGs and photo or video sharing communities. As Creative Commons has shown, most contributors reserve the right of authorship and do not allow their works to be commercially used.

Conductive Works as Derivative Works/Adaptations

In the broadest sense, almost all works, in some degree are derived or based on previous works. As Justice Story pointed out in *Emerson v Davies*, 'In truth, in literature, in science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout'.¹⁷⁷ However, not all of them are regarded as derivative works in the context of copyright law.

To be a derivative work, there are a set of requirements. For example, under the US copyright law, all of the following requirements must be satisfied: (a) the work must be based in whole, or in a substantial part upon a pre-existing (or 'underlying') work; (b) the work of the secondary creator contains minimum originality; (c) the work is not itself an infringing work (for example, the work is made with the permission of the original copyright owner).¹⁷⁸

¹⁷⁷ *Emerson v Davies*, 8 F Cas 615, 621, No 4436 (CC Mass 1845).

¹⁷⁸ Under the United States *Copyright Act 1976* §106 confers the right to prepare derivative works based on the copyrighted work' on copyright owners, and distinguish derivative works from collective works and compilation. See §101: A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatisation, fictionalisation, 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'.

A successful derivative work will be protected by copyright law as an original work in its own right. However, in most cases the use of derivative work is subject to authorisation from the copyright owner of the derivative work and the copyright owner of the underlying work.¹⁷⁹

In terms of UGC (especially conductive works), would the three factors constituting derivative works be satisfied? It seems that factors (a) and (b) are unlikely to be problems. Whether factor (c) would be a problem depends on how the above mentioned 'permission issues' are answered by copyright law.

Under the 'voluntary licensing scheme', conductive use is authorised by copyright owners. Therefore, provided that factors (a) and (b) are met, conductive works will amount to derivative works. However, the issue is the scope of copyright in the conductive works, and who owns the copyright. In practice, conductors are not granted any control over their creations. For example, under most End-User Licensing Agreements (EULAs) any player-initiated creative work occurring in MMORGs becomes the property of the developer.¹⁸⁰ In cases where conductors are granted some intellectual property rights over their creations, these rights are limited by the licensors.¹⁸¹

¹⁷⁹ For instance, the *Copyright Law* art 34 provides, 'When publishing works created by adaptation, translation, annotation, arrangement or compilation of preexisting works, the publisher shall both have the permission from, and pay remuneration to, the owners of the copyright in the works created by means of adaptation, translation, annotation, arrangement or compilation and the owners of the copyright in the original works.' Article 36 provides, '...When exploiting, for performance, works created by adaptation, translation, annotation, arrangement or compilation of preexisting works, the performer shall both have the permission from, and pay remuneration to, the owners of the copyright in the works created by means of adaptation, translation, annotation, arrangement or compilation and the owners of the copyright in the original works.' Article 39 provides, '...A producer of sound recordings or video recordings who exploits a work created by adaptation, translation, annotation or arrangement of a preexisting work shall both obtain permission from, and pay remuneration to the owner of the copyright in the work created by adaptation, translation, annotation or arrangement and to the owner of the copyright in the original work...'

¹⁸⁰ See Star Wars Galaxies EULA <http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=15629> at 4 September 2007.

¹⁸¹ For instance, the abovementioned 'Game Content Usage Rules' users are not allowed to sell or otherwise earn anything from the derivative works, and not allowed to grant anyone the right to build upon the users' creation. See <<http://www.xbox.com/en-US/community/developer/rules.htm>> at 4 September 2007. Second Life also grant users

However, given the 'Fair Use Scheme' (as outlined above), could the content generated from conductive activities attract copyright protection? Moreover, would further re-use of the conductive content be subject to the control of the creative conductor or copyright owners of the underlying works? In my opinion, not all exclusive rights should subsist in such content and copyright owners of the underlying works should, to a degree, be granted some exclusive rights.¹⁸²

A Brand New Scheme: Ultimate Solution?

In the book *Free Culture*,¹⁸³ Stanford law Professor Lawrence Lessig points out that the prevalence of ICT, especially the Internet and P2P file sharing possibilities, has made for new conditions that law-makers have inadequately and incorrectly addressed. Contemporary copyright protection has had a stifling and chilling effect on cultural production and creativity.

After examining the history of copyright law and the advance of digital technology, Jessica Litman proposes that copyright should be reconfigured 'as an exclusive right of commercial exploitation rather than of reproduction'.¹⁸⁴ However, in light of the legislative process and the power wielded by the relevant stakeholders, she is not optimistic about such a proposal.¹⁸⁵ As a result, Litman seems to be a little fatalistic 'it has seemed to me that consumers' widespread non-compliance (of the current copyright law) offers a very real ray of hope'.¹⁸⁶

some intellectual property right, see <<http://secondlife.com/corporate/tos.php>> at 4 September 2007.

¹⁸² In the sense of the development of culture, copyright encompasses two functionalities: on one hand, it is supposed to encourage cultural innovation; on the other hand, it results in the stability of culture. Such functionalities are reliant on the controls awarded to copyright owners. Therefore, the extent to which the re-use of information should be under the control of the copyright owners of underlying works need to be examined from both sides.

¹⁸³ *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) is a book by law professor Lawrence Lessig that was released on the Internet under the Creative Commons Attribution/Non-commercial license (by-nc 1.0) on March 25, 2004.

¹⁸⁴ Jessica Litman, *Digital Copyright* (2001) 171-91.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.* 194.

Similarly, the Harvard law professor, William Fisher, also believes that digitisation and networking have reshaped copyright and generated the need for a new copyright regime which has a more social focus and responds to the new era.¹⁸⁷ However, in contrast to Litman, Fisher presents three alternative legal and business models of which the third, he believes, is best.¹⁸⁸ This model seeks to introduce an alternative compensation system and transform the copyright regime into an effective administrative system. The most ideal situation, which could potentially be generated under this system, is that users will be free to use, share, communicate and modify copyright works, while creators will be fairly compensated.

In my opinion, the future copyright regime, to liberate participatory creativity and facilitate user-led innovation in this participatory media age, should focus on how to make users feel free to use creative works, while retaining sufficient means to compensate investments in producing and disseminating creative works.

The copyright dilemma has partially resulted from the ‘permission culture’ derived from the mainstream copyright regime. Accordingly, the way forward is dependent on a ‘free culture’ oriented legal copyright framework.

Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially give rise to increased user autonomy, increased participation and increased diversity.¹⁸⁹

¹⁸⁷ See William W Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (2004).

¹⁸⁸ The first model, presented in chapter 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 further, Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), 134-172. 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, and allotment of income amongst the various players in the chain. See further, Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) 173-198.

¹⁸⁹ Organisation for Economic Co-operation and Development, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (October 2007) 12.

Therefore, it is my proposal that the ultimate solution to this copyright dilemma is to re-set the copyright regime towards a 'permission-free mechanism' which *by default* allows any use of copyrighted works unless otherwise required by copyright owners. This mechanism is based on user, creator and market autonomy, and supported by information technology and networks.¹⁹⁰

CONCLUSION

In summary, as Professor Brian Fitzgerald proposed, 'we should be moving beyond the limited conceptual framework of copyright to a legal framework that looks more closely at the relationships any individual or entity has with information, knowledge, culture or creativity.'¹⁹¹ However, to pave the way towards a new Chinese copyright regime which would facilitate the new economic and social models built on user-generation and participation is more difficult in China than it would be in Western countries.

What is more, the academic and practice sectors of copyright law in China are still suffering from domestic and international complaints regarding the rampancy of IP and copyright infringement.¹⁹² Therefore, the attention and focus of research on copyright law and promoting the Internet culture is still being dominated by the current IP laws and long-established international standards. The emerging new creativity models of information, knowledge and culture such as peer/participatory production and non-market based and user-led innovation, have not attracted comprehensive concerns.

¹⁹⁰ It is a combination of technological and legal solutions; however detailed demonstration of this mechanism is beyond the capacity of this chapter. In fact, it is a project proposed for my PhD research. For further and updated information, please visit my academic blog at www.hilaws.com.

¹⁹¹ Brian Fitzgerald, 'Copyright 2010: The Future of Copyright', Chapter 9 in this book.

¹⁹² For instance, one week ago on 13 August 2007, the United States requested the World Trade Organisation (WTO) to establish a dispute settlement panel regarding China's so-called deficiencies in intellectual property protection <http://english.china.com/zh_cn/news/china/11020307/20070814/14276545.html> at 20 August 2007.

When the digital world began moving towards a participatory media age and the networked society became increasingly 'human', mass participation in creativity gave rise to changes as to how information, knowledge and culture are produced and consumed. Therefore, especially in China, it is time to consider re-framing the copyright regime to facilitate the new creativity and economic models based on participatory media and conductive creativity, while at the same time managing to avoid the disintegration or devaluation of copyright caused by information technology.

CREATIVE COMMONS LICENCE: AN ALTERNATIVE SOLUTION TO COPYRIGHT IN THE NEW MEDIA ARENA

Chunyan Wang*

AN INTRODUCTION TO CREATIVE COMMONS

Creative Commons (CC) is a global non-profit organisation that provides free tools, including Creative Commons licenses and software, to enable authors, researchers, artists and educators to easily mark their creative works with the specific intellectual property rights they wish their creative works to carry. The mission of CC is to build a system of balanced intellectual property rights by advocating a ‘some rights reserved’ alternative to the traditional ‘all rights reserved’ system.¹

CC is dedicated to building a flexible copyright regime in the face of increasingly restrictive copyright rules. It encourages legal sharing, remixing, and reuse of creative work, and provides a legal platform to spread and build digitally enabled creative culture. Incorporating distributive and legal mechanisms at the same time, CC serves to remedy excessively restrictive intellectual property protection. By promoting a fair and user-friendly structure of intellectual property rights, CC is helping to realise open access to knowledge.

* Many thanks to Professor Brian Fitzgerald of Queensland University of Technology and Professor Gao Fuping of East China University of Political Science and Law for inviting me to write this article. Thanks also to Dr Stewart Cheifet of Internet Archive and Professor Jing Wang of MIT for their comments and assistance in writing this article. Additional thanks to Mr Yi Zheng and Mr Fei Yang for their help.

¹ Creative Commons <<http://creativecommons.org>>.

There are two extremes of intellectual property rights protection. One is the extreme of total rights control in which every use of a work is regulated, with the result that all rights are reserved. The other extreme is characterised by an IP world of anarchy - a world in which some creators enjoy a wide range of freedom, but others are left vulnerable to exploitation.²

To build a sensible middle ground position, in 2002, Creative Commons established a flexible copyright implementing model, the 'some rights reserved' model through the Creative Commons licenses, which values innovation and protection equally. CC licenses change the traditional mandatory rights assertion into a voluntary, optional rights approach. CC licenses represent a reasonable compromise between those two extremes. The goals are cooperative and community-minded, and the means resorted to are based on a voluntary system. CC works to offer creators a 'best-of-both-worlds' path to protect their works while, at the same time, encouraging certain further uses of their works in the model of 'some rights reserved'.³

Creativity and innovation have always been built on a rich heritage of prior intellectual work. Digital communications promise a new explosion of this kind of collaborative creative activity. However, under an 'all rights reserved' system, digital communications are not easily accessible and are burdened by unreasonable legal restraints. An important aim of CC is to build a simple, free, and extensible infrastructure at the content level that enables the appropriate balance of freedoms and rights so as to pave the way and encourage the flourishing of a truly interactive web culture.

The Creative Commons movement aspires to cultivate a true 'creative commons' in which people can feel free to reuse, not only ideas, but also words, images, music, and scientific knowledge, without having to obtain specific permissions, because permission has already been granted by the creator through the 'some rights reserved' CC license.

The idea of science is to create new knowledge which is accessible to ordinary people around the world. The Internet Archive mission, for

² Ibid.

³ Ibid.

example, is for 'Universal Access to Human Knowledge'.⁴ And the Internet Archive vision is 'a Creative Commons based proposition which ensures that information is accessible and free to anyone from anywhere'.⁵ Creative Commons 'is not against copyright, but notes the importance of copyright and creates a balance to benefit the creators, and the general public as well, through providing an alternative option to authors, scientists, and artists'.⁶

There are four potential elements to a Creative Commons license: Attribution, Non-commercial, Share Alike, and No Derivatives. Based on combinations of the above elements, there are six core CC licenses: Attribution (by), Attribution Share Alike (by-sa), Attribution No Derivatives (by-nd), Attribution Non-Commercial (by-nc), Attribution Non-Commercial Share Alike (by-nc-sa), and Attribution Non-Commercial No Derivatives (by-nc-nd).⁷ Creators can choose the license that meets their needs. This system offers an easy way to license creative works under a CC license that helps users of the creative works obtain permission easily and also helps provide proper protection to the creative content as well. In doing so, CC licenses help solve the problems raised by the traditional 'all rights reserved' model and also serve the unique needs related to digital copyright protection. Because of this, CC licenses have been welcomed in different countries and regions around the world.

CC licenses have now been officially introduced into more than 40 jurisdictions and have been used on a variety of content types. Search results provided by Yahoo and Google in early 2007 showed that there were more than 60 million online works licensed under CC licenses.⁸ The Internet Archive, as the most important CC licensed content

⁴ Internet Archive <<http://www.archive.org>>.

⁵ Stewart Cheifet, 'Creative Commons and the Internet Archive: Enabling the Free Sharing of Online Information' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licences, Beijing, 29 March 2006).

⁶ Lawrence Lessig, 'The Role of Creative Commons in an Information Economy' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licences, Beijing, 29 March 2006).

⁷ See <<http://cn.creativecommons.org/about/licenses/meet-the-licenses.php>> 25 January 2008.

⁸ Giorgos Cheliotis, *Creative Commons Statistics from the CC-Monitor Project* (2007) Creative Commons <<http://creativecommons.org/weblog/archive/2007/6>> 25 January 2008.

repository, has two-thirds of its content licensed under CC licenses, this includes audio, video, educational courseware, software, books and web pages. CC licenses have been playing a very important role in the gathering and distribution of that content. In addition, the use of CC licenses in the fields of broadcast radio and television, and education, is increasing by nearly 300% annually.⁹

CC licenses represent a kind of open content license under which some rights are reserved. They have become a worldwide standardised licensing option and a useful legal tool for cultivating a digital information commons. CC licenses also include a localisation feature as well so that they work equally in a variety of geographic and legal jurisdictions. CC licenses meet the requirement of creating one unified set of rules in the information arena while at the same time creating a unique licensing system that will be honoured in different courts and jurisdictions, in the event that rights are challenged through legal proceedings.

SIGNIFICANCE OF CC LICENSES TO THE CHINESE SOCIETY

The Mainland China version of the CC licenses was launched in March, 2006 in Beijing.¹⁰ Since then, the Mainland China licenses have been integrated into the Creative Commons licensing process. The Creative Commons license has become a valuable local legal instrument in Mainland China. All members of the Chinese creative and intellectual community who wish to declare their works available for others to use are now able to license their works under the new CC guidelines.

In China, traditional intellectuals and members of the creative community subscribed to the ideology of 'art for art's sake' and felt ashamed to exploit the commercial value of their work. Similarly, the Chinese reading public and consumers of creative works took it for granted that the works of authors were free for use and citation.

⁹ Stewart Cheifet, 'Creative Commons and the Internet Archive: Enabling the Free Sharing of Online Information' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licenses, Beijing, 29 March 2006).

¹⁰ Creative Commons China <<http://cn.creativecommons.org>>.

The concept and the approach of Creative Commons licensing will provide a sensible middle ground for China, a balanced position poised between traditional western approaches of strict copyright and the traditional Chinese approach of no intellectual property rights. Indeed, the very idea of Creative Commons is to bring to the conscious level the traditional Chinese intuitive approach of knowledge sharing, under a reasonable set of guidelines. Adopting the Creative Commons system in China would be a significant step forward in helping China further the development of culturally diverse creative works, and improve the ability of the people in China to communicate effectively with other societies and cultures around the world.

It is important to note that while the CC concept derives from a tradition of strictly controlled copyright toward a moderate ‘some rights reserved’ approach in Western societies, it comes from a different direction in Chinese society where the tradition is societal sharing of intellectual creativity. In other words, in China, the CC concept develops from a tradition of communal ownership of property towards a moderate protection of copyright. In this context, Creative Commons licenses are actually playing an important role in copyright education. As Professor Jing Wang, the SC Fang Professor of Chinese Language and Culture at MIT, has said, CC licenses could help cultivate an attitude of conscious sharing within the Chinese society.¹¹

China has been working on building a well-rounded Intellectual Property regime since the 1980’s. It is now perfecting its IP regime by strengthening IP protection, according to ‘China’s Action Plan on IP Protection 2007’ which details 276 measures in 10 areas such as formulating and revising 14 laws, regulations, rules and administrative measures on trademark, copyright, patent and customs protection as well as seven judicial interpretations and guidelines. On the enforcement side, 14 dedicated campaigns such as ‘Fight Piracy Every Day’ and a crackdown on pirated textbooks and teaching supplements, together

¹¹ Jing Wang addressed the global open access to knowledge movement and its significance to the Chinese Society. See Jing Wang, ‘Knowledge Commons: Hopes and Barriers’ (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licences, Beijing, 29 March 2007) <<http://web.mit.edu/fl/www/people/JingWang.shtml>> 25 January 2008.

with 11 standing enforcement programs, are now being carried out simultaneously.

