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***Protecting Copyright in the Digital Era in China:  
A Critical Analysis of the Relevant Law and  
Practice from a Comparative Perspective***

Yuanyuan Hui

A thesis submitted for the degree of Doctor of Philosophy

Durham Law School

Durham University

March 2016

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## **DECLARATION**

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgement has been made in the text.

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献给我最亲爱的家人，感谢他们多年来无条件的爱和支持。

# **CHAPTER 1**

## **INTRODUCTION**

### **Introduction to the Thesis and Overview of the Development of Copyright Protection**

#### **1.1. Background Information**

Copyright is a product, originating from the evolution of human civilization. With the continuous development of society, the protection of copyright has begun to get more and more attention across the world. Also, due to the rapid development of technology in recent decades, especially in the digital era, the issues related to copyright have become more diversified and complicated, which have necessitated the need to improve existing systems of copyright protection in various ways. Accordingly, a series of measures have been adopted at both the international and national levels, such as the Berne Convention, the WIPO Treaties, the Information Society Directive, and the Digital Millennium Copyright Act of 1998 (DMCA), and so on.

In this environment, China, as a big, increasingly wealthy and technologically adept country, has continuously perfected its legal system to keep pace with international standards. However, after a series reform and perfection of its legal system in the last few decades, it is arguable that current copyright

protection system in practice is not fully operationalised in accordance with lawmakers' expectations.

In light of this, this thesis will focus on copyright protection in the digital era in China. By critically examining selected legislation, conventions and cases, across multiple jurisdictions with legal developments and national conditions in China, the issue of how to improve the system of copyright protection in the digital era in China will be analysed in detail.

## **1.2. Research Questions**

With the rapid development of technology, new issues related to copyright protection are emerging in an endless stream. To resolve these new developing problems, the reform of the traditional copyright protection system has been given more and more attention across the globe. Among others, China, as the birth place of several great inventions, has never lacked creativity and innovation. In the digital era, technology innovation has grown rapidly. The issues related to copyright protection have, therefore, become more and more complicated. However, the existing system of copyright protection in China remains very inefficient, at least when compared to western countries, in terms of addressing these new challenges and complexities, arising in the digital age. Accordingly, this thesis will mainly

discuss the development of, and the challenges associated with, copyright protection in China, especially in the digital era.

More specifically, in order to provide a critical analysis of the challenges as well as complexities arising in the digital age in China, and proffer the requisite suggestions for reform in the future, several questions and issues will be addressed by this thesis:

1. With the demands of social development, the current copyright protection system was not well developed until China adopted the opening-up policy in 1979. During this period, China acceded to almost all of the major international treaties on copyright protection in only a decade. However, a number of legal norms in the legal system, which were swiftly transplanted from other western countries, were alien to the Chinese society. In this context, this thesis will address the questions of what are the main international treaties on copyright protection across the globe; what are the purposes for which China joined adopted the various international treaties; and what is the background underlying China's copyright legislation in light the myriad amendments to such legislation over the years.
2. Because of China's own traditions and cultures, it is argued herein that Chinese copyright law, which was transplanted from western law, could

not in practice meet the standard required by international treaties. Accordingly, a series of historic and cultural issues will be analyzed in this thesis. For example, whether the consciousness of copyright has existed in the ancient China? How did the concept of copyright develop from ancient China? Is current copyright system established from the rules originally developed in the ancient China? What are the gaps between protecting the copyright in the current legislations and in practice? In order to better protect copyright in practice, by considering Chinese traditions and cultural dynamics, what could we suggest to further improve the copyright protection in the future?

3. As for the problems in the current copyright system, apart from the alien nature existed in the legislations, the rapid development of technology in these decades has also posed serious challenges and complexities for China. This thesis will also evaluate the role of emerging technologies, such as peer-to-peer technology, which is one of the most popular technologies arising in the digital era. The relevant questions which are discussed in this context are: what is P2P file sharing technology? What new problems are raised by P2P file sharing technology? How does P2P technology challenge traditional copyright laws? And what progressive approaches are adopted by China and other jurisdictions?

4. In order to further discuss the influences of digital technology in the copyright system, a number of contentious issues will be critically analysed in this thesis. More specifically, the following questions will be discussed: what is secondary liability that emerges in the digital age? How to determine the liability of ISPs in practice? In order to promote social development, how to strike the right balance between the interests of key stakeholders in the digital era? Are these relevant interests adequately balanced by the existing main approaches adopted by different jurisdictions, such as the three-step test, fair use and fair dealing? In addition, because of the invention of technological measures, how do various anti-circumvention rules from different jurisdictions balance the requisite interests in the digital age? Can any lessons be learnt from other jurisdictions in order to enhance China's anti-circumvention rule in the future?

### **1.3. Research Framework**

This thesis is divided into eight chapters. Chapter 1 is an introduction chapter.

The background information, research questions, research framework and research methodology will be addressed in this chapter.

In Chapter 2, the history and development of copyright protection in China will be examined. In addition, some of the existing problems and new challenges faced by the current copyright system will be addressed.

After an overview of the development copyright protection in China in Chapter 2, the following five chapters will seek to critically assess many of the existing challenges relating to copyright protection in China, especially in the digital era. However, it is worth noting that the issues selected to be analyzed and discussed in these chapters do not attempt to cover *all* the complexities and challenges in the existing copyright system in China. Rather, these chapters will highlight some of the key issues which seriously influence the copyright protection system and the need for it to be reformed as soon as possible.

Chapter 3 will discuss the challenges and complexities posed by peer-to-peer technology in the digital era, as well as evaluate how other countries have addressed these concerns through an examination of relevant copyright legislation. More specifically, peer-to-peer technology, which is one of the most popular technologies arising in the digital age, will be selected and analysed in this chapter. Accordingly, this chapter will introduce and analyse the working theories of different types of P2P file sharing technology in the first instance, which will lay the ground work for a robust discussion of the challenges associated with digital technology. In addition, the relevant

copyright legislation from selected jurisdictions, especially those legislation which touch and concern digital copyright protection, will be critically examined. By comparing these legislative developments with relevant legislation in China, some valuable methods adopted by those countries would be suggested to enhance China's copyright system in the future.

Chapter 4 will explore the influence of history and culture on the gradual development of copyright protection in China. As a nation's own cultures and traditions could impact on the development of its legal system profoundly, a better understanding of China's tradition and culture would be very helpful to ascertain the gaps between protection of copyright in the context of current legislation and in practice. Therefore, by introducing and analysing China's unique history and culture, the evolution of copyright protection in China will be elaborated upon in this chapter. Additionally, in view of the existing problems, some possible approaches will be provided to assist in the further enhancement of China's copyright system afterwards.

Chapter 5 will critically examine the issues related to liability in respect of the peer-to-peer system. Because of the advent of digital technology, the cases involving copyright infringement are more complicated than ever before. In this context, primary liability and secondary liability will be fully examined and analysed. More specifically, in relation to secondary liability, a series of

relevant theories and legislation from different jurisdictions will be discussed in detail. Meanwhile, relevant legislation in China will be compared and evaluated. By analysing the existing problems in the current legal system, some suggestions will be proffered for the future reform at the end of this chapter.

Chapter 6 will examine how to balance different stakeholder interests in the copyright field. More specifically, there will be an exploration of various international approaches, as well as relevant case law. Three main approaches, which are adopted by most of the countries nowadays, named the three-step test, fair use and fair dealing doctrines, will be introduced and analysed respectively in this chapter. Meanwhile, a series of relevant cases will be analysed and discussed in order to carefully explain how these doctrines apply in practice. In the last part of this chapter, relevant Chinese legislation will be examined and appropriate solutions provided in order to enhance the system in the future.

Chapter 7 will focus on issues related to technological measures in the digital era. More specifically, various technological measures will be critically evaluated, by reference to appropriate legislation and case law in this chapter. By comparing relevant pieces of legislation and case law from selected countries, this chapter will shed light not only on the specific experiences of

other countries in dealing with the contemporary challenge of technological measures, but also on how China can enhance its system of copyright protection by learning from these experiences.

After critical analyses and discussion of the above issues, it is expected that most of the main challenges of copyright protection in the digital era in China will have been fairly presented. It is hoped that this research will help to ascertain the roots of the problems inherent in the current copyright protection system. By examining relevant legislation and approaches from different countries, as well as considering China's nation's own history and culture, some solutions could be provided to enhance this system in the future.

The last chapter, Chapter 8, is the conclusion chapter. All the issues discussed in the thesis will be comprehensively summarized in this chapter.

## **1.4. Research Methodology**

This research was conducted by utilising the doctrinal, historical and comparative methodologies. To proffer appropriate suggestions for the reform of the copyright system in China, it is critical to understand China's own history and culture, its national conditions as well as its legal system. In the meanwhile, by analysing and comparing relevant approaches, legislation and case law across different jurisdictions, some of the more profound ideas and

experiences will be considered and referenced in order to effect future improvement to China's copyright system.

In so far as the doctrinal research methodology is concerned, this thesis was conducted through ascertaining relevant materials on copyright protection, China's history, the theory of P2P technology, amongst others, from various primary and secondary sources, including legislation, books, journal articles, cases, theses, newspapers, official reports, conference papers, websites and blogs. It is worth noting that all of these resources were selected and evaluated carefully in order to ensure the accuracy of the references in this thesis. In this context, the relevant literature will be reviewed from time to time in the context of the respective chapters.

By analysing relevant legal documents from different jurisdictions, including international and national legislation, regulations, treaties, conventions, multilateral and bilateral agreements, theories, approaches, principles and case law, a wide gamut of legal frameworks for copyright protection will be examined.

Moreover, the historical methodology is utilised by this thesis. Although it appears that the current system of copyright protection in China has developed rapidly as a result of China's acceptance of various copyright-

related international treaties and conventions, copyright is not effectively protected in practice in that jurisdiction. In order to improve the system of copyright protection in China, it is very necessary to consider the historical reasons that profoundly influenced the development of copyright in China. Without a consideration of China's own traditions and cultures, it could be argued that China's current copyright law, which was primarily transplanted from western countries, does not reach the standards required by international treaties in practice. This thesis, through the application of the historical methodology, will treat with some of these issues.

The comparative methodology is also adopted by this thesis. By comparing relevant legislation, cases and approaches adopted by China viz-a-viz other selected countries, the gaps and weaknesses in China's existing copyright system is treated with. Relevant solutions from selected jurisdictions will be examined and applied in this thesis, after a comprehensive comparative analysis. More specifically, in this thesis, four jurisdictions are selected as the appropriate comparators. As the copyright systems in the U.S. and E.U. are comparatively advanced, China's legislation and related approaches are compared to China's in order to demonstrate the gaps and weaknesses in its existing system of copyright protection, as well as future improvements that might be necessary.

Additionally, the copyright legislation in Canada and Australia are explored in great detail. Canada was chosen primarily because both China and Canada face similar problems relating to copyright infringement, though the system of copyright protection in Canada has markedly improved in recent years. In this regard, the thesis suggests that some of the Canadian rules in relation to digital copyright protection should be adopted by China. Similarly, as both Australia and China are major consumer countries of copyright works, it is necessary to study the Australian copyright legal system in order to gain key perspectives on how China's system of copyright protection can be improved in future.

In sum, the comparative discussion of both the Canadian and Australian copyright systems in this thesis is part of the thesis' original contribution to the existing literature. The lessons learnt from this discussion will hopefully assist in effecting reform to China's copyright system in future.

# **CHAPTER 2**

## **The Development of Copyright Protection in China**

### **Exclusive Summary**

As the concept of copyright did not exist in the ancient China, it could be said that the area of copyright protection was formally developed until China adopted the opening-up policy in 1979, which was to improve the economic environment and advance nation's international status as well. Accordingly, this chapter will briefly analyse the origin of copyright protection in China at the first, and then emphatically introduce the rapid development of copyright protection in China since 1980s. In the meantime, a series of major international treaties on copyright protection will be introduced and discussed in the chapter, which China has acceded to almost all of them in only a decade. It is noted that in order to reach the standards from those treaties, a few alien legal norms were transplanted to China's legal system of copyright protection. However, without the historical and cultural supports, more and more challenges and complexities have arose in China, especially in the digital era. Therefore, it is necessary to strengthen China's copyright protection system in the near future.

