

CHINESE COPYRIGHT LAW, PEER
PRODUCTION AND THE
PARTICIPATORY MEDIA AGE: AN OLD
REGIME IN A NEW WORLD

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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.'¹¹⁹ 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.