It will be very important for China to adopt a balanced intellectual property regime with greater attention given to knowledge sharing. This is especially relevant with the rapid development of the Internet and, at the same time, the new emphasis on the importance of protecting the interests of IP holders. According to CNNIC (China Internet Network Information Centre), in 2006 Chinese Internet users number over 120 million, making China the second highest ranking Internet user in the world, just after the United States. The Internet is becoming the main content resource for the Chinese creative and intellectual community and to cultivate a healthy Internet economy in China, the interests of end users must be addressed.

As Joseph Stiglitz declared, the ‘world will gain by the success of China’s economic model’, given that China pursues a ‘balanced’ intellectual property regime instead of adopting the kind of unbalanced intellectual property laws that are being demanded by Western governments. Stiglitz said, ‘knowledge itself is the most important input in the production of knowledge, a badly designed intellectual property regime can stifle innovation’. China should avoid building intellectual property regimes that move toward the privatisation and monopolisation of knowledge.¹²

Joseph Stiglitz has reviewed various knowledge and intellectual property systems and come to several conclusions supporting a balanced intellectual property system. He believes that ‘similar to other legal systems, intellectual property systems can only be positive when obstacles to information transmission are removed’. Knowledge is created for sharing, it generates more value for the public from its transmission, and an effective intellectual property system should not set up barriers for using and transmitting knowledge.¹³ Stiglitz continues, ‘Knowledge is one of the most important materials for its own

¹² Joseph Stiglitz, ‘World Will Gain by Success of China Economic Model’ (2007) 4 *Shanghai Daily – Insight* 50
<www.shanghaidaily.com/article/shdaily_opinion.asp?id=312881&type=Opinion> 25 January 2008.

¹³ Liu Lijuan, ‘The awful American Intellectual Property System does not Suit China – a Discussion on Protection and Share of Intellectual Property with Stiglitz, Nobel Prize Winner in Economics’ (2007) April, *Business Watch Magazine*.

generation, and creativity may be strangled by an awful intellectual property system.’¹⁴

It follows that China should avoid an intellectual property system that privatises knowledge and results in a monopoly of knowledge. Joseph Stiglitz further suggests that every country should establish its own intellectual property system that corresponds with its actual conditions.

As a legal system, the Intellectual Property law serves as a profit balancing mechanism. It substantially adjusts the profit distribution for knowledge producers and the public in terms of benefits and usage of intellectual property. Most developing countries are focusing on the intellectual and technological divide, yet it would be even more difficult to eliminate such divides without an intellectual property system that is formulated to effectively promote knowledge sharing.¹⁵

Responding to the fact that the American intellectual property system has been adopted by many countries, which have submitted to the US under pressure, Stiglitz argues that ‘such systems are not even suitable for America itself, let alone the developing countries. China shall draw upon experiences from America to establish its own intellectual property system rather than duplicating its legislation.’¹⁶

Meanwhile, the international academic community is calling for people’s awareness of the counterproductive effects of the western intellectual property system. World-renowned experts from various fields including fine art, law, economics, science, technology, and education, have collaborated to draw up the Adelphi Charter, which reads: ‘The purpose of intellectual property law (such as copyright and patents) should be, now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation. The expansion in the law’s breadth, scope

¹⁴ Joseph Stiglitz, ‘World Will Gain by Success of China Economic Model’ (2007) 4 *Shanghai Daily – Insight* 50
<www.shanghaidaily.com/article/shdaily_opinion.asp?id=312881&type=Opinion> 25 January 2008.

¹⁵ Ibid.

¹⁶ Liu Lijuan, The awful American Intellectual Property System does not Suit China – a Discussion on Protection and Share of Intellectual Property with Stiglitz, Nobel Prize Winner in Economics, (2007) April, *Business Watch Magazine*.

and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend.¹⁷

As mentioned above, the system of Creative Commons is a flexible mechanism making available the legal dissemination of knowledge without unreasonable obstacles, while encouraging legitimate use and reproduction of that knowledge. Authors and other creators who wish to share their intellectual achievements are therefore provided rational and flexible options which help promote the legitimate sharing and reusing of these achievements, and the promotion of a 'read-write culture' which is important for the development of New Media.¹⁸

The statistics on the use of the Creative Commons licenses show that CC licenses are widely accepted now by creators. As estimated by search results on Yahoo, as of 31 July 2007, 493 000 Chinese websites have adopted CC licenses. A great number of these Chinese websites have adopted the local Creative Commons licenses just since the official launch of the Mainland China version of the CC licenses in March, 2006. Further, statistical analysis and comparative study of local Creative Commons applications in 34 different jurisdictions, during the first half of 2007, show that the rate of adoption of CC licenses in Mainland China ranks 10th among all 34 jurisdictions.¹⁹

Many New Media institutions have adopted Creative Commons licenses for their content. For instance, nphoto.net and bababian.com are both presenting their web pages with photographic works licensed under a local Creative Commons license and more and more individual

¹⁷ *The Adelphi Charter on Creativity, Innovation and Intellectual Property Challenges*
<<http://www.adelphicharter.org>>.

¹⁸ A renowned young Chinese artist in the field of New Media arts commented in her blog: 'Sharing is happiness.' Her blog is licensed under a Mainland China version of the CC license. China Tracey's Second Life Blog
<<http://www.alternativearchive.com/chinatracey/>> 25 January 2008.

¹⁹ Giorgos Cheliotis, *Creative Commons Statistics from the CC-Monitor Project (2007)* Creative Commons <<http://www.creativecommons.org/weblog/archive/2007/6>> 25 January 2008.

photographers are choosing CC as their licensing regimen of choice.²⁰ Qiji.cn, an open knowledge depository has also adopted Creative Commons for its Qiji Translation Project.²¹ Furthermore, the pioneer of China's open education program, China Open Resources for Education (CORE), immediately started to license its website under a CC license as soon as the China Mainland version of the Creative Commons license was launched in March, 2006.²² Many blogs in China are also adopting Creative Commons licenses.

INTEGRATING CC WITH NEW MEDIA

The term New Media, which is also referred to as Internet Media or the Fourth Media, has varied definitions with different areas of emphasis. For instance, according to the American magazine *Wired*, New Media can be defined as 'transmission from everybody to everybody'.²³ Xiong Chengyu, Professor in the School of Journalism and Communication at Tsinghua University believes that New Media is 'media that emerges from information technology and generates influences on the basis thereof'.²⁴ He also suggests that 'firstly, the term New Media is a definition based on relativity, according to which "new" is opposite to "old" as newspaper to books and broadcasting to newspapers; secondly, such a definition is temporal, and the form of it can be relatively stable; thirdly, New Media is still developing, and is not limited to existing platforms.'²⁵

²⁰ Nphoto.net <<http://www.photos.nphoto.net/creativecommons/>>; Babian.com <<http://www.bababian.com/cc.sl>> 25 January 2008.

²¹ <<http://www.qiji.cn/drupal/tags/1140>>

²² China Open Resources for Education (CORE) <<http://www.core.org.cn>>.

²³ 'The New Media Definition', *Sohu* (China), 13 May 2006 <<http://it.sohu.com/20060513/n243257100.shtml>> 25 January 2008.

²⁴ 'The New Media Definition', *Sohu* (China), 13 May 2006 <<http://it.sohu.com/20060513/n243257100.shtml>>.

²⁵ CCTV, 'The New Media Environment "Investigative Journalism" Counter Measures', *Investigative News*, 18 April 2006 <<http://www.cctv.com/news/special/C15587/20060418/101927.shtml>> 25 January 2008.

The Creative Commons licenses are commonly used in new media and the Internet. The internet media, for example, social networking sites (such as MySpace, Facebook and Chinary), user generated sites (such as Youtube, Flickr, Tudou, Nphoto and Bababian), virtual worlds (such as Second Life and Hipihi), and blogs, podcasts, wikis etc, all have distinctive features such as openness, sharing, re-usability and unification of interests of authors and users. Therefore this phenomenon is described as a participative culture or a 'read-write culture', as distinguished from the traditional 'read-only culture'.

Professor Lawrence Lessig of Stanford University, CEO of Creative Commons, has described the 'read-only culture', the 'read-write culture' and the differences between them. He says that in a society where the public simply consumes resources created by others, it shall be called a 'read-only' culture. On the contrary, he says where the public generates resources while consuming them; it is called a 'read-write' culture.²⁶

By formulating a legal platform for internet media to create and transmit culture, Creative Commons has become an effective alternative to copyright. Seen as a Web 2.0 tool, CC enables users of the Web to create and share creativity as they choose. It simplifies the process of modularisation and consequently leads to highly creative communities based on cooperation and sharing of creativity. One important aim of Creative Commons is to build a free and extensive infrastructure at the content layer that enables the freedoms that many different Web 2.0 creative projects require.²⁷

Considering the problems resulting from the traditional copyright protection model being implemented on the Internet, Professor Lessig points out that the traditional copyright regime is drawn up purely for a 'read-only' culture.²⁸ For example, the mere act of reading books can never produce new copies. On the contrary, the means of creating and

²⁶ Lawrence Lessig, 'The Role of Creative Commons in an Information Economy' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licenses, Beijing, 29 March 2006).

²⁷ Lawrence Lessig, *CC and Web 2.0*, (2006) Creative Commons <<http://creativecommons.org/weblog/entry/6123>> 25 January 2008.

²⁸ Lawrence Lessig, 'The Role of Creative Commons in an Information Economy' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licenses, Beijing, 29 March 2006).

consuming digital content, including Internet content, almost always generate new copies of the content and, often, new information. If current copyright laws are allowed to regulate such content and such digital dissemination, copyright owners will be allowed to completely control the use of their works, and once new technology enables that, the Internet will be sadly transformed into a 'read-only' network.

However, the creative power of a society is based on a resourceful use of existing intellectual achievements, and the Internet has already established the technical foundations for it to flourish. As part of that, Creative Commons is promoting a creative 'read-write' culture by legal means using CC licenses.

When the current intellectual property laws were formulated, the new digital approaches to creativity had not yet been taken into consideration, like the potential for remixing. However, if existing legal prohibitions against remixing are allowed to stand, the creative 'read-write culture' will be strangled. For instance, a composer releases a song licensed by Creative Commons which allows others to remix his work, and when such a remix takes place, a new creative work is uploaded. Two composers can then be recognised as having collaborated to complete the new song, even though there has been no direct communication between them and no complicated legal negotiations or obligations.²⁹ The positive impact of Creative Commons is then made evident.

Remix is a special form of creativity unique to the Internet and digital media. It is the very nature of the remix process that enables users to be the authors of newly generated works. Remix enables people to enrich and develop existing creative resources by making use of current intellectual and cultural materials. It is obviously quite popular among web users where there are tools available to facilitate remixing. It is even becoming popular among those who had been working to protect their copyrights, as they are being influenced by the remix culture and are thus changing their attitudes towards traditional copyright protections.

²⁹ Lawrence Lessig, 'The Role of Creative Commons in an Information Economy' (Speech delivered at the Launch Event of the Mainland China Version of the Creative Commons Licenses, Beijing, 29 March 2006).

For instance, George Lucas, writer, director and copyright owner of the Star Wars movies has been doing his utmost to protect his intellectual property, frequently suing fans who remix clips from his movies; this has resulted in his nickname 'Lucas the Litigator'.³⁰ Yet now, after Sony BMG Music Entertainment opened the door by offering music fans song tracks to use for remixing, the Star Wars team followed suit and began to change their attitude toward remix from prohibition to promotion. Nearly 250 clips from all six episodes of the Star Wars films are now being released on the official Star Wars web site for the specific purpose of allowing fans to edit, add and remix. And the Star Wars team is even allowing the new works to be posted to blogs or social networking sites like MySpace and Facebook. The approach of George Lucas shows how many media companies today are dealing with the remix culture in an effort to keep some semblance of control over their intellectual property in the digital age.³¹ The comments from some Star Wars fans are typical of the consumer's view of this issue.³²

CREATIVE COMMONS SUPPORTS THE DIGITAL CONTENT INDUSTRY: A SUBSTITUTE COMMERCIAL MODEL EMERGES

Reviewing the Star Wars case, what is apparent is that George Lucas noticed what his fans noticed, that to allow non-commercial use does not mean you lose the ability to exploit the material commercially and does not mean all users have to be tightly contracted to achieve this. In fact, allowing non-commercial sharing may improve commercial gains.

³⁰ Sarah McBride, 'Make-It-Yourself "Star Wars"', *The Wall Street Journal Online*, 24 May 2007 <http://online.wsj.com/public/article/SB117997273760812981-f0iom146uttxl3ah1760ew3D71o_20070623.html?mod=tff_main_tff_top> 25 January 2008.

³¹ Sarah McBride, 'Make-It-Yourself "Star Wars"', *The Wall Street Journal Online*, 24 May 2007 <http://online.wsj.com/public/article/SB117997273760812981-f0iom146uttxl3ah1760ew3D71o_20070623.html?mod=tff_main_tff_top> 25 January 2008.

³² On 'Star Wars Duel of the Fates Remix Video', *Youtube.com*, one of the comments reads 'don't worry about copyright, George Lucas doesn't care really' <<http://www.youtube.com/watch?v=RSLipa5kNRM>> 25 January 2008.

Jeffrey Ulin, Senior Director of Distribution and Business Affairs at Lucasfilm Ltd has said, 'We see what's going on out there on the Web generally. And we wanted fans to come to Starwars.com as the centre of fan activity.'³³ He estimated that the website has attracted more than two million visitors, and he predicted that the new remix content being made available on the site could quickly increase the amount of visitors to Starwars.com. Furthermore, Ulin says the company believes that legitimising remixing and the subsequent promotion of these activities may draw new attention to the Star Wars episodes and that sales for DVDs and other related products may actually increase.³⁴

Prior to the Lucas decision, there were also other Internet and media companies that successfully adopted the substitute commercial model and thus transformed their traditional copyrighted content into an equally lucrative sales, advertising and promotion business model that attracted new venture capital investments. Most of these companies have adopted open licenses by using the legal approaches supported by Creative Commons, such as the sharing model. For instance, Magnatune.com,³⁵ an Internet music company, is using the Creative Commons Attribution-NonCommercial-Share Alike license for all its music releases.³⁶

Similarly, the web music company Jamendo³⁷ has established a music sharing site which allows their users to download CC licensed songs for free. Three million albums had been legally downloaded through July, 2007. In January, 2007 Jamendo launched a new profit redistribution project which enables musicians to receive a share of the income generated by Jamendo, with half of the advertising income from the site

³³ Sarah McBride, 'ake-It-Yourself 'Star Wars'', *The Wall Street Journal Online*, 24 May 2007 <http://online.wsj.com/public/article/SB117997273760812981-f0iom146utxl3ah1760ew3D71o_20070623.html?mod=tff_main_tff_top> 25 January 2008.

³⁴ Sarah McBride, 'ake-It-Yourself 'Star Wars'', *The Wall Street Journal Online*, 24 May 2007 <http://online.wsj.com/public/article/SB117997273760812981-f0iom146utxl3ah1760ew3D71o_20070623.html?mod=tff_main_tff_top> 25 January 2008.

³⁵ Magnatune <<http://magnatune.com>>.

³⁶ Creative Commons <<http://creativecommons.org/weblog/archive/2007/7>> 25 January 2008.

³⁷ Jamendo <<http://www.jamendo.com>>.

going to registered musician members. Jamendo's business, based on an open content model, has successfully attracted significant venture investment. Jamendo's founder and CEO, Laurent Kratz, commented, 'We have a proven business model where music is not only proposed for free to end consumers but we are also closing an increasing number of partnership agreements and licensing deals.'³⁸

Creative Commons statistics from the CC-Monitor Project show that non-commercial licenses are increasingly favoured by commercial companies. These statistics also show that, among all CC adopters, 70% of them have opted for the NonCommercial option.³⁹ Naturally all commercial companies have selected the NonCommercial option, such as the Creative Commons Attribution-NonCommercial-Share Alike licenses adopted by Magnatune.com.

Where the NonCommercial license is used by the creator, the user of the CC licensed material must comply with any conditions stated for commercial usage of the content by the content creator, if the user intends to conduct any commercial activities with the CC licensed content. The result is that there is a productive integration between Creative Commons and the information industry in which each one supports the other. Creative Commons provides not only convenience for the promotion and transmission of creative works, but it also reserve a wide range of options for individuals and companies to commercialise creative works.

In conclusion, Creative Commons is having a significant impact on the digital content industry in several respects:

1. Enabling the legitimate sharing and reuse of content rather than unauthorised transmitting and downloading;
2. Providing an option for announcing a 'Some Rights Reserved' license with specific licensing conditions, instead of the default 'All Rights Reserved' license and its accompanying ambiguities;

³⁸ *CC News*, Creative Commons <<http://creativecommons.org/weblog/archive>> 25 January 2008.

³⁹ Giorgos Cheliotis, *Creative Commons Statistics from the CC-Monitor Project* (2007) Creative Commons <<http://creativecommons.org/weblog/archive/2007/6>> 25 January 2008.

3. Rights owners are enjoying new protection based on a detailed assertion of clearly defined licensing conditions;
4. Content users are provided with explicit statements of appropriate rights authorisations and prohibitions.

CRIMINALIZING PRIMARY COPYRIGHT
INFRINGEMENT IN SINGAPORE: WHO
ARE THE REAL ONLINE CULPRITS

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This chapter only appears in the print edition of the book.