## 2.1. Background Information

### 2.1.1. The Origin of Copyright in China

Copyright is defined as an exclusive right granted to the right holder of an original work.<sup>1</sup> In this regard, the copyright holder is empowered to distribute, copy and/or adapt the work as he/she sees fit. In China, before the invention and widespread use of the printing technology in the Sui and Tang dynasties, which was around the late 7<sup>th</sup> century to the early 8<sup>th</sup> century, two main approaches were used in respect of the transmission of works. The first was by word-of-mouth, and the second by hand-written letters. The latter, in particular, invariably required a considerable amount of time and effort.<sup>2</sup> In order to disseminate the authors' own ideas and propositions in a manner that could reach a large audience, especially in relation to hand-written works, authors at that time did not mind that their work was copied by other people.<sup>3</sup>

With the invention and development of the papermaking technology, as well as the printing technology, particularly after the appearance of typography around the middle of 11<sup>th</sup> century, it became easier to copy and to transmit literary works and artistic works. Therefore, the market for print publishing was gradually extended. Meanwhile, in order to generate generous amounts in

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<sup>1</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 31.

<sup>2</sup> Linli Situ, 'Qianyi Zuopin de Zhuzuoquan yu Bianji Chuban Gongzuo (A Brief Discussion About the Copyright of a Work and the Editing and Publishing Work)' (1996) 1 Mudanjiang Shifan Xueyuan Xuebao.

<sup>3</sup> Ibid.

profits within the context of the Song dynasty, publishers began asking for protection from the government. This resulted in a number of publishers acquiring the exclusive right to stop the copying and distribution of their works by other people.<sup>4</sup>

China officially started protecting copyright works from 932AD when the Emperor of the North Song dynasty indicated his plan to publish the “Nine Books”, and announced an imperial edict forbidding the reproduction of the “Nine Books” without authorization.<sup>5</sup> Subsequently, in the late North Song dynasty, the printer’s colophon was printed; the accompanying note made it clear that, “the work has been applied protection from the superior, any unauthorized reproduction is prohibited”.<sup>6</sup> This was, from all accounts, the earliest copyright notice in the world. That said, it must be noted that “copyright” at that time was limited in nature, as it only protected the profits of publishers, not the authors. It was not until the publishing of the books titled, *Fang Yu Sheng Lan* and *Cong Gui Mao Shi Ji Jie*, in the South Song dynasty, that the protection offered by copyright extended to authors.<sup>7</sup>

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<sup>4</sup> Lihua Yang, ‘Zhongguo Gudai Zhuzuoquan Baohu Jiqi Chengyin Tanxi (Exploration of Copyright Protection and Origin Cause in Ancient China)’ [2004] *Jinling Falv Pinglun* 38.

<sup>5</sup> Nine Books is a set of collection of Chinese classics, which could be divided into two parts, named Four Books and Five Classics respectively. The Four Books illustrated the core value and belief systems in Confucianism, include Great Learning, Doctrine of the Mean, Analects and Mencius. The Five Classics are five pre-Qin Chinese books that form part of the traditional Confucian canon, including Classic of Poetry, Book of Documents, Book of Rites, I Ching and Spring and Autumn Annals.

<sup>6</sup> G. H. Tang, *Copyright and the Public Interest in China* (Edward Elgar Publishing 2011) 65.

<sup>7</sup> Shangshu Zhu, ‘The Earliest Copyright Law in the World ’ chinadailycomcn <[http://www.chinadaily.com.cn/hqph/2007-01/30/content\\_796549\\_3.htm](http://www.chinadaily.com.cn/hqph/2007-01/30/content_796549_3.htm)> accessed 30

Notwithstanding this, however, it was generally felt that there was, at the time, no common system of copyright protection in ancient China. Interestingly, the concept of “copyright”, which was referred to as “*Banquan*” or “*Zhuzuoquan*” in Chinese, did not originate in China,<sup>8</sup> but rather in Japan.<sup>9</sup> In this connection, it was not until 1903 that the term “*Banquan*” was used in a treaty that was concluded between China and the United States of America, referred to as “Zhong Mei Tong Shang Xing Chuan Xu Ding Tiao Yue” (China-United States Renewed Treaty on Commerce and Navigation).<sup>10</sup> Essentially, in order to fulfil the obligations that arose from this treaty in respect of copyright protection, the government of the Qing dynasty promulgated the “Daqing Zhuzuoquan Lv” (Great Qing Copyright Code) in 1910, which was the first copyright law in Chinese history.<sup>11</sup> Since that time, all legislation regarding copyright protection was given a different legal terminology; that is, “*Banquan*” was changed to “*Zhuzuoquan*” by the government – a term of art that is still in use today.<sup>12</sup> Suffice it to say, it is also noteworthy that the Northern Warlords government enacted its own copyright law in 1915.<sup>13</sup> Unfortunately, however, this copyright law was ultimately not enforced because of the fall of the

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January 2012.

<sup>8</sup> Mingde Li and Chao xu, *Copyright Law* (1 edn, Law Press, China 2003) 1.

<sup>9</sup> Ibid.

<sup>10</sup> Zhihai Cui, ‘A Preliminary Study of The Revised Sino-American Commercial Navigation Treaty of 1903’ (2001) 5 *Jindaishi Yanjiu* (Modern Chinese History Studies).

<sup>11</sup> Yiman Zhang, ‘Establishing Secondary Liability with a Higher Degree of Culpability: Redefining Chinese Internet Copyright Law to Encourage Technology Development’ (2007) 16 *Pacific Rim Law & Policy Journal* 257 259.

<sup>12</sup> “*Banquan*” means tending to concern the right of the publisher. “*Zhuzuoquan*” means tending to concern the right of the author.

<sup>13</sup> Chengsi Zheng and Michael D. Pendleton, *Chinese Intellectual Property and Technology Transfer Law* (Sweet & Maxwell 1987) 87.

government. This did not, however, stop the enactment of another copyright law in 1928 by the government of Kuomintang.<sup>14</sup> Interestingly, as a result of the Japanese invasion and the outbreak of the civil war between the Communists and Nationalists, this law had very little effect during that period of time. After the Kuomintang retreated to Taiwan in 1949, the 1928 copyright law was not enforced in Mainland China, and was accordingly repealed in 1959 by the Chinese government.<sup>15</sup>

It is noteworthy that when the People's Republic of China was founded in 1949, all of the previous laws and regulations, including many of the foregoing, were annulled. In this regard, it can be argued that at the earliest stage of nation-building, there was no development of copyright protection. That said, it must also be noted that there were tremendous developments in many other fields, including technology and intellectual property. As such, in order to stimulate new creations and reassure intellectuals that their rights would be well protected, a series of pronouncements about publication and author remuneration policies were issued in quick succession,<sup>16</sup> which provided some level of copyright protection to authors at that time.<sup>17</sup> However, without formal copyright legislation, the phenomenon of piracy still occurred quite

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<sup>14</sup> Ibid.

<sup>15</sup> Wolfram Eberhard, *A History of China* (2nd edn, University of California Press 1960), Chapter 11 and 12.

<sup>16</sup> William P. Alford, *To Steal a Book Is an Elegant Offense* (Stanford University Press 1995) 59-60; see also Sanqiang Qu, *Copyright in China* (Foreign Language Press 2002) 64.

<sup>17</sup> Alford 59-60.

frequently. This disconcerting situation did not, however, significantly change until 1978.

In the late 1970s, through reform and, in particular, the opening-up policy, the economic environment in China was considerably diversified, which stimulated the vitality of the Chinese society. In this context, the Chinese government realised the importance of copyright protection and begun drafting a copyright law.<sup>18</sup> On 1<sup>st</sup> January 1987, the *General Principles of the Civil Law of the People's Republic of China* came into effect. It represented the first time that Chinese citizens and juridical persons had been vested with copyright protection by the national basic law after the new China was founded. Thereafter, there were further developments, with the *Copyright Law of the People's Republic of China* having been enacted in 1990. Among other things, this law sought to reflect the needs of the planned economy during that period of time.

In 1992, China acceded to two international conventions, namely the *Berne Convention* and the *Universal Copyright Convention*, respectively.<sup>19</sup> This effectively means that copyright protection in China is in line with international norms. In short, compared to some of other countries which have had modern

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<sup>18</sup> Ibid 65-66.

<sup>19</sup> Deli Yang, 'The Development of Intellectual Property in China' (2003) 25 World Patent Information 131 136.

systems of copyright protection in place for an extended period of time, China only spent a brief period of time creating its copyright system. Of note, in this regard, however, is the fact that China was more or less transplanting applicable western laws. This might perhaps explain why there was very little debate surrounding the adoption of China's copyright law, as well as the fact that little or no account was taken of traditional Chinese laws, culture and attitudes.

More generally, it is important to note that, in order to join the WTO, China had to adapt to the new economic system, thereby transforming itself from a planned economy to a market economy.<sup>20</sup> It also had to adapt to quickly evolving technologies, which might perhaps explain why the *Chinese Copyright Law* has since been revised, in accordance with the Decision on the Amendment of the Copyright Law of the People's Republic of China, passed on 27<sup>th</sup> October 2001 at the 24<sup>th</sup> Session of the Standing Committee of the Ninth National People's Congress.<sup>21</sup> It is arguable, therefore, that the latest version of the Chinese copyright law fits in quite nicely with the dynamics of a market economy. Additionally, it is arguable that, in many respects, such a law conforms to the demands of the TRIPS agreement. For example, the amended copyright law was adapted to reflect the developments of the

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<sup>20</sup> Nicholas Hope, Dennis Yang and Mu Li, *How Far Across the River?: Chinese Policy Reform at the Millennium* (Stanford University Press 2003) 33.

<sup>21</sup> Copyright Law of the People's Republic of China.

modern digital era, including rules relating to copyright protection on the internet, amongst others. Furthermore, on 11<sup>th</sup> December 2001, China became a member of the World Trade Organization,<sup>22</sup> which not only served to enhance China's international standing, but also buttress China's open policy, as well as effectively protect China's economic and trade arrangements in the international market.

In sum, then, it is submitted that, pursuant to the amended copyright law, copyright protection within the context of China has been further improved, which would hopefully inspire authors to create artistic works, literary works and scientific works. In this connection, it is arguable that the new copyright law is promoting the development of various industries in China, especially in the field of information technology. China's copyright law is also arguably in conformity with international law, and reflects traditional western justifications for intellectual property rights, and, copyright, in particular.

### **2.1.2. The Development of Copyright Protection in China**

In the modern digital society, almost every country around the globe has recognized the importance of a system of copyright protection, as such

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<sup>22</sup> Warren Newberry, 'Copyright Reform in China: A TRIPS Much Shorter and Less Strange Than Imagined' (2002-2003) 35 Conn L Rev 1425.

protection has the potential to influence the development of their culture, educational and scientific landscapes, economy and industry. Because the main purpose of copyright is to encourage the creation and transmission of intellectual works, a copyright system protects these works not only in their home countries, but also in foreign countries.<sup>23</sup>

The rapid development of innovation and technology has led to an extension of the protection offered by copyright more than ever before. Copyright protection not only protects works in the cultural field, but has been widely used in the industrial field as well.<sup>24</sup> This is because copyright protection is not limited to written works, but also includes musical, dramatic, choreographic and acrobatic works, as well as works of fine art and architecture. It also extends to computer software, drawings, and product designs, as well as maps, sketches and other graphic works and model works. The rapid extension of copyright protection, however, has the potential to create new problems. These problems include, among other things, the infringement of copyright work by digital technology. Such contemporary problems, it is submitted, may be even more damaging to copyright holders than traditional forms of copyright infringement. This is therefore an area where amelioration

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<sup>23</sup> Xiaohong Yan, 'The Copyright and Culture in the Age of Big Data' (*Media*, 2015) <<http://www.gapp.gov.cn/govpublic/96/241836.shtml>> accessed 12 May 2015.

<sup>24</sup> Shuyu Qi, 'Jianli Wenhua Falv Tixi shi Shixian Wenhua Qiangguo Mubiao de Baozhang' *www.cpcnews.cn* <<http://theory.people.com.cn/n/2015/0311/c83863-26674908.html>> accessed 25 March 2015.

is required. In short, it cannot be the case that the law does not keep up with new advancements in technology; the law must be responsive in order to meet the new challenges that are directly associated with advancements in technology.