^{*} This chapter was originally published in the *European Intellectual Property Review* (2007) 108-114. Permission to reproduce this article has been kindly granted by the authors and Sweet & Maxwell Ltd, to which the editors are very grateful.

THE AUSTRALIA-CHINA FREE TRADE AGREEMENT: IMPLICATIONS FOR INTELLECTUAL PROPERTY LAW

Jane Ogge-Cowan

INTRODUCTION

Intellectual property is not usually the first thing that people think of when they talk about the Australia-China Free Trade Agreement¹ (FTA) – an FTA is about ‘trade’: market access for agricultural products and manufactured goods, banking and educational services, easier access for Chinese investors and workers into Australia – the significance of intellectual property to trade is not foremost in most peoples’ minds. But when you ask Australian business people what they think about doing business in China, a great number in many fields are concerned about whether their innovative work will be protected – this is true for architects, manufacturers and educational software designers. And for innovative Chinese companies, whether they are domestically or internationally focussed, intellectual property is an increasingly important issue.

Perhaps the first thing to say about this topic is that we don’t know what the actual implications of the FTA on intellectual property regulation will be. The FTA negotiations are concluded as a single undertaking – one whole agreement – and a key principle of that, is that nothing is agreed until everything is agreed. Therefore in this regard it can be confidently said at this point, that nothing has yet been agreed, and that

¹ Note that at the time of writing, the Australia-China Free Trade Agreement negotiations are still ongoing. For more information see <<http://www.dfat.gov.au/geo/china/fta>> 25 January 2008.

certainly applies to the intellectual property component of the negotiations.

The following chapter will examine the implications of the proposed Australia-China FTA on intellectual property law. In particular, the chapter will consider key issues, such as why Australia believes it is important to include a separate chapter on intellectual property in the Australia-China FTA. Finally, the chapter will conclude by drawing some conclusions on what implications the Australia-China FTA might have on intellectual property regulation.

WHY IS INTELLECTUAL PROPERTY IMPORTANT IN AN FREE TRADE AGREEMENT?

Australia advocates a sensible balance in the protection of intellectual property. Australia's believe this balance is well-reflected in Article 7 of World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).² Article 7 essentially provides that intellectual property protection should serve the greater public good by promoting innovation through rewarding the innovator.³ Intellectual property protection is a balance established in the granting of monopoly rights that are limited in time and scope. The security of those rights, and the appropriate limitations on those rights, are an active debate, including in Australia.

Not all of you will know that Australia is a net importer of intellectual property, that is, we pay more to overseas intellectual property owners than we receive, not unlike most developing countries. And yet, in Australia we are conscientious in protecting intellectual property rights because we believe doing so is vital to maintaining our standard of living, and the international competitiveness of Australian companies. Australia's intellectual property regime encourages innovation, which is critical to the maintenance of commercial competitive advantage, and

² See <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> 25 January 2008.

³ Ibid.

vital to the development of, and access to, new products, particularly as we move to the so-called knowledge economy.

When it comes to bilateral trade with other countries, Australia believes that if both countries recognise and protect intellectual property rights in the same way, this will help trade and investment grow. Including a chapter on intellectual property in the FTA should provide more consistency between the Australian and Chinese jurisdictions and that should help both countries trading relationship to grow and diversify.

AN INTELLECTUAL PROPERTY CHAPTER SPECIFIC TO THE AUSTRALIA-CHINA RELATIONSHIP

A key objective in the FTA negotiations is to make commitments that will deliver practical and commercially significant outcomes. In this context, the main purpose of an intellectual property chapter is to address intellectual property concerns specific to trade between the FTA partners. Australia has an Intellectual Property Chapter in all of its FTAs, with the exception of our FTA with New Zealand. That FTA was negotiated before intellectual property became the important issue it is today in bilateral trade. All of the chapters on intellectual property in Australia's FTAs with Thailand, Singapore and the United States are different; each reflects the nature of the different bilateral trade relationships. For both Australia and China our trade interests differ from one bilateral trade relationship to another. Therefore a standard approach to FTAs in general, and intellectual property in particular, would not suit either Australia or China.

Accordingly, in preparing a draft text for the FTA, Australia has tailored the proposed intellectual property provisions specifically to the Australia-China trade relationship. To the extent that there may be similarities with other Intellectual Property Chapters, those similarities merely reflects Australia's experience with what works in relation to a particular issue or technology. Both Australia and China will continue to learn through experience, and we expect that some of the lessons from the Australia-China FTA will be reflected in our future FTAs with other countries.

So what does the Intellectual Property Chapter cover? For the most part, it addresses specific intellectual property issues or matters of concern which currently affect our bilateral trading relationship. It also provides methods of addressing these issues in a way that Australia hopes will strengthen our trading relationship. For example, many Australian business people have expressed concern about the enforcement of intellectual property rights in China. Specific issues include processes for the registration of intellectual property rights, the scope of intellectual property rights available in China and whether industry can have confidence in intellectual property rights that have already been granted. In the FTA Australia will seek a commitment to maintain an effective intellectual property regime consistent with international standards, such as those articulated in the World Trade Organization TRIPS Agreement and core World Intellectual Property Organization (WIPO) treaties. All of the provisions in Australia's proposed Intellectual Property Chapter reflect this commitment to identify and address intellectual property issues in our trading relationship.

THE INTELLECTUAL PROPERTY CHAPTER NEEDS TO RESPOND TO TECHNOLOGICAL CHANGE

But of course, an approach that deals only with existing problems would be too static and rigid for a chapter on intellectual property. Intellectual property is anything but static and intellectual property rights are the backbone of the knowledge economy and the driver of innovation. Accordingly, intellectual property rights regulation must respond to developments in technology. To be effective, an intellectual property chapter in an FTA needs to be a 'living document' able to accommodate change.

One of the key technological developments since the TRIPS Agreement has, of course, been the growth of the Internet. The growth of the Internet has had major implications for the treatment and protection of copyright material. This has been recognised by the development of the WIPO Internet Treaties – which will enter in to force for both Australia and China over the next two months.

Technological developments have made copyright material easier to reproduce, and more difficult to protect. One response by copyright owners has been to develop technological measures to protect their material. However, these measures are of course vulnerable to technological circumvention. Article 11 of the WIPO Copyright Treaty requires 'adequate legal protection and effective legal remedies' against circumvention. Australia and China have the opportunity in the FTA negotiations to consider appropriate regulatory responses to this type of challenge. The results of such exchanges could feature in the Intellectual Property Chapter, or they may filter through to legislative reform in both countries in advance of the FTA's completion. Whatever the outcome, the fact that both countries have had detailed, considered exchanges about how to accommodate technological change within their respective intellectual property regimes is itself a positive development. It demonstrates good will, and ensures that important issues are properly considered from a range of perspectives.

IMPORTANCE OF HIGH STANDARDS OF PROTECTION AND ENFORCEMENT

Another important issue concerning Intellectual Property Chapters in FTAs is how to achieve high standards of intellectual property protection and enforcement. High standards encourage trade and investment in materials which have intellectual property protection. Industry and business need to be confident that their intellectual property can be effectively protected and enforced whenever they enter overseas markets. Australia's interests are to ensure that, as far as possible, key trading partners apply similar copyright protection and enforcement measures. This issue is becoming more significant because trade in copyright materials across borders and over the Internet has significantly increased and emerging technologies have made it easier for problems such as piracy to flourish.

Australia believes a proper international strategy to address emerging copyright issues cannot be successful unless they are properly addressed in both multilateral fora and in bilateral discussions between key trading partners. That is why Australia has been active in Asia-Pacific Economic

Cooperation and in trade agreement negotiations in promoting such standards.

To properly address copyright issues, FTA partners should, as a first step, commit to implement commonly accepted international treaty obligations such as the World Trade Organization TRIPS Agreement and the WIPO Internet Treaties. This will ensure that copyright laws are up-to-date and more effective in dealing with emerging copyright issues posed by advances in technology. It will also ensure that there are effective civil and criminal remedies available against copyright infringement.

THE IP CHAPTER PROVIDES AN OPPORTUNITY TO SHOWCASE SOME OF THE POSITIVE DEVELOPMENTS IN CHINA'S IP REGIME.

A further element of the draft Chapter on intellectual property in the FTA is what people in government like to call 'advocacy'. The Intellectual Property Chapter has two advocacy roles: one is to showcase the positive developments in China's intellectual property regime and the other is to send useful messages to interested parties.

In relation to the first role, an Intellectual Property Chapter in the FTA not only describes the commitments the parties have made to enhancing bilateral trade, it can also be used to highlight positive developments that are already facilitating bilateral trade. In this context, Australia has identified a range of areas in which China has developed mechanisms, guidelines or practices of a high standard that many interested parties in Australia may not be aware of. Examples of this include transparency in intellectual property regulation and the granting of intellectual property rights. Similarly, China's existing commitments in relation to the use of legitimate software demonstrate the strong support of the Chinese Government for the use of such software, and its progress toward achieving that goal. This contrasts with some of the perceptions about the protection of software in China.

The second advocacy role for the Intellectual Property Chapter is to send useful messages to a range of interested parties. For example,

repeating specific provisions from agreements both countries are parties to, such as the TRIPS Agreement, can demonstrate and underscore the commitment of the parties to the objective of those provisions.

Including a list of key international treaties, and giving an in-principle undertaking to join other new international treaties also sends strong and positive messages about the commitment of the parties to particular intellectual property issues. Treaties such as the Patent Law Treaty⁴ (2000) and the Singapore Treaty on the Law of Trademarks⁵ (2006) demonstrate that the parties are working towards international best practice in the registration of intellectual property rights. Those treaties also provide a basis for modest steps in harmonising patent and trademark office practices, resulting in savings to industry, and increased business confidence.

Of course, there are sometimes tensions between the interests of different groups. For example, the interests of copyright users such as universities (who may also be copyright owners in their own right) are sometimes at odds with the interests of those who want increased copyright protection. Similar tensions can exist between industrial property stakeholders (for example, in some differences in approach to patent issues between generic and patent pharmaceutical manufacturers).

ENHANCED ECONOMIC INTEGRATION

A further broad benefit of including an Intellectual Property Chapter in the FTA is the contribution it can make to economic integration. This is achieved by reducing the barriers to trade, and encouraging trade-related activities where possible. In this context, even modest steps towards harmonisation of intellectual property regulations can help encourage business people from one of the parties to operate in the jurisdiction of the other. Lack of familiarity with practices and requirements are often cited as impediments to bilateral trade. This is especially so in relation to intellectual property, where the intellectual property rights need to

⁴ See <http://www.wipo.int/treaties/en/ip/plt/trtdocs_wo038.html> 25 January 2008.

⁵ See <http://www.wipo.int/treaties/en/ip/singapore/singapore_treaty.html> 25 January 2008.

registered, protected and enforced. Agreement to reduce differences in intellectual property law practice and administration would be helpful. Similarly, the availability of the same range of intellectual property rights in both parties to the FTA would enhance economic integration.

CHAPTER PROVIDES A BASIS FOR CLOSER CO-OPERATION AND ON-GOING ENGAGEMENT

Co-operation and on-going engagement are important elements of the FTA, and have particular value in relation to intellectual property. There is currently a broad range of interaction between intellectual property agencies, including the regular meetings of the industrial property offices, and the recent visit to Australia by the National Copyright Administration of the People's Republic of China. These provide a good basis for enhanced co-operation, and Australia regards the FTA as a useful vehicle for expanding and improving co-operation in IP.

We know that China also sees the Intellectual Property Chapter as a useful vehicle for the further development of co-operation. I am sure that together both parties can work out how best to use the FTA negotiations to support their shared objectives, and give greater focus to the areas in which better co-operation can be most beneficial to both parties.

CONCLUSION

In concluding, it is necessary to briefly summarise why it is important to include a separate chapter on intellectual property in the FTA and the five main areas where it can be expected that the FTA will impact on intellectual property law.

Looking first at why a separate chapter on intellectual property is important in a FTA – intellectual property can make a big contribution to promoting bilateral trade and economic integration. Its importance to bilateral trade will only increase in the future. Australia's experience shows that including intellectual property in FTAs can increase the confidence of business people in the FTA partner country and enhance

bilateral cooperation in many areas. Even small efforts at harmonising regulation have resulted in financial savings to industry, thereby promoting bilateral trade.

So where will the FTA impact on intellectual property regulation in Australia and China? The first point to note is that Australia and China are negotiating on intellectual property at a time when both countries are amending domestic regulations to accommodate new technologies and signing on to new treaties, such as the WIPO Internet Treaties. Hopefully, this will lead to better, more considered and effective regulation in both countries. Technological change is something each country must deal with, and Australia and China have already exchanged a great deal of information in this area in the context of the Intellectual Property Chapter negotiations.

The second point is that the Intellectual Property Chapter may also see new issues for both countries addressed for the first time. At this stage, the negotiations on these issues are sensitive and confidential, so it is not possible to elaborate on the specific issues. But it is worth mentioning that both countries have raised issues that could see the inclusion of commitments on new developments in intellectual property.

Third, we hope that the Intellectual Property Chapter will address specific bilateral concerns raised by each other's stakeholders. This is the basis for a successful FTA – it is an agreement specifically tailored to improving bilateral trade relations, and in the area of intellectual property, even simple things such as amending registration and objection processes to take into account translation or timeliness issues can facilitate trade between countries.

Fourth, the Intellectual Property Chapter may also make a useful contribution in identifying positive developments already in place that many interested parties may not be aware of. This can increase the public understanding of the importance of intellectual property and the priority both Australia and China give to effective intellectual property protection. This is true for Australia, where we would like to use the Intellectual Property Chapter to highlight some recent developments in our own legislation and practice. We also believe there is much in China's regime that is of a very high standard. Indeed, we are aware of China's efforts to improve the transparency of China's intellectual

property laws and enforcement systems, that go beyond China's existing commitments. The more people know about China's achievements in this regards, the more confidence they will have in China's current intellectual property regime.

Finally, the Intellectual Property Chapter should lay the foundation for enhanced co-operation between Australia and China in a wide range of intellectual property related issues. There already exists a good level of co-operation between our countries, but the Intellectual Property Chapter can provide focus, momentum and even institutional commitment to on-going co-operation.

In closing, it must be said that Australia hopes that the Intellectual Property Chapter will make a valuable contribution to enhancing bilateral trade between Australia and China. In the negotiations so far, the Australian negotiators have been impressed by the professionalism and commitment of China's intellectual property negotiating team. Together both countries have developed a good working relationship, and the discussions have been conducted in a positive and constructive spirit. Australia knows the negotiations will be complex, long and difficult. However, intellectual property is an important issue to both countries, and it deserves the careful consideration both sides are giving to it.

NEW HOPE FOR CONSUMERS OF DIGITAL COPYRIGHT MATERIAL IN HONG KONG

Yee Fen Lim

INTRODUCTION

Articles 139 and 140 of the Basic Law of Hong Kong state that protection should be given to intellectual property rights in Hong Kong. It comes as no surprise then that Hong Kong has a suite of legislation dealing with each of the major intellectual property regimes, namely copyright, trade marks, patents and registered designs. The copyright regime is enshrined in the *Copyright Ordinance* (Cap 528) and like most other jurisdictions, registration is not a pre-requisite for obtaining copyright protection, nor are there any formalities that need to be complied with before copyright protection is afforded to a work in Hong Kong.

The *Copyright Ordinance* gives protection to a wide range of creative outputs including literary works (including computer programs), dramatic, musical and artistic works, sound recordings, films, broadcasts, published editions as well as rights in performances and moral rights.

Hong Kong is a member of the World Trade Organisation (WTO) and its intellectual property laws generally meet the requirements set out in the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs).

CURRENT ANTI-CIRCUMVENTION PROVISIONS

Currently, the relevant section of the *Copyright Ordinance* that deals with anti-circumvention is section 273. However, a raft of changes were gazetted on 6 July 2007 although at the time of writing, the specific provisions dealing with anti-circumvention have not yet come into force. We shall return to these below.

The current section 273 imposes civil liability only. The section reads:

(1) This section applies where-

(a) copies of a copyright work are issued or made available to the public; or

(b) an unfixed performance is made available to the public or copies of a fixation of a performance are issued or made available to the public,

by or with the licence of the copyright owner, the performer or the person having fixation rights in relation to the performance, as may be appropriate, in any form which is copy-protected.

(2) The person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies against a person who, knowing or having reason to believe that it will be used to make infringing copies or infringing fixations-

(a) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or possesses for the purpose of, in the course of, or in connection with, any trade or business, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or

(b) publishes information intended to enable or assist persons to circumvent that form of copy-protection,

as a copyright owner has in respect of an infringement of copyright.

(3) Further, the person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies under section 109 (delivery up) in relation to any such device or means which a person has in his possession, custody or control with the intention that it should be used to make infringing copies of copyright works or infringing fixations of performances, as a copyright owner has in relation to an infringing copy.

(4) References in this section to copy-protection include any device or means specifically intended to prevent or restrict copying of a work or fixation of a performance or to impair the quality of copies or fixations made.

...

(6) It is immaterial for the purpose of subsection (2)(a) whether or not the trade or business consists of dealing in devices or means specifically designed or adapted to circumvent forms of copy-protection.

(7) In subsection (6), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing.¹

The current provision only covers devices or means specifically designed or adapted to circumvent a form of copy-protection employed, which includes any device or means specifically intended to prevent or restrict copying or to impair the quality of copies. The current provision is to be applauded for being quite narrow in that it deals only with those devices that prevent or restrict perfect copies from being made, and for only outlawing those devices or means specifically designed or adapted to circumvent a form of copy-protection employed.

Despite the narrowness of the provision, the current section 273 has however been read widely by the courts to favour the plaintiffs.

There have been two high profile cases with the same defendants. Lik Sang International was a defendant in both cases and it sold legitimate

¹ Note the legislative provisions appearing in this chapter have been reproduced from the Bilingual Laws Information System web site <<http://www.legislation.gov.hk>> with the permission of the Government of Hong Kong Special Administrative Region.

and infringing computer game related items through its website to customers from all over the world. The first of these cases is *Sony Computer Entertainment Inc v Lik Sang International Ltd*² where the defendant sold mod chips for Sony's PlayStation consoles which enabled the consoles to play, inter alia, infringing copies of PlayStation games. One of the hotly contested issues in this case was whether the device used by Sony is a copy-protection device as defined under the legislation. In cases involving similar mod chips in other jurisdictions such as Australia, the Sony device was established to be a device that enabled Sony to employ regional market segmentation with the result that a legally purchased game in a region such as Japan could not be played in a console purchased in Australia.³ Hence, the Sony device has been held to be an access control device.

At trial, the defendants conceded that Sony's device, namely the protection code in the discs which must be read by the consoles to enable play, is a means specifically intended to prevent or restrict copying of a work. The question then turned on the requirement of the legislation in section 273(2)(a) when it refers to any device or means specifically designed or adapted to circumvent the form of copy-protection employed. The defendants argued that Sony's device could not be a device which is specifically designed or adapted for circumvention purposes because it had innocent and legitimate uses such as enabling legitimately purchased copies from another region to be played on the consoles. The Court however held that the section did not require the use to be exclusive following the English case of *Sony Computer Entertainment Inc v Paul Owen & Others*⁴

In effect, the court held that as long as the device had at least one use that was an infringing use, then the device came within section 273. With respect, this interpretation is not entirely satisfactory as it renders the word "specifically" in the section to be redundant. If the intent of the

² See *Sony Computer Entertainment Inc v Lik Sang International Ltd* [2003] HKEC 521, High Court of the Hong Kong Special Administrative Region Court of First Instance, Action No 3583 of 2002.

³ It should be noted that the Australian High Court decision was decided subsequent to the Hong Kong cases: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193.

⁴ Ch Div Case No HC01CO 5235, Jacob J.

legislature was that *any* device designed or adapted for circumvention purposes would be caught, whether used exclusively for circumvention purposes or not, then it would have omitted the word “specifically” from section 273(2)(a). Secondly, because of the regional coding purpose of the Sony device, there is no reason why the mod chip was not something specifically designed to enable players to fairly utilise games they have purchased in another region, and hence not “specifically designed or adapted for circumvention purposes.”

It is also unfortunate that the defendants conceded that Sony’s device was a means specifically intended to prevent copying. Given the regional market segmentation purposes of the Sony device, there would have been room to argue that it was not a means that Sony specifically employed to prevent copying.

The second case is *Nintendo Co Ltd v Lik Sang International Ltd*⁵ where the defendant sold Flash Linker, Flash Cards and Flash Discs which facilitated the copying of games contained in Nintendo’s Game Boy cartridges onto a computer and then onto a Flash card. Without a great deal of analysis, the court found that the device utilised by Nintendo was something specifically intended to restrict copying and that the defendants’ products were specifically designed or adapted to circumvent a form of copy protection.

On the requirement in section 273(2)(a), the court said that the question that should be asked is “what is the substantial purpose of these Flash products of the defendants and what made them such successful products which sell like hotcakes?”⁶ With respect, the requirement in section 273(2)(a) is whether the product was specifically designed or adapted to circumvent a form of copy protection, not the looser requirement of the “substantial” purpose of the product.

It would appear that although the current section 273 is narrowly worded, the courts have read the provision fairly widely. It could even be argued that the courts have effectively disregarded the wording of section 273(2)(a).

⁵ See *Nintendo v Lik Sang International Ltd* [2003] HKCFI 499, High Court of the Hong Kong Special Administrative Region Court of First Instance, Action No 3584 of 2002.

⁶ *Ibid*, [9]

2007 AMENDMENTS

The *Copyright (Amendment) Ordinance 2007* was gazetted on 6 July 2007 and it amended the *Copyright Ordinance* in a number of areas, including:

- the introduction of permanent criminal offence provisions relating to business end-user possession of computer programs, movies, television dramas and musical recordings
- the introduction of a new criminal offence relating to the copying and distribution of printed copyright works for the purpose of or in the course of trade.
- the introduction of criminal liability for company directors and partners in certain situations.
- the introduction of new civil offences relating to the circumvention of technological measures and new criminal offences relating to circumvention activities.
- the introduction of a new rental right for films and comic books.
- changes to provisions concerning parallel imports of copyright material, including provisions on criminal sanctions.
- changes to provisions on fair dealing for education and public administration purposes.

It should be noted that not all of these provisions have come into force, including the provisions on circumvention devices.

2007 AMENDMENTS ON CIRCUMVENTION PROVISIONS

The 2007 amendments repeal the current section 273 and replaces it with a new section 273 and the addition of sections 273A to 273H. The new section 273 sets out the various definitions and the subsequent sections provide for the substantive wrongs. For example, section 273A places a prohibition on the act of circumvention, section 273B provides

for the civil remedies against trafficking in circumvention devices or services and section 273C sets out the criminal remedies against such trafficking. Sections 273D, 273E and 273F provides for exceptions to sections 273A, 273B and 273C respectively. Section 273H enables further exceptions to be recognized.

The new section 273 warrants a close examination.

(1) In sections 273A to 273H, “circumvent” (規避), in relation to an effective technological measure which has been applied in relation to a copyright work—

(a) where the use of the work is controlled through the measure by the copyright owner of the work, means to circumvent the measure without the authority of the copyright owner;

(b) where the use of the work is controlled through the measure by an exclusive licensee of the copyright owner of the work, means to circumvent the measure without the authority of the exclusive licensee; or

(c) where the use of the work is controlled through the measure by any other person who, with the licence of the copyright owner of the copyright work—

(i) issues to the public copies of the work;

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service,

means to circumvent the measure without the authority of that other person.

(2) For the purposes of this section and sections 273A to 273H, where a technological measure has been applied in relation to a copyright work, the measure is referred to as an effective technological measure if the use of the work is controlled by any person referred to in subsection (1)(a), (b) or (c) through—

(a) an access control or protection process (including the encryption, scrambling and any other transformation of the work) which achieves the intended protection of the work in the normal course of its operation; or

(b) a copy control mechanism which achieves the intended protection of the work in the normal course of its operation.

(3) In subsection (2)—

(a) “technological measure” (科技措施) means any technology, device, component or means which is designed, in the normal course of its operation, to protect any description of copyright work;

(b) the reference to protection of a copyright work is to the prevention or restriction of acts which are done without the licence of the copyright owner of the work and are restricted by the copyright in the work;

(c) the reference to use of a copyright work does not extend to any use of the work which is outside the scope of the acts restricted by the copyright in the work.”

The new section 273 is to be applauded for its clarity and the fair balance struck between the interests of copyright owners and the interests of consumers. Unlike its predecessor, the new section 273 in subsection (2) distinguishes clearly between access control devices and protection processes such as passwords and copy control mechanisms. Importantly however, subsection (3) places the caveat that for something to be recognised as a technological measure, it must be something which is designed, in the normal course of its operation, to protect any description of copyright work, and that this notion of protection is limited to those acts which a copyright owner can give a licence for. Subsection (3)(c) makes it very clear that reference to “use of a copyright work” is limited to those acts restricted by the copyright in the work.

It is arguable that the spirit of the new section 273 would mean the devices used by Sony in its playstation consoles do not satisfy the criteria

of a technological measure because of the regional coding function. Whilst subsection (2)(a) specifically refers to access control mechanisms which at first glance the Sony device would meet, a close examination of subsection (3) would render the Sony device to be one that restricts acts beyond that which Sony has the right to control as a copyright owner, namely, the Sony device achieves geographic market segmentation, and hence it would not be considered a technological measure under section 273.

A strict reading of the new provision also seems to find favour for consumers in terms of the preservation of the ability to exercise fair dealing. It could be argued that the combination of subsections (2) and (3) means that devices which for example prevent copying of text in toto may not fit within the criteria of a technological measure. A strict reading of subsections (2) and (3) could mean for example, that a student who under section 38 wishes to copy 5% of a work for research or study purposes may argue that the mechanism that prevents her e-book from allowing her to copy is not a technological measure because under subsection (3)(b), the act of copying that small amount for a fair dealing purpose is not an act which requires a licence from the copyright owner. The same student could also argue that “the use of the work” in subsection (2) is qualified in subsection (3)(c) to explicitly not extend to any use of the work which is outside the scope of the acts restricted by the copyright in the work and since the exercise of fair dealing is a use permitted by copyright law, the mechanism in her e-book is in effect controlling use of the work outside the scope of the acts restricted by the copyright in the work, and hence is not a technological measure.

The new definition of “access control technological protection measure” in the Hong Kong legislation is to be commended for being considerably narrower in coverage than similar provisions in other jurisdictions. The Hong Kong legislation requires a direct link to the prevention of copyright infringement whereas the Australian legislation, which is the most recently adopted on this topic in the Asia-Pacific region, provides much broader coverage than Hong Kong, in that section 10(1) of the Australian *Copyright Act* defines “access control technological protection measure” to include any access control technology that a right holder has “used ... in connection with the exercise of the copyright.”

THE ROAD AHEAD

The courts of many countries have grappled with the novelty of digital media and the protection of copyright material in the new media. The novelty of devices used by copyright owners has been tested in the courts against legislation which have been enacted only over the past ten years or less. Some of these cases has brought about decisions which consumers may not be satisfied with but there is hope that the second round of legislation on technological protection measures and anti-circumvention devices will bring some long-awaited balance.

COPYRIGHT PROTECTION IN THE PEOPLE'S REPUBLIC OF CHINA

Chao Xu

LEGISLATION

A great change in the field of technology and the economy has occurred in China since the Chinese *Copyright Law* was first issued in 1990. This change was particularly evident in the development of the information and communication technology fields. As a result of this change, traditional copyright protection has encountered a variety of new problems, for instance in the areas of computer programming, databases, copyright in the network environment and the electronic environment and security. The World Intellectual Property Organisation (WIPO) through the two treaties it adopted in 1996, the *WIPO Performances and Phonograms Treaty (WPPT)* and the *WIPO Copyright Treaty (WCT)*, have offered the Chinese legislature useful information in overcoming the problems it faced in copyright protection.

There are two aspects to the change in China's economy. Firstly, the Chinese economy changed from the original plan economy into a market economy which required changes in the legal system. When the *Copyright Law* came into effect China still had a plan economy and it was important for the legislature to adapt the *Copyright Law* to the market economy. Secondly, due to the globalisation of the economy China has not only attended the World Trade Organisation (WTO) but has also modified its laws so that they are consistent with the principles of the WTO. Many of the regulations adopted by the *Copyright Law* in 1990 were inconsistent with the Berne Convention and the TRIPS Agreement.

While there were various reasons for China to amend its *Copyright Law* the main reasons were the changes in the field of economy and technology. On 27 October 2001 the revised *Copyright Law* was finally adopted in the 24th meeting of the Standing Committee of the Ninth People's Congress. The revised *Copyright Law* is concerned with six Regulations: the *Regulation to Protect Computer Software* (20 December 2001), the original *Implementing Regulation to the Copyright Law* which has been modified (2 August 2002), the *Regulation on Collectively Managing Copyright* (28 December 2004) and the *Regulations for the Protection of the Right of Communication on Information Networks* (10 May 2007). The *Copyright Protection Methods for Folklore Works* and the *Methods of Paying the Statutory Licence Fee by Broadcasting Organisations* are now being formulated.

China's copyright regime has undergone numerous changes on a national level since China entered the WTO and the TRIPS Agreement came into force. A variety of principles have also been introduced from the WCT and the WPPT regarding copyright protection in the network environment.

ENFORCEMENT

The Chinese enforcement system relating to Intellectual Property (IP) differs from that used by most other countries. The Chinese system provides a judicial remedy similar to that of other countries, as well as an administrative remedy.

With regard to the judicial remedy, the Chinese Supreme Court, the High Court of each province and the Middle Level courts in the cities have in the last 10 years established more than 30 IP-Tribunals to handle IP disputes. According to the Chinese Supreme Court, in 2006 the Chinese IP-Tribunals accepted 5719 copyright cases and handed down judgements on 5751 cases.

The Chinese courts also have Criminal Tribunals which provide criminal sanctions for serious IP infringements. These serious IP infringements are investigated according to Articles 217, 218 and 220 of the Chinese *Criminal Code*. In 2004 the Chinese Supreme Court published a Judicial

Interpretation,¹ which was followed by a second Interpretation in 2007,² to enforce the relevant Articles in the Criminal Code. According to the Chinese Supreme Court, 2,277 criminal cases regarding IP infringement had been decided and 3508 people had faced criminal sanctions in 2006.

¹ The *‘Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights’*, which was adopted at the 1131st meeting of the Judicial Committee of the Supreme People’s Court on November 2, 2004, and the 28th meeting of the Tenth Procuratorial Committee of the Supreme People’s Procuratorate on November 11, 2004, came into force on December 22, 2004.

² The *‘Interpretation II of the Supreme People’s Court and the Supreme People’s Procuratorate of the Issues concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights’*, which was adopted at the 1422nd meeting of the Judicial Committee of the Supreme People’s Court and the 75th meeting of the Tenth Procuratorial Committee of the Supreme People’s Procuratorate on April 4, 2007, became effective as of April 5, 2007.

Regarding Article 47 of the Chinese *Copyright Law*,³ the infringing activities have civil and administrative consequences if the activity is serious and impairs the rights and interests of the public. This Article is enforced by the National Copyright Administration of China and its local offices in each province and city. The Copyright Offices have the power to order a person to discontinue the infringement, confiscate unlawful income, destroy infringing reproductions, impose fines and

³ *Copyright Law of PRC* Art. 47 states:

“Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances' and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability:

(1) reproducing, distributing, performing, showing, broadcasting, compiling or communicating to the public on an information network a work created by another person, without the permission of the copyright owner, unless otherwise provided in this Law;

(2) publishing a book where the exclusive right of publication belongs to another person;

(3) reproducing and distributing a sound recording or video recording of a performance, or communicating to the public his performance on an information network without the permission of the performer, unless otherwise provided in the Law;

(4) reproducing and distributing or communicating to the public on an information network a sound recording or video recording produced by another person, without the permission of the producer, unless otherwise provided in the Law;

(5) broadcasting and reproducing a radio or television program produced by a radio station or television station without the permission of the radio station or television station, unless otherwise provided in this Law;

(6) intentionally circumventing or destroying the technological measures taken by a right holder for protecting the copyright or copyright-related rights in his work, sound recording or video recording, without the permission of the copyright owner, or the owner of the copyright-related rights, unless otherwise provided in law or in administrative regulations;

(7) intentionally deleting or altering the electronic right management information of a work, sound recording or video recording, without the permission of the copyright owner or the owner of a copyright-related right, unless otherwise provided in law or in administrative regulations; or

(8) producing or selling a work where the signature of another is counterfeited.”

confiscate the materials, tools and equipment used for making infringing reproductions.

The Chinese Government has been firm on fighting piracy. Since 1995 the Government has offered rewards of 300 000 to 600 000 RMB to people who provide important information in reporting illegal CD-production lines. At present 231 illegal CD-production lines have been seized. The Government also sends staff from the Departments of Public Security, Industry and Commerce, Fighting against Illegal and Pornography Publications and Copyright Administration to seize and destroy piracy products. For example, in 2006 during the so-called 'Hundred Days of Anti-Piracy Campaign' 150 000 shops, 49 800 kiosks and 116 000 printing and reproduction enterprises were inspected. As a result 4408 printing and reproduction enterprises and 2377 web sites were penalised for IP infringements and 13 000 shops and kiosks, 664 printing and reproduction enterprises and 1061 illegal web sites were shut down. Overall over 58 million illegal publications, pirated audiovisual products and software were confiscated, which was nearly half of the total products seized during the previous year.

Another example of the stance the Chinese Government has taken on piracy comes from the Copyright Administrative Agencies. In 2005 the Copyright Administrative Agencies accepted 9644 cases of which it ruled on 9380 cases, 7840 cases were given criminal sanctions and 366 cases were transferred to judicial agencies. The Copyright Administrative Agencies confiscated over 100 million pirated goods, consisting of over 19 million pirated books, over 1 million pirated journals, over 65 million pirated audiovisual products, over 13 million e-publications and over 7 million in pirated software.

In order to fight the various types of counterfeiting and establish a fair competition system, the State Council decided to improve the Chinese market economy order in 2001. Since copyright piracy is related to counterfeiting and because it is a factor in destroying the Chinese market economy order, from 2001 the fight against software piracy was implemented nationally.