Since the dawn of the 21<sup>st</sup> century, and, more especially in recent years, the internet has developed by leaps and bounds. The transfer of information is more efficient and easier than ever before. Meanwhile, because of its widespread access, low price as well as the reliable interactions which it secures, the internet has become one of the most important tools for information transfer. According to the latest results of a survey conducted by the China Internet Network Information Center, the administrative agency responsible for Internet affairs under the Ministry of Information Industry of the People's Republic of China, there was a 2.1% increase in the number of persons using the internet in 2014 compared to 2013, which accounts for about 649 million users.<sup>25</sup> While the internet, and, digital technology, in particular, has been an important contributor to changes in Chinese people's lifestyle, it is also an important factor underlying economic growth in China.

Notwithstanding these positive outcomes, however, it must be borne in mind that, with the increasing expansion of the internet, contemporary problems

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<sup>25</sup> CNNIC, *35th Statistical Report on Internet Development in China* (2015) 25.

have arisen. More specifically, within the context of the digital era in China, the rapid development of the internet, including access to internet music, internet video and search engines, has brought about greater challenges to copyright protection than ever before. How to effectively protect copyright in the digital era in China, and, by extension, other countries, is the universally difficult question which must accordingly be addressed.

Compared with the traditional printing technology, the internet undoubtedly has a more serious, if not deleterious, effect on copyright. On the one hand, it is very simple for copyright owners themselves to publish their works on the internet. These published works can be accessed within a relatively short period of time, which has the natural corollary of inspiring copyright owners to increase the dissemination of their work. Not only has the internet facilitated increased access to published works, but it has also allowed for the generation of interest in the works of copyright owners, thereby contributing to the latter's fame and enthusiasm. That said it is perhaps axiomatic that the internet is a double-edged sword. Notwithstanding the aforementioned positive results, however, it must also be borne in mind that the internet has made it easier for works to be re-transmitted at little to no cost. More specifically, once works have been uploaded to the internet, it is possible that thousands of persons may use these works. If such works have not been fitted with high-tech safeguards, it is difficult for the copyright owner to control

other people's use of said works, whether the use is permitted or not.<sup>26</sup> This effectively means that limiting the transmission of unauthorized works is tremendously difficult, if not impossible. In this context, the rights of the copyright owner may be significantly impaired. More specifically, infringement of copyright works causes both loss of control said works, as well as economic losses. Losses aside, it is also arguable that if works which have been created are not ascribed full protection, authors' enthusiasm and creativity might be stymied. In other words, the loss of control, as well as the loss of the ability to enforce rights in works, may create a negative incentive for creativity. In this regard, it is necessary to amend or enact relevant pieces of legislation and regulations that are aimed at regulating the infringement of copyright works. The corollary of this is the protection of copyright owners.

In view of the challenges and complexities identified above, it is important to note that recent Chinese legislation have sought to address at least some of these problems. In July 2006, for example, the *Regulation on the Protection of the Right of Communication through an Information Network* entered into force. This important piece of legislation seeks to, among other things, afford digital copyright protection.<sup>27</sup> Notwithstanding this, however, it has since become evident that, in the network information era, which is characterized by

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<sup>26</sup> China E-business Research Center, 'Introduction to the Protection of the Right of Information Network Transmission' [cniprcom <http://www.cnipr.com/news/sdbd/201005/t20100518\\_116804.html>](http://www.cnipr.com/news/sdbd/201005/t20100518_116804.html) accessed 19 June 2014.

<sup>27</sup> Regulations for the protection of the Right of Communication through Information Network.

many legal problems relating to reproduction, including temporary reproduction, regulation through the enactment of a law is simply not enough. The difficulties associated with regulating the reproduction of copyright works is not, however, a problem that is unique to China; there are a few other countries that similarly do not have a clear and effective law on the question of reproduction. Unfortunately, the Chinese *Regulation on the Protection of the Right of Communication through an Information Network* does not sufficiently deal with this problem either.

On the question of copyright protection in China, it is noteworthy that the Chinese Copyright Law, in Article 1, provides that one of the goals of said law is to protect the copyright of authors in their literary, artistic and scientific works and copyright-related rights and interests. Additionally, the law seeks to encourage the creation and dissemination of works which would contribute to the construction of socialist spiritual ideals and material civilization, as well as to promote the development and prosperity of the socialist culture and science.<sup>28</sup> Operationally, however, it appears that, in practice, the copyright law's overarching aims are to improve the dissemination of works and increase public access to new works, whilst simultaneously ensuring that protection is granted to authors, thereby encouraging the production of new works. In other words, copyright legislation within the context of China seeks

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<sup>28</sup> Article 1, Copyright Law of the People's Republic of China.

to strike the right balance between societal interests and authors' rights in copyrighted works.<sup>29</sup>

Notwithstanding the existence of copyright legislation in China, however, one of the key questions which have arisen in recent years is how to specifically protect authors' rights, particularly in relation to reproduction. On this question, it is important to note that, in this rapidly developing information society, the traditional copyright protection system which is centered on the right of reproduction faces a great challenge. Because of the burgeoning of internet technology in China, the main form of infringement in recent years has been described as the use of digital means to publish or transmit copyright works to the public without authorization. This not only involves reproduction, but also making available the work to the public. In an effort to respond to this challenge, the *Copyright Law of the People's Republic of China* and the *Regulation on the Protection of the Right of Communication through an Information Network* were enacted. The former Act, enacted in 2001, contains provisions regarding the reproduction right, rather than the publishing right.<sup>30</sup> This is in contrast to the 2006 Act, which contains provisions regarding the right of communication.<sup>31</sup> In this context, it would seem that the right of communication or the publishing right is viewed as a core one, and

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<sup>29</sup> Yahong Li, 'Changing perception of piracy/copyright protection in Digital and Internet Era' (The 11th ASLI Conference, University of Malaya, Kuala Lumpur, 20-30 May 2014).

<sup>30</sup> Copyright Law of the People's Republic of China.

<sup>31</sup> 2006 Regulations.

accordingly given requisite protection in the information era, and not just the traditional reproduction right. In other words, the foregoing laws specifically address different areas of copyright. They deal with different rights afforded the copyright holder. Moreover, as can be seen from the history of copyright law and its concomitant development, the law in China on this important issue was changed because of the development of the printing technology, and, later, because of the advent of internet technology.

## **2.2. International Conventions**

### **2.2.1. The Berne Convention**

In the 19<sup>th</sup> Century, a multitude of great artists and writers emerged in Europe, especially in France.<sup>32</sup> As these artists and writers were at the time creating a number of landmark works, which have since been circulated around the world, the international protection of copyright became a hot topic among several European countries.<sup>33</sup> To this end, Victor Hugo, a famous writer from France, held a literary convention in Paris in 1878.<sup>34</sup> At this convention, the International Literary and Artistic Association was established, with the main purpose of promoting an international agreement to protect authors of literary,

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<sup>32</sup> For a more detailed analysis of the Berne Convention please see Liyong Xu, 'Lun Banquan Guoji Baohu (An Introduction to the International Protection for Copyright)' (2005) 1 Publishing Science and Peter Burger, 'Berne Convention: Its History and Its Key Role in the Future' (1988) 3 The Journal of Law and Technology 1.

<sup>33</sup> Burger 7-8.

<sup>34</sup> Ibid 11.

scientific and artistic works.<sup>35</sup> The association achieved this goal with the adoption of the Berne Convention for the Protection of Literary and Artistic Works on 9<sup>th</sup> September 1886.<sup>36</sup> This is the first international copyright convention in the world. The Berne Convention was subsequently re-negotiated in 1896 in Paris, in 1908 in Berlin, in 1928 in Rome, in 1948 in Brussels, in 1967 in Stockholm and in 1971 in Paris, respectively. It should be noted, in this context, that there are a number of core features in the Berne Convention. One of these features is the establishment of minimum standards regarding national copyright legislation in each member state. For example, one of the minimum rules created by virtue of the adoption of the Berne Convention was that the period of copyright is to be a minimum of the author's lifetime plus 50 years.<sup>37</sup>

China formally became a member of the Berne Convention on 14<sup>th</sup> October 1992. While the application process was, in some respects, conducted smoothly, a number of challenges, however, arose. At the outset, it is important to note that, in December 1978, following the culmination of the ten years cultural revolution, China entered the new era that was characterized by a socialist market economy. Later on, because of the strategic plan of socialist

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<sup>35</sup> 'ALAI Congress, London 14th - 16th June 2009. From 1710 to Cyberspace: Celebrating 300 years of copyright and looking to its future.' (14 June 2009) <<http://www.law.cam.ac.uk/press/events/2009/06/alai-congress-london-14th--16th-june-2009-from-1710-to-cyberspace-celebrating-300-years-of-copyright-and-looking-to-its-future/916>> accessed 13 July 2012.

<sup>36</sup> Burger 15.

<sup>37</sup> Article 7, Berne Convention for the Protection of Literary and Artistic Works.

modernization, China urgently needed to develop the areas of science, education, culture, as well as widely transmit the large volume of creations that were being made by its nationals. In this regard, the Chinese government, in 1979, put forward a proposal to the effect that a copyright law should be urgently drafted.<sup>38</sup> Meanwhile, in order to bring about a modernization drive, implementation of a basic state policy in respect of reforms, the opening-up policy as well as the widespread foreign exchange of technology and culture was required.<sup>39</sup> This could be achieved by improving and managing copyright.

However, the copyright law had been in the draft stage for almost 10 years in China. During this period of time, there were numerous discussions. Interestingly, as can be seen from these discussions, one of the most controversial points concerned foreign affairs, rather than domestic issues.<sup>40</sup> For example, in 1985, the Chinese government held a meeting to decide on whether to become a member of international copyright treaties.<sup>41</sup> During this meeting, the participants considered that China should enter into the

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<sup>38</sup> Jiaquan Shang, 'The Development of Copyright in China- The Significance of Revision of Chinese Copyright Law', Chinese Lawyer Website <[http://article.chinalawinfo.com/ArticleHtml/Article\\_69358.shtml](http://article.chinalawinfo.com/ArticleHtml/Article_69358.shtml)> accessed 26 April 2013.

<sup>39</sup> In 1979, China's new President Xiaoping Deng realised that China needed to modernize and open itself both economically and culturally to the world. Therefore, a series of reform was implemented afterwards. Among them, the reform and opening-up policy, involving opening the economy to the outside world, was one of the most important policies, which wanted to attract and invest the foreign business in the country, setting into motion the economic transformation of modern China. In order to reach the purpose according to this policy, the field of intellectual property has been considered as one of the areas and needed to be urgently developed during that period of time.

<sup>40</sup> 'From Beijing to Berne- The Process of Copyright Protection in China' chinacomcn <[http://www.china.com.cn/book/zhuanti/qkjc/txt/2007-08/03/content\\_8624228.htm](http://www.china.com.cn/book/zhuanti/qkjc/txt/2007-08/03/content_8624228.htm)> accessed 7 May 2013.

<sup>41</sup> Ibid.

international treaty, because it stood to benefit from improved cultural exchanges between China and foreign countries. However, when the draft copyright law of 1987 was made subject to consultation and scrutiny, some departments were concerned that if China acceded to the Berne Convention, on the basis of 1987 version of the copyright law, foreign books and periodicals would be difficult to introduce into China, which would mean that the development of science, technology and education studies might be stymied.<sup>42</sup> Therefore, said departments advised the government to halt the progress of the draft copyright law, and to temporarily delay the process involved in acceding to the Convention.<sup>43</sup> One year later, the Bureau of Legislative Affairs, under the auspices of the State Council, held a meeting to discuss the feasibility of drafting and subsequently enacting a copyright law. At the end of this meeting, an agreement was reached to move with alacrity so as to enact copyright legislation.

During the process of drafting the copyright law, there were various issues which had to be determined; for example, how best to effectively combine the principles espoused in the Berne Convention with the Chinese social, economic and political conditions. This was, to some extent, resolved through

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<sup>42</sup> Gao Liu, 'The Whole Story of China's Entry into the International Copyright Convention' National Copyright Administration of the People's Republic of China <<http://www.gapp.gov.cn/chinacopyright/contents/537/20672.html>> accessed 14 September 2013.

<sup>43</sup> , 'From Beijing to Berne- The Process of Copyright Protection in China'.

constant communication with, and reassurance from, the World Intellectual Property Organization. In September 1990, the first copyright law of People's Republic of China was promulgated.<sup>44</sup> In this important piece of legislation, a number of provisions specifically addressed the protection of foreign works. For example, Article 2(2) provided that, "any work of a foreigner which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs or in which he has habitual residence and China, or under an international treaty to which both countries are party, shall be protected in accordance with this Law."<sup>45</sup> This was augmented by Article 2(3), which provided that "works of foreigners first published in the territory of the People's Republic of China shall enjoy copyright in accordance with this Law."<sup>46</sup> In short, these provisions, in embodying the territorial and reciprocity principles, demonstrated the positive manner in which China tried to protect foreign copyright works.

After the Copyright Act came into effect, the question of whether to enter the Berne Convention was once again put on the national agenda. In this context, in September 1991, the Chinese Copyright delegation went to Geneva to consult with the World Intellectual Property Organization about China's

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<sup>44</sup> Copyright Law of the People's Republic of China.

<sup>45</sup> Article 2(2), *ibid.*

<sup>46</sup> Article 2(3), *ibid.*

accession to Berne Convention.<sup>47</sup> Subsequently, in May 1992, the State Council submitted a document to the National People's Congress Standing Committee, which advanced a proposal on China's accession to the Berne Convention. The proposal was subsequently adopted at the 26<sup>th</sup> session of the Standing Committee of the Seventh National People's Congress on 1<sup>st</sup> July 1992. Subsequently, on 10<sup>th</sup> July, the Chinese Permanent Representative of United Nations agencies in Geneva formally handed the application concerning China's accession to the Berne Convention to Director-General of World Intellectual Property Organization. On 15<sup>th</sup> July 1992, the World Intellectual Property Organization announced that China had become a member of Berne Convention, and this convention would enter into force in China on 15<sup>th</sup> October 1992.<sup>48</sup>

In retrospect, it can be argued that, on the basis of the contents of various international copyright treaties, including the Berne Convention, the current Chinese copyright law is consistent with the main principles espoused by those treaties. This can partly be attributed to the fact that, as early as 25 September 1992, China's State Council specifically promulgated a document titled, "the Implementation of International Copyright Treaties".<sup>49</sup> This

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<sup>47</sup> Liu.

<sup>48</sup> 'Berne Notification No. 140: Berne Convention for the Protection of Literary and Artistic Works (Accession by the People's Republic of China)' (*WIPO*, 15 July 1992) <[http://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_140.html](http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_140.html)> accessed 3 July 2013.

<sup>49</sup> International Copyright Treaties Implementing Rules.

document made it clear that, wherever there were inconsistencies as between China's copyright law and its international treaty obligations, the State Council would issue further guidance regarding how such inconsistencies ought to be resolved. This suggests that, at the very least, foreign works, in particular, have been given adequate protection in China since 1991.

In conclusion, it can be argued that, because China is a developing country, it is comparatively lagging behind in terms of the development of its system of copyright protection, at least when compared to its developed counterparts. This point is buttressed by the fact that when China had initially begun drafting its copyright law, more than 100 countries from all around the world had already enacted their own copyright laws. China's copyright law was enacted in September 1990, and enforced from June 1991.<sup>50</sup> It was only after a year and four months that the Berne Convention was acceded to by China. In this context, it is submitted that China spent around a decade trying to create a municipal copyright system, which is in contradistinction to many other countries, which may have spent several decades trying to reach this goal. That said, in drafting the Chinese copyright law, it is clear that there was very little discussion, and, because it was western law that was transplanted, no proper account was taken of Chinese traditions and culture. In this regard, it

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<sup>50</sup> Stephanie L. Sgambati, 'China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China' (1992) 3 Fordham Intellectual Property, Media and Entertainment Law Journal 139 140.

is arguable that in order to better reach the standards required by international treaties in practice, the relevant Chinese copyright legislation should be further enhanced by taking better account of Chinese traditions and cultural dynamics.

## **2.2.2. Universal Copyright Convention**

Aside from the Berne Convention, another international copyright convention was also became effective in China in the 1990s; that is, the Universal Copyright Convention (UCC), which was enacted on 30<sup>th</sup> October 1992. The UCC plays a similarly important role as the Berne Convention<sup>51</sup> in the history and development of international copyright protection.<sup>52</sup>

The UCC was prepared by the United Nations Educational, Scientific and Cultural Organization in 1947, and was adopted in 1952 in Geneva.<sup>53</sup> The Convention subsequently entered into force in 1955. It was then revised in Paris in 1971.<sup>54</sup> As intimated above, this Convention is one of the two

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<sup>51</sup> For a more detailed analysis of the Berne Convention please see Burger.

<sup>52</sup> The Central People's Government of the People's Republic of China, 'An Introduction to Cooperation between China and International Copyright Organization' [www.govcn <http://www.gov.cn/banshi/2005-06/28/content\\_10736.htm>](http://www.gov.cn/banshi/2005-06/28/content_10736.htm) accessed 3 August 2013.

<sup>53</sup> Joseph S. Dubin, 'The Universal Copyright Convention' (1954) 42 California Law Review 89 89-90.

<sup>54</sup> Silke von Lewinski, 'The Role and Future of the Universal Copyright Convention' e-Bulletin Copyright [Bulletin <http://portal.unesco.org/culture/en/files/32622/11718941731ucc\\_study\\_e.pdf/ucc\\_study\\_e.pdf>](http://portal.unesco.org/culture/en/files/32622/11718941731ucc_study_e.pdf/ucc_study_e.pdf) accessed 17 July 2013.

principal international treaties on the issue of copyright protection; the other being the Berne Convention.

The main reason behind the adoption of the UCC lies in the fact that the United States, which is the largest user of European works, decided not to accede to the Berne Convention.<sup>55</sup> After World War II, the United States became a relatively developed country in the fields of science, art and culture. It was thus felt that international copyright protection was apposite. However, the United States did not wish to adopt the Berne Convention, whose enforcement was pioneered by a number of European countries, including the United Kingdom and France, as it wanted to evade liability arising from its use of European works. The converse was also true; most works from the United States which were produced during this period of time were not used in European countries. As such, the United States presided over, and later adopted, the Universal Copyright Convention in 1952.<sup>56</sup>

It can be argued that the Universal Copyright Convention was an alternative to the Berne Convention, in particular for those countries which did not agree to parts of the Berne Convention, but still wished to accede to some form of multilateral copyright protection. These countries included developing

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<sup>55</sup> Ibid.

<sup>56</sup> Dubin.

countries as well as the Soviet Union, which collectively considered that the copyright protection granted by the Berne Convention would primarily benefit western developed copyright-exporting countries.<sup>57</sup> Interestingly, some of the state parties to the Berne Convention also acceded to the Universal Copyright Convention.

With regard to the substantive content of both of these conventions, it is important to note that the Berne Convention provided copyright protection based on the life of the author, and did not require a copyright notice or registration before copyright could be granted. By contrast, copyright terms in the United States were fixed and renewable, and the Universal Copyright Convention provided that a copyright notice and registration at the Copyright Office were steps which had to be taken before a work could be granted copyright protection. Accordingly, if the United States had wished to accede to the Berne Convention at that time, it would have had to amend some of the main clauses of its copyright law to comport with the requirements of the Berne Convention. The reality, however, was that the United States was far from prepared to amend its copyright law at the time.<sup>58</sup> Rather, it ensured that the Universal Copyright Convention included a clause that permitted those states which had the same copyright protection as the United States to not to

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<sup>57</sup> Lewinski.

<sup>58</sup> John Schulman, 'International Copyright in the United States: A Critical Analysis' (1954) 19 Law and Contemporary Problems 141.

amend their legislation.<sup>59</sup> Notwithstanding this, however, it is noteworthy that in 1989, the United States began to change its national copyright law to meet the requirements of the Berne Convention; in fact, it later went on to become a state party to the Berne Convention.<sup>60</sup>

When one compares the Berne Convention and Universal Copyright Convention, it becomes immediately apparent that the overall level of protection afforded by the former is slightly higher than the latter. In order to prevent state parties to the Berne Convention, who sought low-level copyright protection by acceding to the Universal Copyright Convention, from withdrawing from the Berne Convention, the Universal Copyright Convention, Appendix declaration relating to Article XVII. (a), provided that countries which have entered into Berne Convention could accede to Universal Copyright Convention, but there was an important caveat; they could not renounce their membership in the Berne Convention. Had they been allowed to, adequate copyright protection would arguably not have been afforded by the Universal Copyright Convention.<sup>61</sup>

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<sup>59</sup> Dubin 91.

<sup>60</sup> Jane C. Ginsburg and John M. Kernochan, 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' (1988-1989) 13 Colum-VLA JL & Arts 1.

<sup>61</sup> Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971.

In so far as China is concerned, it is noteworthy that in the early stages of copyright development, the primary foreign copyright relationship existed as between China and the United States, presumably because the majority of copyrighted works that were used in China originated from the United States. It is no surprise, then, that when China entered into the 21<sup>st</sup> century, the United States was the first country that raised the issues of copyright protection with China.<sup>62</sup> More specifically, in order to enhance the fields of culture, science and art through the introduction of foreign copyrighted work, China forwarded its application for accession to the Universal Copyright Convention to United Nations Educational, Scientific and Cultural Organization on 30<sup>th</sup> July 1992. This Convention entered into force in China on 30<sup>th</sup> October 1992.<sup>63</sup>

After China joined both the Berne Convention and Universal Copyright Convention, foreign works gained a significant degree of protection, irrespective of whether the work in question originated from a state party to the Berne Convention or the Universal Copyright Convention. Likewise, where Chinese works are used in foreign countries, as long as said countries are state parties to either of the conventions, they would be granted a certain degree of protection. This suggests that the development of copyright

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<sup>62</sup> Jeanne Boden, *The Wall Behind China's Open Door: Towards Efficient Intercultural Management in China* (Asp / Vubpress / Upa 2008) 186.

<sup>63</sup> The Central People's Government of the People's Republic of China, An Introduction to Cooperation between China and International Copyright Organization.

protection in China has gradually been buttressed to comport with international standards on copyright protection. This will hopefully be of benefit to domestic cultural industries, as well as the general business environment in China.<sup>64</sup>

### **2.2.3. World Intellectual Property Organization (WIPO) Treaties**

The World Intellectual Property Organization (WIPO) is an international organization which aims to encourage creative activity and promote the protection of intellectual works.<sup>65</sup> The organization further seeks to develop intellectual property protection throughout the world as well as enhance cooperation between different countries and various intellectual property organizations.<sup>66</sup> This organization was established in 1967. Fifty-one member states from Paris Convention (International Union for the Protection of industrial Property) and the Berne Convention (International union for the Protection of Literary and Artistic Works) convened the WIPO in Stockholm, the capital city of Sweden.<sup>67</sup> Today, there are 188 member states which have entered into this organization.<sup>68</sup>

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<sup>64</sup> Yang.

<sup>65</sup> Convention Establishing the World Intellectual Property Organization.

<sup>66</sup> Ibid.

<sup>67</sup> Georg Hendrik Christiaan Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property, as Revised at Stockholm in 1967* (WIPO 1968).

<sup>68</sup> WIPO, 'Member States' <<http://www.wipo.int/members/en/>> accessed 17 July 2015.

WIPO has promulgated a series of intellectual property treaties. The two main treaties, in this regard, are the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Both of these two treaties were agreed upon in 1996, and entered into force in 2002.<sup>69</sup> They aim to supplement and extend existing Conventions in the field in order to better protect copyright in the digital era.<sup>70</sup> The provisions contained in these treaties reflect modern technological changes, including new challenges which have arisen in the digital era<sup>71</sup> as a result of social, economic, cultural and technological developments.<sup>72</sup>

### **2.2.3.1. WCT**

With the rapid development of Internet technology, people's lives have undoubtedly become more and more convenient. Simultaneously, however, an increasing number of challenges have manifested themselves, including conflicts between copyright protection and neighbouring rights protection. In an effort to resolve at least some of these issues, the WCT was enacted, as "a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works."<sup>73</sup> In short, the WCT, as a

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<sup>69</sup> Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press 2002) 19-20.