In June 2000 the State Council published a regulation encouraging the development of the computer software and integrated circuit industries.⁴ This regulation states that the fight against piracy must be strengthened and requires public agencies to use authorised software. In 2001, in order to effectively enforce the *Copyright Law* and the 2000 Regulation, NCAC tried to concentrate on the issues through the end-user of the software. Because this problem has a wide scope and is not well-understood by the public, NCAC tried to explain the meaning of software protection through training courses, disseminating legal knowledge through various types of media and other positive education schemes. Any agency that used unauthorised software could generally cancel the illegal software and buy its legal replacement through an initiative of the Copyright Administrative Agencies. While these schemes and educational promotions were a massive undertaking for the Copyright Administrative Agencies, they should be continued in the future.

At present there is only one copyright collective management organization for musical works – the Music Copyright Society of China (MCSC).⁵ This Society commenced in 1992 and currently has 4706 members. The Society manages performing rights, broadcasting rights and mechanical reproduction rights and has signed representative contracts with 37 sister societies throughout the world. In 2006 the income of the Society was slightly above 45 million RMB. The Society has commenced 23 suits in total and has been awarded 1.28 million RMB. With the development of digital technology the potential market for literature and artistic works has increased. The authors and the users of the works hope that through establishing corresponding copyright

⁴ The '*Some Policies for Encouraging the Development of Computer Software Industry and Integrated Circuit Industry*' (Guo Fa [2000] No. 8) was released by the State Council of PRC in 2000.

⁵ There are several other collective management organisations being in the process of examination and approval by relevant Chinese authorities. For example, the China Audio-Video Collective Administration, founded by China Audio-Video Association, has been approved by the National Copyright Administration and is awaiting further approval by the Ministry of Civil Affairs of the PRC. Moreover, the Collective Management Organisation for Literature, Films and Photographs is also in the process of being established. For more information, see <http://www.bjipo.gov.cn/include/wenzhang.jsp?id=11452416640005> at 18 January 2008.

collective societies this will resolve the problems associated with numerous people using the works and having to pay licence fees. Preparation is now underway in China to establish copyright collective societies for audio-visual producers, literature work, fine art work and photographic work.

As a result of trying to effectively enforce the *Copyright Law*, the Government has increased the positive education schemes. Since 2001, advertisements to improve public awareness relating to copyright protection have been made under the Cooperation Project between the NCAC and the EU. These advertisements have been broadcasted by the main broadcasting stations in mainland China and Hong Kong. In conjunction with the advertisements broadcast, numerous posts and education efforts have been made to the public in order to raise legal awareness of copyright protection. China is a developing country with a population of 1.3 billion and a history of unbalanced economic development. To enforce the *Copyright Law* China needs public support, if the *Copyright Law* meets public resistance it is unlikely to have any effect.

CONCLUSION

Although China is a member of the WTO it has not yet fulfilled its legal notification and review of obligations as required. As a result an important task in the near future will be trying to complete the IP requirements, including legal notification of the *Copyright Law* and the review of its proceedings.

After entering the WTO, the next problem facing China is enforcement of the law. The revised *Copyright Law* has strengthened the fight against infringement and increased the obligations of administrative enforcement bodies. At present there are few staff members of the Copyright Administration. The Chinese Government needs to consider and solve how this task could best be fulfilled.

The Chinese Government has garnered respect regarding the IP problems mentioned in the new Doha negotiations. China as a new member of the WTO should be actively participating in all discussions, including IP.

CRIMINAL INFRINGEMENT OF COPYRIGHT: THE *BIG CROOK* CASE

Steven Gething

On 24th October 2005 an unemployed man from Hong Kong, Chan Nai Ming aka “Big Crook”, received the dubious honour of becoming the first person in the world to be sentenced to a custodial sentence for using the Bit Torrent protocol to infringe copyright.¹ This chapter explores the definitions of “affect prejudicially” and “distribution” in the context of criminal law; issues which emerged from the case.

THE TECHNOLOGY

Bit Torrent is open source file-sharing protocol that can be used to disseminate any type of computer file. Any program that implements the protocol is known as a Bit Torrent “client”.

Three elements are required for the system to function correctly: (1) a file to share (“the shared file”); (2) its corresponding “torrent” file, which contains metadata about the shared file; and (3) a tracking computer (“a tracker”) which locates other clients that are uploading or downloading the shared file. A Bit Torrent user creates the torrent file using a client and uploads it to a newsgroup site (which typically also functions as the tracker²), but keeps the shared file on their own computer. Other Bit Torrent users download the torrent file from the

¹ ‘Jail for BitTorrent bandit ‘Big Crook’’, *Sydney Morning Herald*, May 18 2007, <<http://www.smh.com.au/news/security/jail-for-bittorrent-bandit-big-crook/2007/05/18/1178995417708.html>> 25 January 2008.

² The notorious Swedish website *The Pirate Bay* <<http://thepiratebay.org/>> operates in this manner.

newsgroup site and their Bit Torrent client software will download and exchange parts of the shared file with other users using the same tracker, in what is known as a “swarm”. The parts of the shared file that a user has already downloaded become available to the other users in the swarm, so each user almost immediately becomes part of the dissemination process. This means that if there is no user who has a complete copy of the shared file (“a seeder”) in the swarm, a complete copy of the shared file can still be created by other users transferring different parts of the shared file to each other. In plain English, this means that files containing copyrighted films, music, software, etc. can be easily and quickly transferred between computers.

THE FACTS

On 10 January 2005, while browsing a (now defunct) film newsgroup site, a customs officer came upon a post from a member calling himself “Big Crook”. Accompanying the post was a torrent file for the film *Daredevil*³ which the officer used to successfully transfer a copy of the film from “Big Crook’s” computer.⁴ The next day the officer downloaded the films *Red Planet*⁵ and *Miss Congeniality*⁶ using the same method.⁷ Customs officers traced the IP address of “Big Crook” from the newsgroup message, presumably obtained his residential address from the Internet Service Provider (“ISP”) and raided Chan’s flat “where he was found sitting at a computer and surfing the internet”⁸. They seized legitimate copies of the three films, a digital camera used to make images relating to the films and Chan’s computer.⁹ A forensic expert analysed the computer and concluded that it was the original source from which copies had been downloaded by the Customs officer and others.¹⁰

³ See <<http://www.imdb.com/title/tt0287978/>> at 3 December 2007.

⁴ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 260.

⁵ See <<http://www.imdb.com/title/tt0199753/>> at 3 December 2007.

⁶ See <<http://www.imdb.com/title/tt0212346/>> at 3 December 2007.

⁷ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 260.

⁸ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 260.

⁹ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 260.

¹⁰ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 260.

THE MAGISTRATES' DECISION

Chan faced three charges under s159G of the *Crimes Ordinance, Cap 200* arising from offences under the then s 118(1)(f) of the *Copyright Ordinance, Cap 528*.¹¹ Section 159G codifies the law of attempts and s118(1)(f) confers the substantive offence that Chan was accused of attempting. Section 118(1)(f) stated:

A person commits an offence if he, without the licence of the copyright owner, distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, an infringing copy of a copyright work.¹²

Three alternate charges were brought for obtaining access to a computer with dishonest intent, contrary to s 161(1)(c) of the *Crimes Ordinance, Cap 200*. Chan was found guilty of the first three charges and no verdict was given for the alternate charges.¹³ Chan failed in both his appeals to the High Court¹⁴ and the Court of Final Appeal.¹⁵

The main issues that emerged from the hearing were: (a) whether or not the extent of Chan's activities was sufficient to "affect prejudicially the copyright owner"¹⁶ had he succeeded in his attempt; and (b) the meaning of the word "distribute".¹⁷

¹¹ Section 118 has been amended by the *Copyright (Amendment) Ordinance 2007* since this case commenced. The offence Chan was charged with still exists, and is found at s 118(1)(g) of the amended *Copyright Ordinance, Cap 528*.

¹² *Copyright Ordinance, Cap 528* (1 April 2001) s 118(1)(f) amended by *Copyright (Amendment) Ordinance 2007*.

¹³ *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, 153.

¹⁴ *Chan Nai Ming v HKSAR* [2007] 2 HKC 1.

¹⁵ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255.

¹⁶ *Copyright Ordinance, Cap 528* (1 April 2001) s 118(1)(f) amended by *Copyright (Amendment) Ordinance 2007*.

¹⁷ *Copyright Ordinance, Cap 528* (1 April 2001) s 118(1)(f) amended by *Copyright (Amendment) Ordinance 2007*.

PREJUDICE

The term “affect prejudicially” can be found in the copyright offence provisions of a large number of countries in the former British Commonwealth¹⁸, but its meaning has received little or no judicial analysis. The “three step test” in art 9(2) of the Berne Convention¹⁹ uses similar language to the offence provisions, stating “Members shall confine limitations and 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 rights holder”²⁰, but the ambiguity of this term leaves it open to a variety of interpretations. In Chan’s case Magistrate Colin Mackintosh took a very wide view of what is meant by the term:

Prejudice in this context is not necessarily restricted economic prejudice, though that is the obvious area at which attention is directed. It might be said that (for example in the case of Miss Congeniality, charge 3,) the distribution of one copy to a customs officer, who would never otherwise have bought it, in the context of local sales since release in 2001 of over 50,000 copies, barely amounted to significant prejudice. If that is a correct analysis, then given that the intention of the defendant must have been to distribute much more widely than simply to one downloader, his acts amounted to an attempt to distribute to such an extent as to affect prejudicially the owner of the copyright, within the context of section 159G(1) of the Crimes Ordinance, Cap 200. It is inevitable that distribution to 30 or 40 or more downloaders would involve prejudice to the copyright owners through unauthorised distribution of their intellectual property and lost sales. And though lost sales, in the context of the evidence in this case, might be small, nevertheless, such losses would amount to a prejudicial effect.²¹

¹⁸ See *Copyright Act* (Canada) s 42(1)(c); *Copyright Act* (Jamaica) s 46(1)(d); *Copyright Act* (Singapore) s 136(2)(b); *Copyright Act 1968* (Australia) s 132AI(2)(d); and *Copyright, Designs and Patents Act 1988* (England and Wales) s 107(1)(e).

¹⁹ Berne Convention for the Protection of Literary and Artistic Works 1886.

²⁰ Berne Convention for the Protection of Literary and Artistic Works 1886 art 9(2).

²¹ *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, 152.

The question of whether or not the extent of the distribution is sufficiently widespread to affect prejudicially the copyright owner, as Mr Mackintosh correctly stated, is in part dependent on the size of the market for legitimate copies, but this is not a complete picture. To state that it is “inevitable that distribution to 30 or 40 or more downloaders”²² demonstrates perhaps, that the continual propagation and repetition of the industry view (i.e. that each case of infringement equates to a lost sale) has had its desired effect of becoming the hegemonic view of the popular discourse. Although Mr Mackintosh acknowledged that the “distribution of one copy to a customs officer, who would never otherwise have bought it” would have “barely amounted to significant prejudice” he did not explore this analysis further, and did not consider the possibility that none of the potential recipients of Chan’s infringing copies may have ever bought legitimate copies, or even, that one or more of those recipients may have bought a legitimate copy because they watched an infringing copy.

Mr Mackintosh stated the scope of what was meant by “affect prejudicially” was not limited merely to the financial impact of an unauthorised distribution:

Potential lost sales are not the only measure of prejudice. There is, for instance, the movie rental market to be considered. And copyright owners plainly suffer prejudice from such piracy as this beyond simply their sales figures. The widespread existence of counterfeits tends to degrade the genuine article and undermines the business of copyright owners.²³

These statements concerning the prejudicial effect on the rental market are again couched in terms of the damage “piracy”²⁴ in general does to the film industry, rather than the actual prejudicial effect caused or attempted to be caused by Chan. It might be a plausible argument that the cumulative effect of large numbers of Bit Torrent users distributing infringing copies prejudicially affect copyright owners beyond a direct financial impact of lost sales, but it is difficult to see how an individual charged with distributing 30 or 40 infringing copies could be held responsible to any measurable degree for the fortunes of the film rental

²² *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, 152.

²³ *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, 152.

²⁴ *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, 152.

market, particularly when the offence in question has not been completed.

Since Chan was charged with an attempt, Mr Mackintosh only needed to find that Chan's actions implied the necessary specific intent required to convict. Ribeiro J suggested that the *mens rea* of the offence requires an intention to distribute widely enough that it prejudicially affects the copyright owner:

“The reason why the prosecution resorted to the offence of attempt was to avoid any difficulties that might be posed by the requirement in the full offence of showing that distribution was to such an extent as to cause prejudice to the copyright owner.”²⁵

This is perhaps the most disturbing aspect of this case. It meant that one of the crucial elements of the *actus reus*, a threshold test to assess the damage caused to the victim, was instead left to Mr Mackintosh's estimation of (a) Chan's state of mind; and (b) the film buying habits of imaginary recipients of non-existent infringing copies. Chan's legal team did not seek to appeal on any grounds raised by this issue, and regrettably, since the finding of specific intent was a matter of fact and not law, it is understandable why it was not pursued. It was suggested in the Court of Final Appeal that Chan had passively allowed other users to make their own copies, an argument that was rejected by Ribeiro J:

“After taking the numerous preparatory steps described, he kept his computer connected with the network and continued to run the software to ensure that entire copies of the films would be transferred to the downloaders. It would be wrong to mistake his use of automated means (ie the BitTorrent software) to achieve his purpose for mere passivity on his part”²⁶

This would also suggest however, that Chan did not know, much less cared, how many other users were transferring files from his computer. There is perhaps, an argument to be made that he was merely reckless or

²⁵ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 258.

²⁶ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 270.

negligent in his state of mind and lacked the specific intent to distribute the infringing copies to the extent required.

THE COURT OF APPEAL DECISION

Chan chose instead to appeal on the following grounds to the High Court:

“[1] The Magistrate erred in law by failing to recognise that the offence under section 118(1)(f) of the Copyright Ordinance (Cap. 528) is concerned with distribution of infringing copies, and not merely distribution of data/information. Consistent with this error, the Magistrate failed to take note of the meaning of “copy” as defined in section 23(2) of the Copyright Ordinance, which requires that a “copy” must be in a “material form”, i.e. a physical material entity.

Consequently, the Magistrate erred in law by: -

- (a) confusing the concept of distribution of data/information with distribution of copies, and equating the former with the latter;
- (b) failing to recognise that distribution of copies in the context of the Copyright Ordinance must involve distribution of physical material entities

[2] The Magistrate erred in law by finding the Appellant’s acts constituted a distribution (or an attempted distribution) of the films the subject of the charges under section 118(1)(f) of the Copyright Ordinance: -

- (a) The finding is contrary to the evidence of the Prosecution expert, which clearly suggested that the downloading process of each downloader using the BitTorrent technology was initiated by the downloader himself and that it was the downloader’s own decision which directly caused the creation of the copy in the downloader’s computer.
- (b) The Magistrate’s reasoning at most supports the contention that the Appellant’s acts played a crucial part in facilitating or assisting the downloaders in making copies in their own computers. It does not lead to the conclusion that the Appellant’s

acts amounted to distribution of copies as the making of the copies was initiated and directly caused by the downloaders themselves.

[3] This ground related to the fact that although the Magistrate did not deliver verdicts on the alternative charges, he nevertheless expressed his view that the charges could have been made out. Although this ground of appeal refers to a so-called finding, there was no finding made nor verdict given against which the Appellant can appeal. Accordingly, for the purposes of the appeal this ground was not argued.

[4] This was a catchall submission that the convictions were unsafe and unsatisfactory under all the circumstances²⁷

Justice Beeson considered the arguments in grounds one and two, but found that neither of these grounds were made out and dismissed the appeal.²⁸ She stated:

“No real assistance can be derived from a comparison of the historical development of legislation in Hong Kong and the UK, interesting though it might be. Nor can any weight be given to the Appellant’s insistence that the “distribution right”, a term devised by a textbook author to label a concept, is relevant to Hong Kong; and is the meaning to be given to distribution. Having considered the matters raised in argument, having regard to the evidence and having noted the structure and content of the Copyright Ordinance, Cap.528, I am satisfied that the Ordinance does, and was intended to cover, copies in digital format. The Magistrate did not confuse the concept of distribution of data/information with distribution of copies as the Appellant alleges. Further, the Appellant’s argument that ‘copies’ must involve physical material entities has not been established. Accordingly the appeal against conviction fails.”²⁹

²⁷ *HKSAR v Chan Nai Ming* [2007] 2 HKC 1, 9.

²⁸ *HKSAR v Chan Nai Ming* [2007] 2 HKC 1, 21.

²⁹ *HKSAR v Chan Nai Ming* [2007] 2 HKC 1, 18.

THE COURT OF FINAL APPEAL DECISION

All of the other judges of the Court of Final Appeal agreed with the judgment of Ribeiro PJ. The Court upheld the decisions of the lower courts and rejected Chan's appeal. Again, the arguments brought before the court were essentially that: (a) the word "copy" used in s118(1)(f) of the Copyright Ordinance meant that "an electronic copy can only exist as something stored in a physical object"³⁰; and (b) that "for 'distribution' to occur, the distributor must first be in possession of the relevant copy which he then transfers to the recipient, after which he no longer has the distributed copy"³¹. It is clear, as Ribeiro PJ pointed out³², that the two arguments were very closely related, if not inseparable.