<sup>70</sup> WIPO Internet Treaties.

<sup>71</sup> WCT Art. 1 defines the Treaty as a 'special agreement' within Art. 20 Berne Convention.

<sup>72</sup> Ruth Okediji, 'The Regulation of Creativity Under the WIPO Internet Treaties' Minnesota Legal Studies Research Paper No 09-30 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1433848](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433848)> accessed 19 August 2013.

<sup>73</sup> Article 1(1), WIPO Copyright Treaty.

supplement of Berne Convention, seeks to achieve a balance between copyright protection and the public interest.

A thorough analysis of the WCT's content reveals that there are at least three provisions which reflect the so-called 'digital agenda'.<sup>74</sup> The first is Article 8, which provides that 'authors of literary and artistic works shall enjoy the exclusive right of authorizing and communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'<sup>75</sup> This, in effect, means that contracting parties are under an obligation to provide authors exclusive rights in so far as allowing them to make their works available to the public through their chosen methods, including the Internet. Second, on the basis of Article 11, contracting parties are also under an obligation to provide adequate legal protection against the circumvention of effective technological measures which are sometimes used by authors to protect their legal rights.<sup>76</sup> And, third, in accordance with Article 12, contracting parties must provide adequate and effective legal remedies to those who are adversely affected by interferences with 'rights management information', which is used to identify

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<sup>74</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 44.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

or explore copyrighted works.<sup>77</sup> The specific modalities of these provisions will be further explored in Chapter 7.

### **2.2.3.2. WPPT**

WPPT was enacted on 20 December 1996 to supplement the Rome Convention.<sup>78</sup> As for the subject matter of protection, it is important to note that the WPPT only makes provision concerning the rights of performers and producers of phonograms, and not broadcasters. This can perhaps be explained by the fact that the treaty mainly aims to resolve new problems relating to copyright protection in the digital era, and, in particular, the protection of performers and phonogram producers on the internet.

With regard to the protection of performers in the music industry, the WPPT includes a number of important provisions. In this context, it is important to note that the WPTT contains three extra rights which are not contained in previous treaties. First, in Articles 7-10, performers are afforded rights to manage various acts which relate to the fixation of their performances, such as reproduction, rental, distribution and the making of copies.<sup>79</sup> Second, in Article 15, the WPPT makes it clear that, with respect to the direct or indirect use of phonograms published for commercial purposes for broadcasting or for

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<sup>77</sup> Ibid.

<sup>78</sup> WIPO Performances and Phonograms Treaty.

<sup>79</sup> Article 7-10, *ibid.*

any communication to the public, contracting parties should ensure that performers are remunerated for such works.<sup>80</sup> Third, in accordance with Article 5, contracting parties are required to confer moral rights on the performers of 'live aural performances or performances fixed in phonograms',<sup>81</sup> which is quite similar to Article 6bis of the Berne Convention.<sup>82</sup> The modalities of these specific provisions will be addressed in Chapter 7 of this thesis.

More generally, it is also important to note that the WPPT has made provision for the protection of the rights of producers of phonograms. More specifically, the treaty has conferred on the producers of phonograms the rights of control, distribution, reproduction, rental and making copies.<sup>83</sup> Additionally, the three provisions regarding 'digital agenda', which were discussed above in relation to the WCT, are also applicable under the WPPT.

In short, it is submitted that the WPPT is a timely and important development in this field, as it specifically addresses the rights of copyright owners as well as neighboring rights. Importantly, the treaty not only re-defined the rights of reproduction and distribution, which exist under traditional copyright laws, but also enacted a number of new rights, such as the right of rental and the right

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<sup>80</sup> Article 15, *ibid.*

<sup>81</sup> Article 5, *ibid.*

<sup>82</sup> Article 6bis, Berne Convention.

<sup>83</sup> Article 11-14, WPPT.

of communication to the public. Additionally, the WPPT has also required contracting parties to afford greater protection and relief in relation to technological measures and rights management information.<sup>84</sup>

### 2.2.3.3. WIPO and China

China formally joined the WIPO on 3 June 1980, making it the ninetieth member state to have joined the organization.<sup>85</sup> After over thirty years, China has arguably managed to maintain good relations with the WIPO. More specifically, China has actively attended the various conferences, assemblies and meetings organised by the WIPO. China has also become a member of a number of WIPO committees, including the Standing Committee on Information Technology and the Standing Committee on Copyright and Related Rights, amongst others.

More generally, there are 26 treaties which are administered by WIPO.<sup>86</sup>

Since 1980, China has become a state party to almost all treaties on copyright

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<sup>84</sup> For more detailed analysis, please see Peter K. Yu, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol 1 (Peter K. Yu ed, Greenwood Publishing Group 2007); Arpi Abovyan, *Challenges of Copyright in the Digital Age: Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Herbert Utz Verlag 2014); and Gwen Hinze, 'Brave New World, Ten Years Later: Reviewing the Impact of Policy Choices in the Implementation of the WIPO Internet Treaties' *Technological Protection Measure Provisions* (2006-2007) 57 *Case Western Reserve Law Review* 779.

<sup>85</sup> Zongfa Ma, 'Introduction and Interaction of the Intellectual Property System: WIPO and China' *International Review* <<http://202.119.108.161:93/modules/showContent.aspx?title=&Word=&DocGUID=d21bb49d87fe49ccafedc361e1011909>> accessed 13 May 2014.

<sup>86</sup> 'WIPO-Administered Treaties' (WIPO) <<http://www.wipo.int/treaties/en/>> accessed 17 February 2015.

protection, including the Berne Convention for the Protection of Literary and Artistic Works. This suggests that after China entered the WIPO, the system of copyright protection in that country has developed both rapidly and smoothly, which has arguably enhanced the Chinese economy as well as its relations with the wider international community.

## **2.2.4. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**

One of the important international developments on copyright is the formulation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The TRIPS Agreement, which is the end result of several years of negotiation, was enacted at the Uruguay Round of General Agreement on Tariffs and Trade (GATT).<sup>87</sup>

### **2.2.4.1. Origin of TRIPs**

The origins of the TRIPS Agreement can be traced back to the 1970s. At the beginning of 1970s, several western countries tried to enact the new regulations so as to revise existing conventions on intellectual property protection.<sup>88</sup> During this time, the United States as well as a number of other

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<sup>87</sup> Jay Dratler and Stephen M. McJohn, *Intellectual Property Law: Commercial, Creative, and Industrial Property* (Law Journal Press 1994) 1A-8.

<sup>88</sup> David P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1 edn, Kluwer Law International 1993) (describing efforts by developed countries to revise intellectual property treaties), in Julia Cheng, 'China's Copyright System: Rising to the Spirit of Trips Requires an Internal Focus and WTO Membership' (1997) 21 *Fordham Int'l LJ* 1941.

western countries, argued that existing conventions did not sufficiently protect intellectual property, which, in turn, necessitated calls for the adoption of an international treaty aimed at enhancing the protection of intellectual, even if only in those countries. These countries contended that a new treaty would strengthen existing treaties, through appropriate amendments, as well as complement the enforcement of intellectual property legislation through the creation of a formal dispute settlement mechanism. These ideas did not, however, come to fruition in the 1970s.<sup>89</sup> In fact, it was not until 1986, with the hosting of the Uruguay Round of the General Agreement on Tariffs and Trade, that the delegates finally decided to include trade-related aspects of intellectual property in their agenda.<sup>90</sup> The draft TRIPS agreement, as it then was, was subject to intense discussion and refinement before it eventually could become effective.<sup>91</sup> The Agreement establishes minimum standards in the area of intellectual property rights protection, including copyright in computer programs and databases, patents and industrial designs, amongst others.<sup>92</sup> The overarching aim, in this context, is to reduce barriers to

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<sup>89</sup> For a more detailed introduction in respect of the drafting history of TRIPS Agreement, please see Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (Routledge 2003) and DJ Gervais, *The TRIPS Agreement: drafting history and analysis* (sweet & maxwell 2003).

<sup>90</sup> Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books 2000) 1.

<sup>91</sup> Dratler and McJohn.

<sup>92</sup> Part II, Uruguay Round Agreement: TRIPS Trade-Related Aspects of Intellectual Property Rights.

international trade, whilst simultaneously promoting the effective and adequate protection of intellectual property rights.<sup>93</sup>

The main contents of the TRIPS Agreement relate to ensuring the compatibility of domestic legislation, in addition to enforcing intellectual property rights in member states.<sup>94</sup> More specifically, a number of provisions address the specific question of copyright protection, which arguably reflects the approach countenance by the Berne Convention, save for moral rights.<sup>95</sup> Additionally, it is important to note that the TRIPS Agreement contains some 'Berne-plus' features that relate to various aspects of copyright protection. Some of these provisions encompass the protection of new technologies. In this regard, it can be argued that, in contrast to the Berne Convention, the TRIPS Agreement's remit is broader in scope, thus covering issues such as the protection of computer programmes<sup>96</sup> as well as compilations of data.<sup>97</sup> Moreover, it is noteworthy that the TRIPS Agreement also extended its ambit of protection to cover neighbouring rights, including the rights of performers,<sup>98</sup>

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<sup>93</sup> Mikhaelle Schiappacasse, 'Intellectual Property Rights in China: Technology Transfers and Economic Development' (2003-2004) 2 Buffalo Intellectual Property Law Journal 164 169.

<sup>94</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>95</sup> Article 9(1), *ibid.*

<sup>96</sup> Article 10(1), *ibid.* 'Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).'

<sup>97</sup> Article 10(2), *ibid.* 'Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.'

<sup>98</sup> Article 14(1), *ibid.* 'In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation.'

producers of phonograms<sup>99</sup> and broadcasters,<sup>100</sup> issues which were not directly addressed by the Berne Convention. That said, it must be borne in mind that the TRIPS Agreement should not be viewed as a fully independent convention, but rather an integrative instrument that is based on various conventions, albeit that it aims to provide comprehensive protection for intellectual property rights.<sup>101</sup> Additionally, of some relevance is the fact that the TRIPS Agreement includes provisions concerning the enforcement of copyright protection, as well as a dispute settlement mechanism.

#### **2.2.4.2. The TRIPS Agreement in China**

The TRIPS Agreement brings intellectual property within the remit of the World Trade Organisation's (WTO) framework, through the creation of minimum standards on intellectual property protection that are enforceable through a dispute settlement systems.<sup>102</sup> In this context, it is important to note that, in order to become a member state of the WTO, which would facilitate ease of access to a number of international trade markets, states are required

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

<sup>99</sup> Article 14(2), *ibid.* 'Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.'

<sup>100</sup> Article 14(3), *ibid.* 'Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).'

<sup>101</sup> Correa 2.

<sup>102</sup> Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (OUP 2007)

to first comply with the TRIPS Agreement. For this reason, it is arguable that the TRIPS Agreement is the single most important multilateral agreement for the globalization of intellectual property laws.

Further to a series of reforms, and, in particular, the operationalisation of the “Open Door Policy” in 1979,<sup>103</sup> China gradually begun coming out from economic isolation, through actively allowing for the introduction of foreign investment, trade and high-end technology.<sup>104</sup> During this time, the Chinese government also realised the importance of enhancing its system of intellectual property protection.<sup>105</sup> This was perhaps inevitable, however, as China could not enter the WTO without first enhancing its system of intellectual property protection. Additionally, China stood to lose a number of significant international business opportunities if it had failed to enhance its system of intellectual property protection.<sup>106</sup> In this regard, in order to create an attractive environment for investors, China tried to remodel its intellectual property legislation.<sup>107</sup>

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<sup>103</sup> Yongnian ZHENG and Sow Keat TOK, *‘Harmonious Society’ and ‘Harmonious World’: China’s Policy Discourse under Hu Jintao* (2007). It means to open up the erstwhile closed doors of China to introduce foreign participation into China’s economic development.

<sup>104</sup> Lee Branstetter and Nicholas Lardy, ‘China’s Embrace of Globalization’ NBER Working Paper No 12373 <<http://www.nber.org/papers/w12373.pdf>> accessed 15 July 2015 3.

<sup>105</sup> Chengsi Zheng, ‘The Trips Agreement and Intellectual Property Protection in China’ (1998-1999) 9 *Duke Journal of Comparative & International Law* 219 219.

<sup>106</sup> *Ibid*

<sup>107</sup> Newberry 1425.

Suffice it to say, compared to a number of western countries, China can be aptly described as a newcomer to the international system of copyright protection.<sup>108</sup> This is because copyright, as it is conceived in the modern era, is a new concept that is alien to the Chinese culture, particularly when viewed in light of the fact that many people in China still cannot fathom how intangible works of the mind could be protected as property rights. Nevertheless, China was thrust into the precarious position of having to urgently enact relevant legislation so as to comply with the standards contained in the TRIPS Agreement, a key requirement for gaining entry into the WTO. Subsequently, China supplemented its Copyright Law by enacting Regulations on the Implementation of International Copyright Treaties, and, in particular, Implementing Rules on the Berne Convention.<sup>109</sup>

In sum, it is noteworthy to note that, after much deliberation, China finally became a member of the WTO on 11 December 2001.<sup>110</sup> Before doing so, however, the Chinese government had to commit to strictly adhering to the TRIPS regulations, which included amending and strengthening domestic intellectual property legislation to bring them into conformity with TRIPS standards.

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<sup>108</sup> There was no copyright system in China until the first Chinese copyright law, Copyright Law of People's Republic of China, was enacted in 1990.

<sup>109</sup> Reiko R. Feaver, 'China's Copyright Law and the TRIPS Agreement' (1995-1996) 5 Journal of Transnational Law & Policy 431 438.

<sup>110</sup> Boden 182.

## 2.3. Conclusion

In conclusion, on the basis of the developments described in the foregoing sections, it can be argued that China acceded to all of the major international treaties on copyright protection, including the Berne Convention for the Protection of Literary and Artistic Works (1992), the Universal Copyright Convention (1992) and the TRIPS Agreement (2001), within the space of a decade. Notwithstanding this, however, it is submitted that such a swift transplantation of legal norms that were alien to the Chinese society, has inevitably resulted in the creation of tensions at various levels.<sup>111</sup> Apart from the alien nature of these standards, the unexpected growth of the digital industry has also posed serious challenges and complexities for China.

More specifically, this chapter has argued that because of the rapid development of technology, it will prove more and more difficult to deal with the various contentious issues related to copyright protection in the digital era in the absence of robust copyright legislation. In this regard, it is submitted that in order to better protect copyright in China, it is necessary to strengthen the overall system of copyright protection system. This can be effect through, for example, emulating relevant legislation or rules emanating from different countries.

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<sup>111</sup> Bingchun Meng, *China's Copyright Policy in the Era of Globalization: A Chance to Restore the Public's Interest* (ProQuest 2006) 3.

In view of the above, therefore, the subsequent chapters will respectively seek to critically assess many of the existing challenges relating to copyright protection in the digital era. In the next chapter, it will discuss the challenges and complexities posed by peer-to-peer technology in the digital era. Also, a few of relevant copyright legislations from some selected countries, particularly those legislations which address the issues surrounding digital copyright protection, will be introduced and examined afterwards.

# **CHAPTER 3**

## **The Emergence of Peer-to-Peer Technology in the Digital Age: A Contemporary Challenge to Copyright Protection**

### **Exclusive Summary**

Because of the rapid development of digital technology, traditional notions of copyright protection have been challenged more and more seriously. As P2P file sharing technology is one of the most popular technology arising in the digital era, this Chapter will talk about the issues related to the increasingly development of the P2P file sharing technology first. Also, some relevant legislations from different jurisdictions will be introduced and discussed afterwards.

Specifically speaking, this chapter will be divided into two parts. The former part will introduce and analyse several working theories in terms of the different types of P2P file sharing technology, which will lay the ground work for the discussion of the challenges associated with P2Ps next. The later part will examine the relevant copyright legislations in a few selected countries, particularly those legislations which involve the issues on digital copyright protection. By understanding the development of copyright protection in different countries across the globe, some valuable methods adopted by

these countries could be referenced to perfect the China's copyright protection system in the future.

## **3.1. Peer-to-Peer technology**

### **3.1.1. Introduction**

The term "peer-to-peer" (P2P) first appeared in the late 20<sup>th</sup> century, and has since become a prominent name across the globe.<sup>1</sup> P2P is defined as a distributed application architecture that partitions tasks or workloads between peers.<sup>2</sup> P2P technology works by allowing computers to act as peers to the extent that they could connect to each other directly. Through this connection, groups could be formed, which could, in turn, facilitate collaboration between user-created search engines on virtual supercomputers and file systems by using appropriate information and communication systems without necessarily requiring central coordination.<sup>3</sup> Overtime, P2P computing has conspicuously become one of the most prominent technological innovations in computer networking. In fact, millions of people are estimated to have actively participated in this system, a user-base which is envisaged to only extend in future.

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<sup>1</sup> Andrew Oram, *Peer-to-peer: Harnessing the Benefits of a Disruptive Technology* (Andrew Oram ed, O'Reilly Media, Inc. 2001) 3.

<sup>2</sup> For general information, 'Peer-to-peer' <<http://en.wikipedia.org/wiki/Peer-to-peer>> accessed 14 March 2010.

<sup>3</sup> Detlef Schoder and Kai Fischbach, 'Peer-to-Peer Prospects' (2003) 46 *Communications of the ACM* 27 27.

Although it is arguable that, in recent years, because of the rise of other computer technologies, such as media streaming, P2P technology is not thriving in the file-sharing arena as before,<sup>4</sup> it nevertheless still has an important place in the Internet industry today, as it remains perhaps the most significant development in the computing field since the web browsing. Suffice it to say, in order to better understand the benefits and the problems associated with P2P technology, the working theory of P2P will be briefly explored at the very outset of this chapter.

P2P technology is a communication model that is characterized by the fact that every peer in this system has the ability to function both as a client and as a server. This essentially means that a peer (or computer) can be treated as a client in P2P systems, but it can also perform server functions in other P2P processes. In general, whether the peers are clients or servers will depend on certain specific conditions. Normally, there will be a request to access certain resources which belong to other peers. This request is usually made for, *inter alia*, a file to be read or copied, computations to be performed, or for some information on content and files, or a message file to be passed on to others. For example, peer A may make a request to access a resource which is stored on peer B. In this scenario, peer A is the client, while peer B is the

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<sup>4</sup> Cache, 'Peer-to-Peer in 2005' <[www.cachelogic.com](http://www.cachelogic.com)> accessed 10 June 2010. The data from CacheLogic showed that at the end of 2004, P2P represented 60 percent of the Internet traffic. "P2P Not Dead!": 300 mn BitTorrent Users Swap TV Shows and Movies Every Month' (31 May 2014) <<http://on.rt.com/j75ebp>> accessed 30 March 2015.

server. This amounts to a peer-to-peer network of nodes, whereby each peer, considered as an 'equal', serves as one of the nodes. This is in contrast to the client-server network.<sup>5</sup> In practice, the files which are subject to the peer-to-peer system are stored on different computers, and exchanged by using a direct connection between the downloading and uploading peers. The ease of this process might account for why P2P became so prominent overtime as a leading file sharing system.

More generally, it is important to note that, with regard to file sharing systems, depending on how peers locate files, the peer-to-peer architecture might be classified into three models, typically referred to as centralized, decentralized and hybrid peer-to-peer systems, respectively.

In centralized peer-to-peer systems, the files are stored in user sites, and the connections between users are not organized by use of any algorithm. In this configuration, the central servers, which are used for searching and guiding the entire working process, play an important role in this system. As for the operating theory, it is noteworthy that the centralized peer-to-peer system is characterized by traditional web search engines. It does not use the previous indexing robot spider,<sup>6</sup> which follows links among Web pages, but, instead,

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<sup>5</sup> 'Peer to Peer (P2P) Networking' <<http://www.doc.ic.ac.uk/~vlt/DS/P2P.pdf>> accessed 18 February 2015.

<sup>6</sup> The indexing robot spider is a program run by a search engine to build a summary of a

uses the indexer to gather the information required from the shared directories of user sites. On the specific question of its working process, it is also worth noting that a large group of dedicated central servers maintain an index of the files that are currently being shared by active peers. Each peer has a connection to one of the central servers, according to which the file location requests are sent. Subsequently, the servers would cooperate with each other in order to process the request and then return a list of matching files and locations. In this context, the peer may choose to use the resulting list so as to initiate a file exchange directly from another peer. Additionally, apart from maintaining an index of shared files, centralized servers also monitor the status of each peer in the system so as to keep track of metadata.<sup>7</sup> For example, servers would check the peer's reported connection bandwidth and the duration that the peer has remained connected to the system. This metadata is returned along with the results from a request. The initiating peer could then use this information to distinguish between which download sites could be used to execute the requests.<sup>8</sup>

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website's content (content index). Spiders create a text-based summary of content and an address (URL) for each webpage. When a person searches, the keywords they enter are compared with the available website content indexes and all appropriated Web pages will be returned in ranked order- from most to least relevant. See Jezeelmuhammed, 'Build a Scrapy Spider to Index Websites' (*quadloops.com*, 28 March 2014) <<http://quadloops.com/blog/build-a-scrapy-spider-to-index-websites/#more-468>> accessed 19 June 2015.

<sup>7</sup> "Metadata is data that describes and gives information about other data. In the other words, Metadata summarizes basic information about data, which can make finding and working with particular instances of data easier." See Margaret Rouse, 'Metadata' (July 2014) <<http://whatis.techtarget.com/definition/metadata>> accessed 19 September 2014.

<sup>8</sup> Stefan Saroiu, P. Krishna Gummadi and Steven D. Gribble, 'A Measurement Study of Peer-to-Peer File Sharing Systems' (Proceedings of Multimedia Computing and Networking, MMCN, San Jose, CA, 2002).

By contrast, in decentralized peer-to-peer systems, all participating computers are peers, and no central server is used to control, coordinate, or manage the exchanges between peers. Because no centralized server is used, it could be argued that the decentralized peer-to-peer system is, in fact, a real peer-to-peer system. More specifically, without a central server, the peers that constitute a decentralized peer-to-peer system make point-to-point connections with a set of neighbors in order to build up an overlay network. One of the main purposes of this process is to ensure that the peers will accumulate relevant information, which will then be used to execute searches. Another purpose is to ensure that relevant files are stored on the peer's system folder, thus allowing for the sharing of that peer's resources. In practice, when a peer wishes to search for a file, a request packet will be sent to all of its neighbors, which will then initiate a controlled flood of the network. After receiving a packet request, a peer will check whether any stored files match the request. If this is found to be the case, the peer will then send a response packet back towards the originator of the request. If not, the peer will continue to flood the request through the overlay network. By way of example, a peer may request that a particular movie be searched for. This request will be passed along by peer hosts for a number of relays, and then sent. If any of the peers finds or saves this movie, said peers will make available the movie to be shared.

The third peer-to-peer system is typically referred to as the hybrid peer-to-peer system. As the name suggests, hybrid peer-to-peer systems contain more than one character of both pure and unstructured P2P configurations. In general, with the hybrid peer-to-peer system, supernodes are a key feature. These supernodes serve as network relayers and proxy servers so as to handle data flow and connections with other peers. More generally, it is noteworthy that hybrid peer-to-peer systems divide their clients into two groups, client nodes and overlay nodes. If the network has a momentary need, each client plays a different role and becomes part of the respective overlay network which is used to coordinate the peer-to-peer configuration. The purpose of this division between normal nodes and supernodes is to deal with the scaling problems which arose in respect of very early pure peer-to-peer systems. Furthermore, as can be seen from the working theory of hybrid peer-to-peer systems, the request relies on a central server to perform a number of required functions. In this context, it can be argued that some functionalities that are specific to this system are centralized.<sup>9</sup> In the other words, hybrid peer-to-peer networks, in general, take features from both centralized and decentralized systems.

In short, with the rapid development of technology today, peer-to-peer

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<sup>9</sup> Beverly Yang and Hector Garcia-Molina, 'Comparing Hybrid Peer-to-Peer Systems' (27th VLDB Conference, Roma, 2001) 561-570.

systems have increasingly been updated to reflect the nuances associated with the digital era. Because the problems that arise in this regard are widespread in nature, for example, digital copyright infringement, is important to comprehensively explore the peer-to-peer system from the very outset. That is, in order to understand peer-to-peer networks and the myriad complex issues surrounding their operation, the development process of file sharing technology needs to be explained. This will be done in the next section, which examines the development of peer-to-peer technology. More specifically, reference will be made to a number of important cases, including the Napster case, the Groster Case, and the Pirate Bay Case.