COPY

Dealing with the first part of Chan's arguments Ribeiro PJ made the following statements:

"I agree of course that an electronic copy must exist in some physical medium or environment and not in a vacuum. But as the evidence established and as everyday experience indicates, electronic data constituting a digital copy of a work can plainly be transmitted via the medium of the network of computers and cables making up the Internet. Electronic copies can thus plainly be transmitted without first being stored in a tangible article such as a CD or DVD to be physically handed over to a recipient."³³

"It is of course true that an electronic copy will often be stored in a disk or some similar tangible object which is capable of and intended for physical delivery. But use of such a storage device is not an essential condition for the transfer or distribution of an electronic copy. An Internet network made up of linked

³⁰ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 258.

³¹ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 259.

³² *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 259.

³³ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 265.

computers is no less tangible and effective a medium for its transmission.”³⁴

“Plainly, electronic copies of copyright works can be bought, sold and delivered entirely via the Internet [...] It is of course true that in some cases, such as with rentals, one would normally envisage persons renting and then returning disks containing electronic copies of the relevant works. But it does not follow that because one particular form of dealing with an electronic copy may require physical delivery of the storage device, all forms of dealing, and in particular distribution, of such copies must inevitably require similar physical handling, to the exclusion of delivery via the Internet. Indeed, technological advances are constantly being made with a view to eliminating the need for such physical delivery. Thus, an electronic copy of a ‘rented’ film may be sent to the recipient on the Internet, programmed to delete itself after a stated period. In other words, there is no factual imperative for dealings with, and in particular distribution of, electronic copies to be confined to the physical transfer of storage devices.”³⁵

DISTRIBUTION

Chan’s counsel sought support for his distribution argument³⁶ from the agreed statements concerning Articles 6 and 7 of the WIPO Copyright Treaty³⁷ which states:

“As used in these Articles, the expressions “copies” and “original and copies,” being subject to the *right of distribution* and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”³⁸

³⁴ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 266.

³⁵ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 266.

³⁶ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 267.

³⁷ *World Intellectual Property Organisation (WIPO) Copyright Treaty, Geneva*, 20 December 1996.

³⁸ Article 6, footnote 5, *World Intellectual Property Organisation (WIPO) Copyright Treaty, Geneva*, 20 December 1996.

Ribeiro PJ was of the opinion that this merely “represented an agreement as to minimum levels of copyright protection to be implemented”³⁹ by the contracting parties of the Treaty⁴⁰ and did not confine the meaning of “distribution”. He stated:

“There is also no legal reason to confine distribution of copies to cases involving delivery by physical means. “Distribution” is not defined in the Ordinance and should be given its ordinary meaning. In the present case, the evidence showed that upon being accessed by downloaders seeking to obtain a copy of the relevant film, the appellant’s computer reproduced the infringing electronic copy (which remained on his hard disk) in the form of packets of digital information which were sent to the downloaders and reassembled by their computers in the correct sequence to constitute an entire infringing copy of that film. In my view, that process in aggregate is aptly described as involving the appellant’s creation of infringing electronic copies (transient or otherwise) of the film and their distribution directly or indirectly to each member of each swarm.”⁴¹

He went on to state:

“It does not by any means follow that the scope of the s118(1)(f) offence should be [confined to fixed copies], if, as a matter of its proper construction, it provides more extensive protection. This is especially so where, as in the present case, the Court is not concerned with ascertaining the scope of a rightholder’s distribution right nor with conduct permissible after exhaustion of that right – which was the relevant focus of the Treaty – but with the unlicensed dissemination of multiple infringing copies via the Internet.”⁴²

The other aspect of the distribution argument submitted by Chan’s counsel was that

³⁹ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 268.

⁴⁰ Although the People’s Republic of China acceded to the WIPO Copyright Treaty on 9 March 2007, the Treaty does not, at the time of writing, apply to the Hong Kong or Macau Special Administrative Regions. See http://www.wipo.int/treaties/en/Remarks.jsp?ent_id=1989C 25 January 2008.

⁴¹ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 266.

⁴² *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 268.

“[Chan] did not transfer any infringing copy away from his computer. Rather, copies were only created by the downloading activities of the members of the swarm. In other words, there was no distribution since the appellant did not transfer any copy previously in his possession to the downloading swarm. He merely enabled them to make copies of their own.”⁴³

Ribeiro rejected this argument on the facts:

“It is of course true, but not relevant, that the initial infringing copy of each film remained on the appellant's hard disk. As previously stated, the magistrate accepted the evidence as establishing that electronic copies duplicating that initial infringing copy were generated by the appellant's computer and were then sent to the downloaders as a stream of digital packets designed to be reconstituted as entire, viewable films. Accordingly, even assuming for the sake of this argument, that [Chan's counsel] Mr Pun's approach to the meaning of 'distribution' is correct - namely, that it requires the transfer of a copy in the distributor's possession to the recipient - the findings were to the effect that the appellant did create and did have possession of such a copy (transiently or otherwise) for distribution to the downloading swarm.”⁴⁴

In *obiter*, Ribeiro PJ suggested that an act of distribution may not even require possession of a copy by the distributor:

“[I]f the evidence had been different and if it had shown that no further electronic copy of any film was ever created by the appellant's computer and that no such copy was ever transmitted to the downloaders; but that the appellant had enabled the recipients by some technological means to create infringing electronic copies of the three films on their own computers, the question would still arise as to whether such conduct on his part could constitute the 'distribution of infringing copies'. The fact would remain that by his use of technology the appellant had caused reproductions of the

⁴³ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 271.

⁴⁴ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 271.

infringing copies on his computer to appear on the computers of the downloaders, even if the process did not involve the prior creation by his computer of an electronic copy (transient or otherwise). I leave open the question whether such conduct might nevertheless be caught by s 118(1)(f).⁴⁵

COMMENTARY

The relevance of this case to Australian law, and indeed other jurisdictions with similar criminal copyright provisions, will depend largely on the willingness of the Courts to take a similarly wide view of what is meant by “distribution”. In this case, it is clear from the judgement that it is not necessary for a court to find that the copyright owner’s *right of distribution* had been infringed (if such a right is recognised in the jurisdiction), the article merely needs to be an infringing copy and *any* distribution (whether the distribution itself is infringing or not) will be an offence.

What was not exactly clear from the case was the approach courts may take when they assess the extent of the distribution when dealing with the fragmented method Bit Torrent uses to disseminate files. If a Bit Torrent user seeds a swarm of 40 other users and distributes a different part of the file to each user, the swarm could still produce 40 complete copies even if the seeder disconnects; 40 copies could be created independently of the original seeder. It is likely that the courts would take the view that the defendant had distributed copies to the 40 users, if they follow the obiter dicta of Ribeiro PJ, but this raises the awkward question of exactly where the liability for the distribution ends. Perhaps more prosecutors will resort to attempt or conspiracy charges to avoid answering this question. We may never know the answer. Another method of file sharing called one-click hosting seems to be overtaking peer-to-peer software like Bit Torrent as the standard method for disseminating infringing copies⁴⁶. In this system, the user uploads the file

⁴⁵ *Chan Nai Ming v HKSAR* [2007] 3 HKC 255, 271.

⁴⁶ See <http://en.wikipedia.org/wiki/One-click_hosting> 25 January 2008 and Choi, Bryan H “The Grokster Dead-End” (2006) 19 *Harvard Journal of Law and Technology* 393.

to a website ostensibly for the purposes of file storage, and receives a URL⁴⁷ which can be used to download the file at a later date. The URL address can be posted on forums in exactly the way Chan posted his torrent files. Other users can then download the files at the maximum speed of their internet connection, rather than being restricted by the available bandwidth of a seeder's connection. This allows a much faster rate of file transfer and consequently a far greater volume of data to be received. Future non-commercial criminal cases (and indeed civil actions against the host services) are more likely to arise from the use of this type of file hosting service than from peer-to-peer file trading protocols.

CONCLUSION

This case was the first real opportunity to observe the application of criminal copyright law in file-sharing cases. The meaning of distribution has been clarified, but the case also highlights the evidentiary difficulties of proving prejudicial effect. There are likely to be more cases of this nature in the future and it will be interesting to see how the law develops to address this problem.

⁴⁷ A Uniform Resource Locator (URL) allows computers to locate pages on the Internet. The text in the address bar of a web browser shows the URL.

CIVIL JURISDICTION, INTELLECTUAL PROPERTY AND THE INTERNET

Brian Fitzgerald and Samsung Xiaoxiang Shi

INTRODUCTION

At the core of the civil litigation system is the notion of jurisdiction. In a narrow sense it refers to whether a court has the authority to hear a case in relation to specific people and activities (subject matter) but in a broader sense it also encompasses what law should be applied (choice of law), whether the court is a suitable court to hear the case (choice of court) and the enforcement of judgements.

The notion of jurisdiction provides a tool for efficiently managing litigation and traditionally has been based upon notions of connection to a particular territory. In the global transnational world of the Internet the concept of jurisdiction has struggled to find a sensible meaning.¹ Does jurisdiction lie everywhere that the Internet runs or is it more narrowly defined?

In this chapter we examine recent cases concerning jurisdiction and the Internet before the courts of the People's Republic of China (PRC) in matters relating to intellectual property. We also consider decisions in Australia and the United States of America (US) and international developments in the area.

¹ For further, see Brian Fitzgerald, Anne Fitzgerald, Gaye Middleton, Yee Fen Lim and Timothy Beale, *Internet and E Commerce Law* (2007) 33-126.

THE FUNDAMENTALS OF JURISDICTION

What is jurisdiction?

At its broadest level the notion of jurisdiction concerns the power of a sovereign state to make, administer and enforce laws. In a narrower sense it refers to the authority of courts in relation to particular people, activities or events, encompassing:

- personal and subject matter jurisdiction
- choice of law
- choice of forum
- enforcements of foreign judgments.²

Under international law jurisdiction can be based on five heads:

- territorial connection
- nationality of the parties
- security or protection
- nationality of the victim (passive personality principle)
- the universal nature of the activity (eg war crimes).³

Personal and Subject Matter Jurisdiction

The general rule in the PRC is that in a civil suit against a Chinese citizen, personal jurisdiction will be established if the action is taken in a place where the defendant is domiciled.⁴ The domicile of a natural person is where their *hukou* (registered permanent residence) is, and in the case of legal person (eg a corporation) it is where they are registered.⁵ If it happens that the place of domicile is not the same as the place of

² Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 33-34.

³ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 33-34.

⁴ See the *Civil Procedure Law of PRC* art. 22. The *Civil Procedure Law of PRC* was adopted on 9 April 1991 at the Fourth Session of the Seventh National People's Congress, and revised by the 30th Session of the Standing Committee of the 10th National People's Congress on 28 October 2007. See

<<http://www.lawinfochina.com/law/display.asp?db=1&id=6459&keyword=civil%20procedure%20law>> at 22 November 2007.

⁵ See article 3 of the *Opinions on the Application of the Civil Procedure Law of PRC*, issued by the Supreme People's Court of PRC on 14 July 1992.

habitual residence (natural person) or primary place of business (legal person), the later shall prevail.⁶

Moreover, a case founded on tort(s) including infringement on intellectual property rights is subject to a 'special territorial jurisdiction rule'.⁷ A lawsuit brought for a tortious act is under the jurisdiction of a court at the place where the tort has occurred (place of tortious acts) or where the defendant is domiciled. Furthermore, it must be pointed out that the place of occurrence includes where the tort is committed and where the results of the infringement occur.⁸

The subject matter jurisdiction of courts is normally set out by the statute or other instrument under which the particular court is constituted. Articles 18-21 *Civil Procedure Law 1991* (amended 2007) outline the subject matter jurisdiction of courts in the PRC. This is further elaborated by interpretations or decrees of the Supreme People's Court of the PRC.⁹ Additionally, cases involving foreign elements (*shewai* cases) are also governed by a set of specific rules.¹⁰

Choice of Law

In litigation in which the activities at issue extend beyond the boundaries of any one state and where potentially conflicting laws could be applied the court will need to determine which law to apply. The rules used by courts to determine which law to apply in such proceedings are known as the choice of law rules.

⁶ See the *Civil Procedure Law of PRC* art 22.

⁷ See the *Civil Procedure Law of PRC* art 29.

⁸ See the *Opinions on the Application of the Civil Procedure Law of PRC* art 28.

⁹ For example, article 2 of the *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* provides that only intermediary courts or higher level courts have jurisdiction over domain name cases; moreover, article 2 of the "*Interpretation of the Supreme People's Court on the Relevant Issues concerning the Scope of Jurisdiction and the Scope of Application of Laws for Hearing Trademark Cases*, adopted at the 1203rd meeting of the Judicial Committee of the Supreme People's Court on December 25, 2001, states that trademark cases should be subject to the jurisdiction of intermediary courts or local district courts nominated by local high people's court; and so on.

¹⁰ See further, the *Civil Procedural Law of PRC* (adopted 1991 and revised 2007) part 4 and relevant provisions in the *Opinions on the Application of the Civil Procedure Law of PRC*.

In context of cases involving foreign elements (*shewai* cases), foreign law may be applicable under certain conditions in China.¹¹ Accordingly, while dealing with claims for damages of torts, the law of the place where an infringing act is committed shall apply.¹²

In instances where it is possible (e.g. in a contractual scenario as opposed to a tort situation where no pre-existing relationship exists), the parties may have clarified this issue through an agreement in advance known as a choice of law agreement/clause. These clauses are often given effect by the courts but can be held to be invalid if they contravene the fundamental policy or interests of the forum.¹³

Choice of Forum

Even if a court determines that it has personal and subject matter jurisdiction in proceedings; and can easily determine which laws should apply, the court may still decline to exercise jurisdiction, or the defendant may obtain a stay of the proceedings, on the basis that it is not appropriate for the court to exercise jurisdiction.

In instances where it is possible parties may try and resolve this issue through agreement in advance through a choice of forum or choice of court clause.¹⁴ In the *shewai* cases relating to contract or property disputes, the parties may, in the form of written agreement, choose the

¹¹ The general rules regarding choice of law are provided in the *General Principles of the Civil Law of PRC* (1986) chapter 8 (art. 142-150). 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 April 12, 1986, and effective as of January 1, 1987.

Moreover, in June 2007, the Supreme People's Court of PRC issued *The Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters*.

¹² See the *General Principles of the Civil Law of PRC* (1986) art 146. It states: "The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act."

¹³ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 63-64; 68-69. See further Dan Jerker B Svantesson, 'Private International Law and the Internet' (2007) 198ff.

¹⁴ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 91-95

court located in the place that has “actual connections” with their disputes, subject to any special requirements.¹⁵

A new Hague Convention on Choice of Courts adopted in 2005 seeks to support the enforcement of judgments given pursuant to a choice of courts clause that nominates courts of members to the Convention.¹⁶ On 26 September 2007, Mexico, as the first country, deposited its instrument of accession to the Convention. One more ratification or accession will suffice to bring the Convention, which is open to all States, into force.¹⁷

Enforcement of Judgments

Articles 265 and 266 of the *Civil Procedure Law of PRC* (amended 2007) and articles 318 and 319 of the *Opinions of the Supreme People’s Court on the Application of the Civil Procedure Law of PRC* deal with the recognition and enforcement of judgments in the PRC. An involved party may apply to a Chinese intermediary court for the enforcement of a judgment made by a foreign court provided the Chinese court has jurisdiction. Moreover, under international treaties to which the PRC is a signatory party or the principle of reciprocity, a Chinese court may enforce foreign judgments upon the request of a foreign court.¹⁸

JURISDICTION AND THE INTERNET IN INTELLECTUAL PROPERTY CASES IN THE PRC

In the context of the Internet and IP cases the general rules which have emerged (especially in the copyright area) based on existing laws and cases are that jurisdiction will be found at the place where:

¹⁵ See the *Civil Procedural Law of PRC* art. 242. See further Dan Jerker B Svantesson, ‘Private International Law and the Internet’ (Kluwer Law International, 2007) 188 ff.

¹⁶ See Convention on Choice of Court Agreements (Concluded 30 June 2005) <http://www.hcch.net/index_en.php?act=conventions.text&cid=98&zoeck=choice%20of%20court%20agreement> at 18 December 2007.

¹⁷ See ‘Mexico first State to join Choice of Court Convention of 2005’, <http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=137>, at 7 January 2008.

¹⁸ See the *Civil Procedure Law of PRC* art 265.

- the defendant is domiciled;
- the equipment (such as the server or computer terminal) by which the tortious acts is committed, is located; or
- in domestic cases, if the previous two are unidentifiable or difficult to determine (although this is not a prerequisite in *shewai* cases), the equipment (such as computer terminal) by which the plaintiff finds the infringement, is located.

Copyright

Ruide (Group) Inc v Yibin Cuiping District Oriental Information Service Inc is one of the first cases involving jurisdiction and the Internet to be heard before the courts of the PRC.¹⁹ The plaintiff found out that the defendant's website was in large part a copy of the plaintiff's. Thus, in 1999 the plaintiff instituted proceedings against the defendant in the Beijing Haidian District People's Court for infringement of copyright and trade secret laws. The defendant challenged the Court's jurisdiction on the ground that Beijing Haidian District is neither the place of domicile of the defendant nor the place of occurrence of the infringement. The challenge was dismissed by the Court²⁰ and this rejection was confirmed by the appellate court, the Beijing No. 1 People's Court.²¹ Both the trial and appellate courts found that the plaintiff's webpages were stored in and published through a server which was located at the plaintiff's residence in the Haidian District, Beijing. To access (including viewing and making a copy of) the webpages, the defendant had to utilise the server. Therefore, it was held that where the injured party's server was located was the place of commission of the infringement.²²

¹⁹ See the Civil Ruling (1999) *Hai Zhi Chu No 21* made by the Beijing Haidian District People's Court and the Civil Ruling (1999) *Yi Zhong Zhi Chu No 64* made by the Beijing No. 1 Intermediary People's Court.