### **3.1.2. The early stage of file sharing technology**

File sharing is the practice of distributing or providing access to digitally stored information, such as multimedia files, computer programs and so on.<sup>10</sup> Although file sharing is quite prominent today, its development was incremental in nature.

At the outset, it is noteworthy that, in the earliest stages of the internet, the anonymous file transfer protocol was the most popular file sharing technology.<sup>11</sup> The Anonymous File Transfer Protocol was a server which

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<sup>10</sup> For general information, 'File Sharing' <[http://en.wikipedia.org/wiki/File\\_sharing](http://en.wikipedia.org/wiki/File_sharing)> accessed 6 March 2011.

<sup>11</sup> Kwansai Gakuin University - School Of Policy Studies, 'P2P File Sharing - History of P2P'

allows users to login by using anonymous names for the purposes of downloading and uploading files to the Internet.<sup>12</sup> A server referred to as "ARCHIE" was used to offer files which users wish to find in the anonymous file transfer protocol.<sup>13</sup>

Subsequently, from 1995 to 1997, both the file transfer protocol and the free Homepage file sharing protocol became the major methods for file sharing.<sup>14</sup> By using the free Homepage protocol, users could upload their files to websites, which allowed other users to search said files and download them directly from websites.<sup>15</sup>

From 1997, Messenger or Hotline became the major software that facilitated file sharing over the internet.<sup>16</sup> These software, as then prominent communication tools, were used to allow users to chat freely or make electronic bulletin boards.<sup>17</sup> The file sharing function was also incorporated into these software.<sup>18</sup>

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(2002) <<http://www.ksc.kwansei.ac.jp/researchfair02/03/website/history.htm>> accessed 19 May 2014.

<sup>12</sup> J. Postel, 'File Transfer Protocol (FTP)' (October 1985) <<https://tools.ietf.org/html/rfc959>> accessed 2 July 2014.a

<sup>13</sup> Philip Miller, *TCP/IP: The Ultimate Protocol Guide*, vol 1 (Universal-Publishers 2009) 446.

<sup>14</sup> Anya Goodman, 'Illegal Downloading' <[astro.temple.edu/~tuc00239/Illegal%20Downloading.pptx](http://astro.temple.edu/~tuc00239/Illegal%20Downloading.pptx)> accessed 30 September 2014 12.

<sup>15</sup> Sherweb, 'Peer-2-Peer Through Time' (14 May 2009) <<http://www.sherweb.com/blog/peer-2-peer-through-time/>> accessed 14 July 2014

<sup>16</sup> Goodman 12.

<sup>17</sup> Kwansei Gakuin University - School Of Policy Studies.

<sup>18</sup> Ibid.

### **3.1.3. The modern development of file sharing technology**

In 1999, a new peer-to-peer file sharing technology was incorporated into the Napster website. This file sharing technology, which contained a centralized unstructured peer-to-peer system and which required a central server for indexing and peer discovery, became the major method of sharing files during this period of time.<sup>19</sup>

With regard to the peer-to-peer technology that was incorporated into the Napster website, it is noteworthy that it could be used to distribute data as well as control and load requests over the Internet. Moreover, the P2P technology could also be used to eliminate the risk of a single point of failure. The creation of Napster could therefore be considered as a great revolution in the field of file sharing. Napster was created by Shawn Fanning, an 18 year old freshman, who was at the time studying in Northeastern University in Boston. He designed this software so as to allow him and his friends to mutually share their digital music files. The software was launched on 1<sup>st</sup> June 1999. Thereafter, it became much easier for users to download music files using Napster than with any other platform that existed hitherto. Napster's capacity was also greater than other file sharing platforms in existence at the time.

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<sup>19</sup> Goodman 12.

Once the application was downloaded, users were able to share files with other peers who had also installed this application on their computers. This meant that it was possible that people could share files with others all across the globe. In view of these advantages, the Napster application spread quickly and widely. Thousands of music fans downloaded and installed the software not only for the purposes of finding rare, out-of-print recordings, but also for collecting free music through Napster's website. In the first 6 months immediately following its launch, the software was downloaded over 2 million times. This figure quickly rose to around 60 million users from all around the world in a matter of a year. However, due to its widespread usage, as well as the fact that more and more music became freely available online using Napster's software, the issue of copyright protection became a major issue. The case of *A&M Records, Inc. v. Napster, Inc.*,<sup>20</sup> is instructive in this regard. In that case, A&M Records sued Napster on the ground that it had facilitated users' storage of MP3 music files on their personal computer hard drives, as well as allowed others to search for and download music files, and store and disseminate copies of said files using Napster's "P2P platform". The argument was that Napster had utilized a centralized P2P system to infringe upon copyrighted works, and that, accordingly, Napster should be liable for copyright infringement.<sup>21</sup> Although this case is extensively discussed in

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<sup>20</sup> *A&M Records, Inc. v. Napster, Inc.* 114 FSupp2d 896, 55 USPQ2d 1780 (ND Cal 2000).

<sup>21</sup> *Ibid.*

chapter 5, it suffices here to note that in July 2000, the US Justice Department and Copyright Office filed legal proceedings against Napster, claiming that Napster and its users were involved in copyright infringement. During this time, a number of artists also called upon their fans to reject Napster, and to only purchase music from legitimate sellers. Ultimately, as a result of these important developments, the original Napster Company crashed and the application was no longer in use at the time. Three years later, in 2003, however, *Roxio*, a brand of Sonic Solutions, bought and later re-launched Napster. Napster was subsequently sold to *Best Buy*. Of note, however, was the fact that the new Napster website did not allow for free file sharing, but rather a retail music distributor, even unto today. As of 2009, Napster continues to flourish as a legitimate digital music source.

The failure of the original Napster file sharing system provided important lessons for a number of other file sharing developers, including Gnutella and eDonkey protocols, which were both created in 2000, albeit based on a decentralized P2P configuration. Decentralized P2P is any distributed network architecture that is composed of participants that make a portion of their resources directly available to other network participants, without the need for central coordination.<sup>22</sup> In March 2000, the Gnutella protocol was released as

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<sup>22</sup> Rüdiger Schollmeier, 'A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications' (In Proceedings of the IEEE 2001 International Conference on Peer-to-Peer Computing (P2P2001), Linköping, Sweden, August 27-29,

the first decentralized file sharing network. Until 2007, it had become the most popular file sharing software on the Internet. In practice, Gnutella worked by connecting peers which were considered as equals; the network therefore had no central point of failure. When a client first runs the software, it must first connect to another computer, which is called a "node", on the Internet in order to show its existence and, where appropriate, receive information from other nodes, such as details about those nodes which were first connected to the online database. Due to the decentralized peer-to-peer configuration of Gnutella, all peers are treated equally. However, whenever there was increased usage on the network or the presence of defective peers, the functions of searching and file transfer for some peers would be greatly enhanced.

Overtime, the software was upgraded, and the new versions of Gnutella have incorporated some special peers, referred to as "ultra peers", to make the connection between each peer better than before. This improvement has increased the scalability of the Gnutella network, and has also reduced expenses, at least when compared to the costs associated with a centralized peer-to-peer system like Napster. That said, because of the special nature of ultra peers, that is, the fact that they are both replaceable and numerous in nature, it has become almost impossible for copyright holders to effectively

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2001).

prevent file sharing on the Gnutella network.

eDonkey was released at around the same period as Gnutella. It is a decentralized server-based peer-to-peer file sharing system. This effectively means that eDonkey does not have a central system for the network. As such, relevant files are not stored on any central server, but are exchanged directly between users. Although it is very similar to Gnutella, it is different in some respects, to the extent that eDonkey's server is proprietary, as opposed to open source. Within the eDonkey configuration, servers are set up to store the catalogues and addresses of shared files, rather than to save specific files. In this regard, each user can search for the addresses of shared files found on the system's servers; from there, the shared files can be automatically downloaded by users. This allows more clients to be engaged, as well as faster speeds when searching and downloading files. In short, it is arguable that eDonkey is very well suited to share big files among users, and has the added value of being able to keep these files within its system for a long period of time.

The most popular eDonkey Windows client program today is eMule. At present, however, it must be noted that the eDonkey network, which was previously run by the MetaMachine Company, is no longer supported by any corporation. As such, the maintenance of the network is fully ensured by its

community and client developers. At the inception, eDonkey was heavily reliant on its servers, whose original purpose was to reduce file sharing activity that could infringe the interests of right holders. As time has gone on, however, these servers have been modified by right holders 'in an attempt to filter or block search results and gather evidence of copyright infringement.'<sup>23</sup> In practice, it, however, remains unclear as to how well rights holders' interests are being protected by these modified servers.<sup>24</sup>

More generally, it is important to note that after Gnutella and eDonkey were launched, the FastTrack protocol was released in 2001. This was also a peer-to-peer network, which became the most popular file sharing network in 2003, primarily because it facilitated the exchange of MP3 music files. In an effort by the developers to increase and diversify their market share, the decision was made to three mutually incompatible versions of the protocol - Grokster, Kazaa and iMesh.

The FastTrack protocol is almost the same as eDonkey, as it can be described as a closed-source and decentralized peer-to-peer network. The protocol uses supernodes to improve its scalability. Due to its widespread use, the right holders have focused transforming developers into clients, rather

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<sup>23</sup> Daniel Smith and Mark Taylor, 'File Sharing: Modern Developments ' (2010) 16 Computer and Telecommunications Law Review 177.

<sup>24</sup> Ibid.

than on the technical maintenance of the protocol.<sup>25</sup> However, as will be thoroughly discussed in chapter 5, as a result of a number of significant lawsuits relating to the FastTrack protocol, including the MGM Studios v Grokster case<sup>26</sup> and Universal Music Australia Pty Ltd v Sharman License Holdings Ltd,<sup>27</sup> the FastTrack protocol gradually lost its popularity.

At present, then, it can be argued that the most important and up-to-date peer-to-peer technology in this field is that of BitTorrent. This is an innovative open source peer-to-peer protocol, which is supported by a large number of servers and clients. BitTorrent is primarily used for distributing large amounts of data. In fact, statistics show that in its heyday, BitTorrent accounted for almost 27-55 per cent of all Internet traffic (depending on location).<sup>28</sup> Further, it can also be argued that although BitTorrent's traffic<sup>29</sup> has declined in recent years with the operationalisation of newer forms of file sharing technology, such as Youtube and Netflix, BitTorrent remains the most popular method of file sharing in the field of P2P technology today.

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<sup>25</sup> Thomas Mennecke, 'End of the Road for Overpeer' (SLYCK.COM, 10 December 2005) <[http://www.slyck.com/story1019\\_End\\_of\\_the\\_Road\\_for\\_Overpeer](http://www.slyck.com/story1019_End_of_the_Road_for_Overpeer)> accessed 29 May 2012.

<sup>26</sup> *MGM Studios, Inc. v. Grokster, Ltd.* 545 US 913, 125 S Ct 2764 (2005).

<sup>27</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 Federal Court of Australia.

<sup>28</sup> Hendrik Schulze and Klaus Mochalski, 'Internet Study 2008/2009' (2009) <<http://www.ipoque.com/sites/default/files/mediafiles/documents/internet-study-2008-2009.pdf>> accessed 12th May 2011.

<sup>29</sup> Todd Spangler, 'Netflix Bandwidth Usage Climbs to Nearly 37% of Internet Traffic at Peak Hours' (*Variety.com*, 28 May 2015) <<http://variety.com/2015/digital/news/netflix-bandwidth-usage-internet-traffic-1201507187/>> accessed 24 July 2015.

With regard to its working processes, it is noteworthy that BitTorrent uses, at the very outset, a system of initial files to supply the data requested. In this context, a user who wishes to download or upload a file has to first create a torrent file. This file contains metadata about the files to be shared and about the tracker. Once the user has downloaded the data to this file, it subsequently becomes a seeder. In practice, whenever peers wish to download files, they will connect with whichever peer that is hosting the data that they wish to download. This process is called 'swarming'. Subsequently, the data will be downloaded in chunks, normally from many different peers or seeders, and will then be finally reassembled. However, in order to reduce the load on the seeders, peers sometimes exchange data which has already been downloaded as between them. When a peer has completely downloaded a file, it will become another seed. The distributed nature of BitTorrent would cause a file to be widely exchanged between peers. Once an increased number of peers join the swarm, it is possible that an entire file could be downloaded successfully by a particular node. In general, because of this development, the download process works quite smoothly. The additional seed, in case of redundancy, can also effectively avoid disruptions when downloading, if system problems were to occur.