²⁰ See Beijing Haidian People's Court the Civil Ruling (1999) *Hai Zhi Chu No 21*.

²¹ See the Beijing No. 1 People's Court the Civil Ruling (1999) *Yi Zhong Zhi Chu No 64*.

²² *Ibid.*

These rulings have been subject to criticism.²³ On 19 December 2000, the Supreme People's Court of PRC issued the *Judicial Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright (Copyright Networks Interpretation)* which was amended in 2003 and 2006.²⁴ The '*Networks Copyright Interpretation*' seeks to clarify 'the place of occurrence of the torts' in the context of online copyright infringement. It states:

- A case involving copyright disputes over a computer network shall be subject to the jurisdiction of the people's court of the place of tortious act or that at the domicile of the defendant.²⁵

Moreover, it gives further explanation on 'the place of tortious act', stating:

- The place of tortious act includes the place where such equipments by which the sued tortious act is committed as internet server, computer terminal, are located. Where it is difficult to determine the place of the tortious act or the domicile of the defendant, the place where the equipments, in which the tortious content is discovered by the plaintiff, such as a computer terminal, is located may be deemed as the place of tortious act.²⁶ (emphasis added)

²³ Some scholars argue that if the sever is the place where the infringement is committed, any access to the plaintiff's webpages would be regarded as infringement. Some other scholars believe that the server of the defendant instead of that of the plaintiff is the place of commission of the infringement because the defendant's act of uploading the infringing webpages to his sever should be regarded as committing the tort.

²⁴ Adopted at the 1144th meeting of the Sentencing Committee of the Supreme People's Court on November 22nd, 2000; amended according to the Decision of the Supreme People's Court on Amending the Interpretations on Several Issues concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network passed at the 1302nd Session of the Sentencing Committee of the Supreme People's Court for the first time on December 23, 2003; amended according to the Decision of the Supreme People's Court on Amending the Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network (II) for the second time on November 20th, 2006.

²⁵ See the *Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright* art 1.

²⁶ *Ibid.*

Since the release of the ‘*Copyright Networks Interpretation*’, cases involving online copyright disputes have followed the jurisdictional rules enunciated in them. For example, in the recent case, *Li Xuebin v Beijing Sohu (.com) information service Inc.*,²⁷ the defendant challenged the jurisdiction exercised by the Shanghai No. 2 Intermediary People’s Court on the ground that ‘disputes involving internet copyright infringement should be subject to relevant judicial interpretation; and accordingly, only courts located in the place where the torts happened, or where the defendant resides can exercise jurisdiction. In this case, the residence of the defendant is at Beijing, and the involved Internet server is also located in Beijing. Therefore, this court does not have jurisdiction.’²⁸ The plaintiff argued that the company behind the website at the heart of the dispute (sohu.com) also operated an internet server located in Shanghai which could be proved by the evidences provided by the plaintiff.²⁹

The court affirmed the relevant provision in the ‘*Copyright Networks Interpretation*’, finding that the Internet servers carrying the defendant’s website (sohu.com) are located in both Beijing and Shanghai. Therefore, the court held that this dispute was subject to its jurisdiction and the defendant’s jurisdiction demurral was rejected.³⁰

Domain Names

On 17 July 2001, the Supreme People’s Court issued another judicial interpretation in relation to domain name disputes (hereinafter referred to as ‘*Domain Name Interpretation*’).³¹ It states:

- In light of the tort disputes over domain names, the intermediate courts in the places of tort or the residences of the

²⁷ See the Civil Ruling (2006) *Hu Er Zhong Min 5 (Zhi) Chu* No 226 issued by the Shanghai No.2 Intermediary People’s Court on 25 August 2006.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ The *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* was adopted at the 1182nd meeting of the Judicial Committee of the Supreme People's Court on June 26, 2001, and came into force on July 24, 2001.

accused have the jurisdiction. In case the places of tort or the residences of the accused are difficult to affirm, the places, where a terminal or other installations of the computers through which a prosecutor finds the domain names, may be the places of tort.³²

It should be noted that there is a significant difference between ‘*Copyright Networks Interpretation*’ and the ‘*Domain Name Interpretation*’.³³ In contrast to the ‘*Copyright Networks Interpretation*’ the ‘*Domain Name Interpretation*’ does not expressly state that jurisdiction can be found on the basis of the location of the equipment (such as the server or computer terminal) by which the tortious acts is committed. It is arguable that the law would now imply such a basis for jurisdiction but this is still unclear.

Trademarks

Infringement on the exclusive rights of a registered trademark which is defined in *Trademark Law of PRC*³⁴ should be subject to the jurisdiction

³² See art 2 of the *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network*

³³ Moreover, it provides intermediary courts are the lowest court to deal with cases involving domain name disputes. See *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* art 2.

³⁴ See the *Trademark Law of PRC* (Amended 2001) art 13 and 52. Art 13 states: “If a trademark, for which an application for registration is filed, of the same or similar commodity is the copy, imitation or translation of a well-known trademark of others which hasn’t been registered in China, and misleads the public and leads to possible damage to the interests of the registrant of that well-known trademark, it shall not be registered and shall be prohibited from use. If a trademark, for which an application for registration is filed, of a different or dissimilar commodity is the copy, imitation or translation of a well-known trademark of others which has been registered in China, and misleads the public and leads to possible damage to the interests of the registrant of that well-known trademark, it shall not be registered and shall be prohibited from use.” Art. 52 states: “Any of the following acts shall be an infringement upon the right to exclusive use of a registered trademark: 1) using a trademark which is identical with or similar to the registered trademark on the same kind of commodities or similar commodities without a license from the registrant of that trademark; 2) selling the commodities that infringe upon the right to exclusive use of a registered trademark; 3) forging, manufacturing without authorization the marks of a registered trademark of others, or selling the marks of a registered trademark forged or manufactured without authorization; 4) changing a registered trademark and putting the commodities with the changed trademark into the

of the court which is located at the place where the tortious act is committed, where the infringing product is stored or seized, or where the defendant is domiciled.³⁵ In a recent case (in 2007) involving online infringement of trademarks,³⁶ a court, Xi'an (Shanxi Province) Intermediary People's Court, by way of analogy, applied the '*Copyright Networks Interpretation*'.³⁷ The defendant was accused of infringing on the plaintiff's trademarks³⁸ on online game software. It was found that the defendants owned an 'Internet server' within the Xi'an city where the court was located. Under the '*Copyright Networks Interpretation*', 'the place of tortious act includes the place where such equipments by which the sued tortious act is committed as internet server or computer terminal are located'.³⁹ Accordingly, it was held that, in this case, the place where the defendant's server was located was regarded as the place of the commission of the trademark infringement. Moreover, the domicile of one of the defendants, the Shenzhen Tencent Computer System Co., Ltd. (Xi'an Branch), was also found within the Xi'an city. Therefore, the court denied the jurisdictional challenge raised by the defendants.⁴⁰

The defendants strongly disagreed with the Xi'an court and appealed to the Shanxi High People's Court. It was argued that the first trial court incorrectly applied the '*Copyright Networks Interpretation*' which could only be applied to online copyright infringement cases. The High Court also dismissed the defendants' (appellants') jurisdiction challenge, but on

market without the consent of the registrant of that trademark; and 5) causing other damage to the right to exclusive use of a registered trademark of another person."

³⁵ See the *Interpretation Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Trademarks* art. 6. This Interpretation was adopted at the 1246th Session of the Judicial Committee of the Supreme People's Court on October 12, 2002, and was promulgated for implementation as of October 16, 2002.

³⁶ *Shenzhen Yuan Hang Technology Co Ltd v Shenzhen Tencent Computer System Co Ltd, Tencent Technology Co Ltd. (Shenzhen), and Shenzhen Tencent Computer System Co Ltd, (Xi'an Branch)*

³⁷ See the first trial Civil Ruling (2007) Xi Min Si Chu No 23 issued by the Xi'an Intermediary People's Court on 5 March 2007.

³⁸ The defendant's trademarks, 'Wa Keng (挖坑)' and 'Bao Huang (保皇)' have been registered to be used on computer software.

³⁹ See the *Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright* art 1.

⁴⁰ See the first trial Civil Ruling (2007) Xi Min Si Chu No. 23 issued by the Xi'an Intermediary People's Court on 5 March 2007.

different ground.⁴¹ It held, ‘indeed, it is inappropriate that the first trial court applied the “*Copyright Networks Interpretation*” to decide on the jurisdiction issue in this case’.⁴² However, the domicile of one of the defendants is within the Xi’an city, Shanxi Province which gives rise to the jurisdiction of the Xi’an (Shanxi Province) People’s Court.’ Accordingly, the defendants’ jurisdictional challenge was rejected.

Shewai Cases (Cases Involving Foreign Elements)

Under the Chinese civil procedure law, a set of provisions, including jurisdictional rules, are applicable to civil proceedings involving foreign elements (*shewai* cases) within the territory of the PRC.⁴³ *Shewai* cases refer to cases where : (1) one or more parties are a foreign natural or legal person or organization; or (2) the legal relationship between the parties establishes, changes, suspends or occurs outside the territory of China; or (3) the location of the object of litigation is outside the territory of China.⁴⁴

In relation to jurisdictional issues in *shewai* cases, most jurisdictional rules concerning domestic cases are currently applicable except as otherwise provided in the chapter 24 (art 241-244) of the *Civil Procedural Law 1991* (amended 2007). Civil actions against a defendant who does not reside within the territory of China are subject to the rules specified in art. 241 of the *Civil Procedural Law 1991*. If the defendant has a representative organization or detainable property within the territory of China, the case could be under the jurisdiction of a Chinese court of the place where the detainable property is located, where the representative organization is located, or where the tort occurs.⁴⁵

⁴¹ See the final Civil Ruling (2007) *Shan Min San Zhong No. 25* made by the Shanxi High People’s Court on 29 April 2007.

⁴² *Ibid.*

⁴³ See the *Civil Procedure Law of PRC* (Amended 2007) art 235-267.

⁴⁴ See the *Opinions on the Application of the Civil Procedure Law of PRC* art 304.

⁴⁵ See the *Civil Procedure Law of PRC* (Amended 2007) art 241. It states: “A lawsuit brought against a defendant who has no domicile in the People’s Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People’s Republic of China, or the object of the action is within the territory of the People’s Republic of China, or the defendant has detainable property within the territory of the People’s Republic of China, or the

The operation of these provisions was at issue recently when Yahoo! Inc was sued by a Chinese citizen, Wang Lu, for copyright infringement. In *Wang Lu v Yahoo! Inc*, through a computer terminal located in Haidian District, Beijing, the plaintiff discovered his copyright work was published on the defendant's website without authorisation. Therefore, in 2005 the plaintiff sued the defendant in the Beijing No. 1 Intermediary People's Court. The defendant challenged the jurisdiction of the court which was denied by the court.⁴⁶ Then, the defendant appealed to the Beijing High People's Court on the ground:⁴⁷

- Firstly, it is incorrect that the first trial court applies article 243 of the *Civil Procedure law of PRC*⁴⁸ because the plaintiff failed to prove that this case met the requirement provided by the applied law. Consequently, article 29 should be applied so that this case should be under the jurisdiction of the court at the place of the tortious act or of the defendant's domicile.
- Secondly, according to the article 1 of the '*Copyright Networks Interpretation*', the court does not have jurisdiction because the defendant is a company registered in US and the internet server and computer terminal relating to the accused infringement are also located within the territory of US.

defendant has its representative agency, branch, or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court located in the place where the contract is signed or performed, the subject of the action is located, the defendant's detainable property is located, the infringing act takes place, or the representative agency, branch or business agent is located."⁴⁶

⁴⁶ See Beijing No 1 Intermediary People's Court Civil Ruling (2005) *Yi Zhong Min Chu No. 5761*.

⁴⁷ *Ibid*.

⁴⁸ This article has been changed to Article 241 when the Civil Procedure Law was amended in 2007. See the *Civil Procedure Law of PRC (Amended 2007)* art 241.

The appellate court confirmed the first trial court's decision and dismissed the jurisdictional challenge raised by the defendant.⁴⁹ The court held, 'It is a *shewai* online copyright infringement case which is subject to special provisions on *shewai* jurisdiction'.⁵⁰ Therefore, article 243 of the Civil Procedure Law of PRC should be applicable.⁵¹ It could be concluded from this judgment that the '*Copyright Networks Interpretation*' is not applicable in *shewai* cases because the court did not support the appellant's argument that was based on the '*Copyright Networks Interpretation*' (as mentioned above).⁵²

Furthermore, the appellate court held that the appellee (plaintiff), through their computer terminal which is located in Haidian District of Beijing, accessed the defendant's website and copyright infringement was found. Therefore, Haidian District is the place of tortious act, and is within the jurisdiction of the first trial court.

In a previous *shewai* case, *Beijing Billich Culture Development Co., Ltd v. Charles Billich*, both the first trial court, Beijing No. 2 Intermediary People's Court,⁵³ and the appellate court, Beijing High People's Court,⁵⁴

⁴⁹ See Beijing High People's Court Final Civil Ruling (2006) *Gao Min Zhong No 1365* issued on 1 December 2006.

⁵⁰ *Ibid.*

⁵¹ This article has been changed to Article 241 while the Civil Procedure Law was amended in 2007. See the *Civil Procedure Law of PRC* (Amended 2007) art. 241. It states: A lawsuit brought against a defendant who has no domicile in the People's Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People's Republic of China, or the object of the action is within the territory of the People's Republic of China, or the defendant has detainable property within the territory of the People's Republic of China, or the defendant has its representative agency, branch, or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court located in the place where the contract is signed or performed, the subject of the action is located, the defendant's detainable property is located, the infringing act takes place, or the representative agency, branch or business agent is located.

⁵² When Jiang Zhipei, Chief Justice of the Supreme People's Court of PRC, was answering a question about jurisdiction and *shewai* cases, he excluded the application of 'Copyright Networks Judicial Interpretation' to *shewai* cases, and he said, 'Jurisdictional provisions of the Civil Procedural Law should be applied to online copyright *shewai* cases.' <<http://www.chinaiprlaw.com/wtjd/wtjd63.htm>>, at 19 January 2008.

⁵³ See Beijing No 2 Intermediary People's Court, Civil Ruling (2003) *Er Zhong Min Chu Zi No 03814*.

⁵⁴ See Beijing High People's Court, Civil ruling, (2004) *Gao Min Zhong Zi No. 36*.

held that the location (Chaoyang District, Beijing, PRC) of the computer by which the plaintiff accessed a website and found the infringement gave rise to the jurisdiction of the Chinese Court.⁵⁵

Generally in domestic cases it appears that the location of the equipment (such as computer terminal) by which the plaintiff finds the infringement will only be a basis of jurisdiction in cases where it is difficult to determine the domicile of the defendant or the place where the equipment (such as the server or computer terminal) by which the tortious acts is committed, is located. However in *shenai* cases it appears that the location of the equipment (such as a computer terminal) by which the plaintiff finds the infringement will be a primary basis of jurisdiction in order to allow the Chinese courts to hear the matter. It could be argued that such an approach is too broad because jurisdiction will be found at any point one can access the Internet.⁵⁶

JURISDICTION AND THE INTERNET: US AND AUSTRALIAN APPROACHES

The United States

There have been many cases relating to jurisdiction and the Internet in the United States (US) as each state of the US is regarded as a separate

⁵⁵ When commenting on this case, Chen Jinchuan, Judge, Beijing High People's Court, said that the 'Copyright Network Jurisdiction' should be only applicable to domestic cases instead of *shenai* cases and in *shenai* cases, Chinese courts should exercise jurisdiction once the case, to some extent, has connections to China. And, the place of a computer by which the plaintiff accesses infringing materials and finds the infringement is the place of occurrence of the consequences of the infringement. Therefore, the Chinese court located at the place where the computer terminal by which the plaintiff finds the infringement has jurisdiction. See Chen Jinchuan, 'Abstract of and Comments on Copyright cases of Beijing High People's Court 2004', (2005) 01 *Journal of Chinese Copyright*, <<http://www.chinaiprlaw.cn/file/200612219710.html>> at 19 January 2008.

⁵⁶ As explained below, decisions in the USA (such as the *Pebble Beach* case) have held that access alone is not sufficient to found jurisdiction although in Australia in the *Gutnick* decision (discussed below), arguably, it has been held to be sufficient.

law district. In the US courts have found specific (as opposed to general)⁵⁷ jurisdiction where:

- There is meaningful contact by the defendant with the jurisdiction
- The defendant purposefully availed themselves of the advantage of doing business in the jurisdiction
- The cause of action arose from defendant's activities within the jurisdiction
- The exercise of jurisdiction is fair and reasonable

The key tests adopted in relation to the Internet are the:

- Sliding Scale Test enunciated in *Zippo Manufacturing Co v Zippo Dot Com Inc.*⁵⁸ and
- The *Calder v Jones*⁵⁹ - Effects plus Targeting Test

In *Zippo Manufacturing Co v Zippo Dot Com Inc.*,⁶⁰ the court held that a finding of jurisdiction was contingent upon the nature of the website and sought to employ a sliding scale test. A fully interactive website would found jurisdiction while a passive website used for mere advertising (without more) would not. In principle, to found jurisdiction under the sliding scale test, the website has to reach out and touch the territory in question.

⁵⁷ On this distinction see *MGM Studios, Inc v Grokster, Ltd et al*, 243 F Supp 2d 1073, 1090 (CDCA, 2003).

⁵⁸ 952 F Supp 1119, 1124 (WD Pa 1997).

⁵⁹ *Calder v Jones*, 465 US 783 (1984).

⁶⁰ The plaintiff Zippo Manufacturing Co. was a Pennsylvania corporation which made the well-known "Zippo" tobacco lighters, and was the holder of a trademark on the name ZIPPO. The defendant Zippo Dot Com, Inc. was a California corporation which operated a web site and Internet news service, and the holder of the rights to the domain names ZIPPO.COM, ZIPPO.NET, and ZIPPONEWS.COM. The plaintiff alleged that by using the trademarked name Zippo on its websites and services the defendant had infringed its intellectual property rights. The defendant argued that the Pennsylvania court did not have jurisdiction over the matter. The Court rejected this argument and upheld jurisdiction on the basis that that Zippo Dot Com Inc had undertaken extensive electronic commerce within the jurisdiction: 1125-1127. Defendant moves to dismiss for lack of proper jurisdiction. For further information, see the case abstract <<http://cyber.law.harvard.edu/property00/jurisdiction/zipposum.html>> at 21 January 2008.

United States courts have also utilised the *Calder* ‘effects test’ to found jurisdiction. In essence, this test provides that where an act is done intentionally, has an effect within the forum state and is directed or targeted at the forum state, then jurisdiction will be satisfied.⁶¹ This approach was evidenced in *MGM Studios, Inc v Grokster, Ltd*,⁶² where a Californian court assumed jurisdiction in a case relating to copyright infringement. One of the defendants in that case distributed, through a website, a software product known as Kazaa Media Desktop which was used to share digital entertainment such as music and film. The Court held that jurisdiction was established on the basis that the software had an impact or effect in California as it was the movie capital of the world and that the software had been targeted at California.⁶³

A more recent US case concerning jurisdiction is that of *Bragg v Linden Research Inc*.⁶⁴ The Californian based defendants in this case, Linden Research Inc. (‘Linden’) and its Chief Executive Officer, Philip Rosedale, operated the well known virtual world known as ‘Second Life’.⁶⁵ As the Court explained “in 2003, Linden announced that it would recognize participants’ full intellectual property protection for the digital content they created or otherwise owned in Second Life.”⁶⁶ Further, the defendants, in press releases, interviews, and through the Second Life website, encouraged users to buy, own, and sell virtual goods in Second Life. Plaintiff Marc Bragg was a Second Life user who traded in virtual property. In April 2006, the defendants froze the plaintiff’s account (for

⁶¹ In *Calder v Jones*, 465 US 783 (1984) California based entertainer Shirley Jones brought a libel action in California against the Florida based publication *The National Enquirer*. The US Supreme Court rejected a challenge to the jurisdiction of the Californian court to hear the matter saying “California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.” 1486-1487. For details, see <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/465/783.html>>.

⁶² *MGM Studios Inc v Grokster, Ltd. et al*, 243 F Supp 2d 1073, 1090 (CDCA, 2003).

⁶³ *Ibid*.

⁶⁴ *Bragg v. Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007)

⁶⁵ ‘It is hosted at <http://secondlife.com>. In Second Life, participants create avatars to represent themselves, and it is populated by hundreds of thousands of avatars, whose interactions with one another are limited only by the human imagination’. See further, *Bragg v. Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007).

⁶⁶ *Bragg v Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007).

allegedly engaging in improper trading), confiscating all of the virtual property and currency that he maintained on his account with Second Life. Bragg commenced action in his home state of Pennsylvania and the defendants challenged jurisdiction. The US District Court E.D. Pennsylvania held that Rosedale's representations - which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property constituted sufficient contacts to exercise specific personal jurisdiction over the defendants.⁶⁷

In *Pebble Beach Co. v Michael Caddy*,⁶⁸ the plaintiff a well-known golf course and resort located in California, USA sued for trademark infringement. The plaintiff had used 'Pebble Beach' as its trade name for 50 years (arguing on this basis that it had acquired secondary meaning in the US and UK) and operated a website located at www.pebblebeach.com. The defendant, was a dual citizen of the US and the UK, who occupied and ran a restaurant and bar located in southern England, UK named 'Pebble Beach' which he advertised at his website www.pebblebeach-uk.com. The website was not interactive and simply included general information about accommodation including lodging rates in pounds sterling, a menu, and a wine list. The District Court's decision that it lacked personal jurisdiction over this case was affirmed by the Court of Appeals for the Ninth Circuit. Both courts held that the defendant's actions were not expressly aimed or targeted at California or the US. Moreover, a passive website and domain name alone did not satisfy the *Calder* effects test.

⁶⁷ Ibid.

⁶⁸ *Pebble Beach Co. v. Caddy*, 453 F 3d 1151, 1154 (9th Cir 2006).

Australia⁶⁹

*Dow Jones & Company Inc v Gutnick*⁷⁰

The landmark case in Australia is *Dow Jones & Company Inc. v Gutnick*.⁷¹ Dow Jones operated WSJ.com an Internet fee based subscription news-site. Those who had not paid a subscription could also have access if they registered, giving their user name and a password. The content at WSJ.com includes *Barron's Online* in which the text and pictures published in the current printed edition of *Barron's* magazines are reproduced. *Barron's Online* for 28 October 2000 and the hard copy edition of the magazine which bore the date 30 October 2000 contained an article entitled "Unholy Gains" in which several references were made to Gutnick. At the time 305, 563 hard copies were sold, 14 in Victoria, Australia and there were 550,000 online subscribers, 300 in Victoria Australia. Gutnick argued that part of the article defamed him and brought an action in the Supreme Court of Victoria against Dow Jones claiming damages for defamation. Gutnick lived in Victoria and was a well-known businessman there, although he also conducted business overseas

Rule 7.01(1) of the Supreme Court (General Civil Procedure) Rules 1996 (Vic) provided that:

"(1) Originating process may be served out of Australia without order of the Court where -

...

(i) the proceeding is founded on a tort committed within Victoria;

⁶⁹ See generally Brian Fitzgerald, et al, *Internet and E Commerce Law* (2007) 33-126.

⁷⁰ See generally Brian Fitzgerald 'Dow Jones & Co Inc v Gutnick: Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace.' (2003) 21 *Melbourne University Law Review*, <<http://www.austlii.edu.au/au/journals/MULR/2003/21.html>> at 21 January 2008.

⁷¹ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002), <<http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>> at 21 January 2008.

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring”.

The key issues turned on whether the Victorian Supreme Court had personal jurisdiction, and if so what law should apply and whether it was a suitable court to hear the matter. As the material had been written in New York, uploaded to a server in New Jersey USA and downloaded in Victoria Australia the defendants argued that jurisdiction should only be granted in the jurisdiction of uploading not downloading. The High Court of Australia rejected this argument by explaining that:

In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.⁷²

As publication had occurred in Victoria, Rule 7.01 (1) (j) was held to be applicable to found jurisdiction:

The place of the commission of the tort was Victoria as alleged that is where the damage to reputation was alleged to have occurred. It is his reputation in *that State*, and only that State, which he seeks to vindicate. It follows, of course, that substantive issues arising in the

⁷² *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [44]; (2002) 210 CLR 575, 606-607..

action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction. There is no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding.⁷³

On the difficulty of solving jurisdictional issues in the Internet world Justice Kirby explained:

The urgency of a new rule. To wait for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the Internet would abandon those problems to "agonizingly slow" processes of lawmaking. Accordingly, courts throughout the world are urged to address the immediate need to piece together gradually a coherent transnational law appropriate to the "digital millennium". The alternative, in practice, could be an institutional failure to provide effective laws in harmony, as the Internet itself is, with contemporary civil society - national and international. The new laws would need to respect the entitlement of each legal regime not to enforce foreign legal rules contrary to binding local law or important elements of local public policy. But within such constraints, the common law would adapt itself to the central features of the Internet, namely its global, ubiquitous and reactive characteristics. In the face of such characteristics, simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction.⁷⁴

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to

⁷³ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [48]; (2002) 210 CLR 575,608.

⁷⁴ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [119]; 627-628.

settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.⁷⁵

The decision in *Gutnick* has been criticised for allowing the view that jurisdiction will be found wherever the Internet can be accessed.⁷⁶ In this regard it is in direct contrast to the US decision of *Young v New Haven Advocate*⁷⁷ which was decided about one week later. The facts in *Young*⁷⁸ were very similar yet the US federal Court of Appeals for the Fourth Circuit in dealing with this “intra-US” dispute resorted to the notion of targeting and effects to deny jurisdiction. The problem with adopting a wide view of jurisdiction is that it may be difficult to enforce the judgment against the assets of the defendant in their home jurisdiction. Judgments given outside the US that conflict with fundamental US law such as the First Amendment right to free speech may be difficult to enforce.⁷⁹

⁷⁵ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [166]; (2002) 210 CLR 575, 643.

⁷⁶ The Court countered this criticism to some extent by saying: “... In considering what further development of the common law defences to defamation may be thought desirable, due weight must be given to the fact that a claim for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. Further, plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets” at [53].

⁷⁷ *Stanley Young v. New Haven Advocate, et al.*, 315 F.3d 256 (4th Cir 2003).

⁷⁸ The jurisdictional question raised in this case concerned whether two Connecticut newspapers and certain of their staff subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. See further *Stanley Young v. New Haven Advocate, et al.*, 315 F 3d 256 (4th Cir 2003), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=4th&navby=case&no=012340Pv2&exact=1>>, at 21 January 2008.

⁷⁹ *Griffis v Luban* 646 NW 2d 527 (S Ct Minn 2002); *Yahoo! Inc v La Ligue Contre Le Racisme et l'Antisemitisme*, 433 F 3d 1199 (9th Cir 2006).

THE FUTURE

Strategies

At a pragmatic level, online businesses have sought to limit the reach of their websites and the potential for establishing jurisdiction by doing things such as employing jurisdictional disclaimers on their websites, geo-location technologies to limit who can access the website and a particular language and currency and subscription or registration process. As well businesses have used contractual agreements specifying choice of law and choice of courts although as explained above these are not always an option nor are they always upheld by national courts.

The recent *Hague Convention on Choice of Courts Agreements* (2005) and the recent ALI Statement of *Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (2007)⁸⁰ provide further support for these types of agreements in certain circumstances. However the broader Hague Convention on Jurisdiction⁸¹ which has been on the drawing board for many years and at one time offered the prospect of solving some the key internet jurisdiction issues seems a long way off completion.

CONCLUSION

In summary jurisdiction is likely to be found where there is some level of contact with that jurisdiction. It is difficult to be certain as to how that will be defined and to what role national courts will play in shaping this benchmark for contact at the transnational level. However what we see emerging from the analysis undertaken in this chapter are three distinct yet related approaches to what will constitute ‘sufficient contact’. We see approaches based on the nature of the activities (the USA approach

⁸⁰ It is a set of non-binding rules concerning jurisdiction, choice of law, and the enforcement of judgments abroad in international IP litigation, and members of ALI approved a final text on 15 May 2007. See The American Law Institute (ALI): *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* <http://www.ali.org/doc/2007_intellectualproperty.pdf> at 18 December 2007.

⁸¹ See Hague Conference on Private International Law's *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, <<http://www.cptech.org/ecom/jurisdiction/hague.html>> at 18 December 2007.

of looking for “effects and targeting”), location of the computer equipments (the emerging approach in the PRC) and the point of access to the Internet (the approach adopted in the Australian *Gutnick* decision).

In these Internet related cases we have seen courts trying to reconcile notions such as the free flow of Internet communication and business with a desire to prevent harm to reputation, intangible property and economic interests. Internet businesses (e.g. web services, online publishers) have argued against the reach of jurisdiction over them into foreign countries that they did not set out to engage with. On the other hand IP rights holders have sought to expand the notion of jurisdiction to protect their assets. They have argued that their rights can be damaged wherever people comprehend, view or copy their IP much in the same way as defamation was established in *Gutnick*. This leads to a finding of jurisdiction almost anywhere the Internet runs. Furthermore these IP rights holders are seeking the ability to commence world wide litigation in their jurisdiction of choice, usually an IP friendly jurisdiction.⁸²

For commerce to prosper in the future we need jurisdiction rules that are sensible, efficient and flexible and that are designed to harness the potential that the technology provides. Unclear approaches to jurisdiction have the very real potential to stymie innovation.

There is still too much uncertainty in this area as the key actors battle to protect their respective interests. There is an urgent need - as Justice Kirby points out in the *Gutnick* decision - for countries like China, Australia and the US to work together to find clearer and more robust solutions in this area.

⁸² See further, The American Law Institute, ‘Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes’, <<http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=1>> at 20 January 2008. See also Rochelle Dreyfuss, ‘The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?’ (2005) 30 (3) *Brook Journal of Intellectual Property Law* 819-848.

BIOGRAPHIES

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Christoph Antons holds degrees of Referendar jur (Rhineland Palatinate), Assessor jur. (Bavaria), and PhD (Amsterdam). He is Professor of Comparative Law and Director of the Centre for Comparative Law and Development Studies in Asia and the Pacific (CLDSAP) at the University of Wollongong, Australia. He is a QEII Fellow of the Australian Research Council (ARC), Chief Investigator in the ARC Centre of Excellence for Creative Industries and Innovation (CCI), Adjunct Research Fellow at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich and Senior Fellow (Graduate Program) in the Faculty of Law at the University of Melbourne. His book publications are “Intellectual Property Law in Indonesia” (Kluwer 2000), “Law and Development in East and Southeast Asia” (RoutledgeCurzon 2003), “Intellectual Property Harmonisation Within ASEAN and APEC” (Kluwer 2004, co-edited with Michael Blakeney and Christopher Heath), and “Globalisation and Resistance: Law Reform in Asia since the Crisis” (Hart 2007, co-edited with Volkmar Gessner).

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Peter Coroneos is Chief Executive of the Internet Industry Association, the national industry body for the Internet in Australia. In addition to his role as primary industry advocate, political strategist and spokesperson for the IIA, Peter drives the IIA's policy development work and has instigated the formation of specialist taskforces to leverage member expertise in diverse legal, economic and technical areas. Peter acts as industry representative on a number of high level bodies and regularly appears before House of Representatives and Senate inquiries to advise on the development of facilitative and workable rules for the internet and new media. A specialist in internet governance and joint industry-

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Professor Brian Fitzgerald holds postgraduate law degrees from Oxford University and Harvard University. He is a professor of intellectual property law and innovation at the Faculty of Law of the Queensland University of Technology, Australia. Brian has published numerous articles and books on these topics in Australia, the United States, Europe and Japan. Professor Fitzgerald has delivered seminars throughout Australia, Canada, New Zealand, the United States, Nepal, India, China, Japan, Malaysia, Singapore, Norway and the Netherlands. His most recent book is *Internet and e-Commerce Law: Technology, Law and Policy* (published by Thomson Australia).

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Chief Justice Zhipei Jiang

CJ Zhipei Jiang, the Chief Justice of the Third Chamber – formerly the Intellectual Property Right Chamber - of the Supreme People’s Court of the People’s Republic of China, occupies the highest position on the Supreme Court bench dealing with lawsuits concerning intellectual property. A famous legal scholar in the areas of Internet Law and socially domain names in China, Justice Jiang has extensive judicial experience and also serves as the Commissioner of the Trial Committee of the Court. In addition, Judge Jiang is the Routine director of the council of China Intellectual Property Right Research Association, and the China Science and Technology Law Academy. He is also the Director of the China Judge Academy, and participated in writing and editing *The Intellectual Property Right Lawsuit; General Discussions of Law; and Network and Electronic Business Law* among others. In 2005, the *Managing Intellectual Property* magazine (UK) reported in its July/August issue that CJ Jiang, with Chinese vice-premier Wu Yi, was among the top 50 most influential people in the intellectual property world.

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Jane Ogge-Cowan is the Deputy Consul General at the Australian Consulate in Shanghai. Prior to taking up her posting in Shanghai, she worked in the Office of Trade Negotiations in the Department of Foreign Affairs and Trade, specialising in Agriculture Trade Negotiations in the WTO. As well as developing Australian negotiating positions, she managed the Secretariat for the Cairns Group coalition of agricultural exporters, which is chaired by Australia. Jane has had previous posting in Sri Lanka and Mauritius. She has a Masters degree in Foreign Affairs and Trade and undergraduate degrees in Law and Japanese.

Eric Priest

Eric Priest is CEO of Fei Liu Holdings, a company that began as a joint research project between Harvard and Tsinghua Universities to help solve the problem of online copyright infringement. Eric is a veteran of the global entertainment business and an intellectual property lawyer with broad China experience. He holds a Masters in Law from Harvard University and a JD from Chicago-Kent College of Law, where he was Editor-In-Chief of the Chicago-Kent Law Review, and subsequently practiced as an intellectual property associate at Dorsey & Whitney LLP. Most recently, Eric was a Resident Fellow at Harvard Law School's

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