The BitTorrent protocol contains an application, referred to as "tracker", which is hosted on a web server. The tracker contains a list of the participating peers

and seeders; this will allow new users to connect to the swarm and begin downloading and uploading. When a user wants to download a file, a torrent file containing all the tracker and data information must first be obtained. Meanwhile, the specified tracker is connected, which lets the user know the source of each piece of the file in question. In short, the tracker manages the entire downloading process to ensure simplicity and to avoid data corruption.

In sum, this section has considered in some detail the generations of peer-to-peer systems, and, in particular, the complex issues of copyright protection associated with each generation. More specifically, the section suggests that even if the issue of copyright infringement was resolved in one generation, newer generations have had to continuously grapple with complex issues of copyright protection. This is perhaps unavoidable, especially in light of the fact that peer-to-peer technology continues to adapt so as to meet new legal and technological challenges. In this context, a strong argument can be made that to more effectively protect copyright in relation to emerging peer-to-peer technology, specific and robust laws must continually be enacted.

### **3.1.4. Peer-to-peer software distribution**

Due to the rapid development of peer-to-peer technology, file sharing has gradually become a social phenomenon in the digital era. In this context, in an effort to download files more conveniently, an increasing number of website

have started to afford free services for downloading software, which allow users to access files more smoothly than ever before. From a right holders' perspective, however, it is clear that this service would encourage people to engage in illegal downloading, which may, in turn, cause a series of problems largely relating to copyright infringement. In this regard, copyright infringement by internet service providers, or so called secondary copyright liability, has been increasingly discussed. For this reason, the issues of primary and secondary liability will be examined in this section.

Primary liability is generally understood as liability which arises in respect of someone who has directly infringed the interests of the right holder. This is the traditional conceptualization of copyright infringement. However, in the digital era, and, in particular, in relation to P2P technology, the issue of secondary copyright liability has emerged. Secondary copyright liability is used to describe 'the liability that is imposed upon a defendant who is not the primary infringer but whom the law nonetheless holds liable for the damages which the copyright owner suffers from the infringement.'<sup>30</sup> In practice, because the nature of secondary copyright infringement is still ill-defined, its boundaries are yet to be fully determined, especially in the era of peer-to-peer file sharing networks.

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<sup>30</sup> Tay Pek San, 'Developing a Secondary Copyright Liability Regime in Malaysia: Insights from Anglo-American Jurisprudence' (2011) 1 Intellectual Property Quarterly 50.

Today, in light of continuous improvements in law as well as the accumulation of practical experience in this field, a number of soft and hard law has emerged in an attempt to define the contours of secondary liability, such as the safe harbor provision, the three step tests, amongst others. Notwithstanding this, however, as a result of novel challenges created by emerging technologies, secondary copyright liability remains a recurring issue. More specifically, recent technological developments have the effect of circumventing existing legislation, by providing more advanced software that invariably attract users wishing to download files. To this end, it can be argued that the process of making regulations to ensure copyright protection in respect of file sharing in the era of peer-to-peer technology is a recurring challenge. The challenge, it would seem, lies in the fact that technology always advances faster than copyright law; as such, copyright law will continue to struggle to sufficiently evolve to deal with emerging challenges.

## **3.2. Relevant Legislation on Peer-to-Peer Technology in Selected Countries**

### **3.2.1. The U.S.A.**

American copyright law has a long standing history. At the initial stage of development of its system of copyright protection, the law tried to protect the

writings of authors.<sup>31</sup> Later, however, the law expanded its remit to protect maps, charts and books.<sup>32</sup> At present, the current Copyright Act and other related legislation on copyright protect various works, such as software, graphic arts, architectural designs, films, sound recordings and so on. In this context, it would appear that American copyright law incrementally develops to keep abreast with improvements in technology. More specifically, when technology emerged, the law would be amended to extend its protection to cover the copyrighted works which constitute that piece of technology. For example, while early copyright law sought to protect the reproduction of authors' writings only, recent amendments to copyright legislation have sought to address the issues emerging raised by the latest technologies, such as P2P technology, the World Wide Web and streaming media.

The origins of copyright law in the U.S. can be traced back to the Statute of Anne, the first copyright law in the U.K, and, by extension, the world, which was enacted in 1709, coming into force in 1710.<sup>33</sup> This statute established the concept of ownership of copyright and stipulated that the duration for the protection of copyrighted works was 14 years, albeit that if the author was still alive after the end of the first term, the duration of protection would be

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<sup>31</sup> American Society of Media Photographers (ASMP), 'A Brief History of Copyright' <<https://asmp.org/tutorials/brief-history-copyright.html#.VVaKdEZwaUl>> accessed 12 March 2015.

<sup>32</sup> Ibid.

<sup>33</sup> Intellectual Property Rights Office, 'A Brief History of Copyright' <[http://www.iprightsoffice.org/copyright\\_history/](http://www.iprightsoffice.org/copyright_history/)> accessed 28 March 2015.

renewed for another 14 years. Additionally, after the period of protection had elapsed, the statute stated that the copyrighted work in question would be moved to the public domain for public use.<sup>34</sup>

Of particular note is the fact that U.S. Constitutional Law intimated that copyright law is necessary for the purposes of promoting social progress. More particularly, Article I, Section 8, Clause 8 of the U.S. Constitution states that “Congress shall have power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>35</sup> This essentially means that congress encourages creation and innovation and is intended on protecting creators' right. It is for this reason that, in 1790, the Copyright Act was promulgated, which is said to be the first piece of copyright legislation in the U.S.<sup>36</sup> The works protected by this legislation, however, only included maps, charts and books.<sup>37</sup>

With the development of technology, US copyright law has been amended several times, by, for example, making provision for new technology, such as P2P technology and file-sharing technology, amongst others. In this context, it

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<sup>34</sup> Paul K. Saint-Amour, *The Copyrights: Intellectual Property and the Literary Imagination* (Cornell University Press 2003) 125.

<sup>35</sup> Article I, Section 8, Constitution of the United States.

<sup>36</sup><sup>36</sup> *An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840* (Robert A. Gross and Mary Kelley eds, UNC Press Books 2010) 202.

<sup>37</sup> American Society of Media Photographers (ASMP).

can be argued that the incremental development of copyright legislation to meet emerging technological advancements has had a profound influence on other countries.

The Copyright Act of 1790, which, as described above, sought to encourage learning by securing copies of maps, charts and books, was the first copyright law in the U.S., which was modelled on the Statute of Anne.<sup>38</sup> In accordance with this Act, authors were granted exclusive rights in respect of their works for 14 years, albeit that if the author was still alive after this term had elapsed, the rights in question could be renewed for another 14 years.<sup>39</sup> Notwithstanding this, however, the scope of this Act was limited, as it only made provision for the protection of maps, charts and books. This regard, other kinds of writings was not explicitly covered by the Act.<sup>40</sup> Subsequently, however, in keeping with the rapid development in technology, the relevant copyright law was revised several times. In 1831, for example, the law was amended to extend the duration of protection for 28 years, with the possibility of renewal for another 14 years.<sup>41</sup> Subsequently, the duration further revised

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<sup>38</sup> Association of Research Libraries (ARL), 'Copyright Timeline: A History of Copyright in the United States' <<http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.VVaUq0ZwaUI>> accessed 19 March 2014.

<sup>39</sup> Saint-Amour 125.

<sup>40</sup> American Society of Media Photographers (ASMP).

<sup>41</sup> Association of Research Libraries (ARL).

in Copyright Act of 1909, thus extending the term to 28 years, with the possibility of another 28 years' protection.<sup>42</sup>

A major amendment of U.S. copyright law occurred in 1976. To ensure conformity with the Berne Convention, which established a uniform standard for copyright protection at the global level, a number of provisions contained in previous copyright law had to be amended. For example, the Act changed the duration of protection to life of the author plus 50 years.<sup>43</sup> Moreover, a new principle regarding "fair use" of copyrighted work was included in the 1976 Act. In this regard, Chapter 1, Section 107, of the Act specifically stated that 'the fair use of a copyrighted work,..., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright'.<sup>44</sup> Furthermore, it is also important to note that a few principles of copyright which were developed by case law was codified by the 1976 Act.

In 1998, the term of protection of copyrighted works was again extended to life plus 70 years.<sup>45</sup> A subsequent amendment in 1990 also added a digital element into U.S. copyright law by making provisions about computer

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<sup>42</sup> United States Copyright Office, 'Duration of Copyright' <<http://www.copyright.gov/circs/circ15a.pdf>> accessed 5 April 2015.

<sup>43</sup> Brian D. Caplan, 'Navigating US Copyright Termination Rights' (*WIPO Magazine*, August 2012) <[http://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0005.html](http://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html)> accessed 7 April 2014.

<sup>44</sup> Copyright Law of the United States, Section 107.

<sup>45</sup> Association of Research Libraries (ARL).

software.<sup>46</sup> The most significant reform to U.S. copyright law however came when the Digital Millennium Copyright Act, also known as the DMCA, was passed on 12 October 1998, and signed into law by President Bill Clinton on 28 October 1998.<sup>47</sup> The purpose of the Act was to make the U.S. copyright law applicable to the protection of digital rights in copyrighted works.<sup>48</sup> The Act was also enacted in order to fulfill the US' obligations under several copyright treaties<sup>49</sup> of World Intellectual Property Organization.

### **3.2.1.1. Copyright Law in the United States**

Copyright protection in the United States is primarily based on the Copyright Act of 1976. As intimated above, this Act has undergone a series of amendments so as to ensure that it keeps up to par with rapid developments in the field of technology.

The United States Copyright Act protects 'original works of authorship',<sup>50</sup> irrespective of whether the work in question is published and unpublished. There are many types of works which are governed by this Act, including (1) literary work, (2) musical work, (3) dramatic work, (4) pantomimes and

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<sup>46</sup> Ibid.

<sup>47</sup> The Digital Millennium Copyright Act of 1998.

<sup>48</sup> 'Copyright - Policies' (*UNC Cyberspace Law*)  
<<http://www.unc.edu/courses/2010fall/law/357c/001/P2PandYoutube/copyrightpolicies.html>>  
accessed 7 July 2011.

<sup>49</sup> The treaties are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

<sup>50</sup> Copyright Law of the United States, Chapter 1, Section 102(a).

choreographic works, (5) pictorial, graphic, and sculptural works, (6) audiovisual works, (7) sound recordings, (8) derivative works, (9) compilations, and (10) architectural works.<sup>51</sup>

The rights which are protected by the Copyright Act, as defined by Chapter 1, Section 106, include the exclusive rights (1) to reproduce the work in copies or phonorecords, (2) to prepare derivative works based upon the work, (3) to distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending, (4) to publicly perform the work, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, and sound recordings by means of digital audio transmission, (5) to publicly display the work, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio visual work.<sup>52</sup>

In practice, copyright in a work is generally automatically vested in the author automatically after the work has been created. If the work is a joint work, however, the authors of the work are co-owners of copyright in that work.<sup>53</sup>

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<sup>51</sup> Ibid, Section 102.

<sup>52</sup> Ibid, Chapter 1, Section 106.

<sup>53</sup> Ibid, Chapter 2, Section 201(a).

Additionally, with regard to work made for hire, the employer owns the copyright in the work, unless an agreement is reached to the contrary.<sup>54</sup>

With regard to the duration of copyright protection, the Act stipulates that works created in or after 1978 would be granted protection for the life of the author, plus 70 additional years.<sup>55</sup> Further, if the work is a joint work which is prepared by more than two authors who do not work for hire, the protection period afforded is that of the life of the last surviving author, plus 70 years additional years after the death of the last surviving author.<sup>56</sup> Moreover, if the work is a work made for hire, copyright protection period will last for 120 years from the year of its creation or 95 years from the year of first publication, whichever expires first.<sup>57</sup>

U.S. copyright law contains a number of defences, exceptions and limitations. One of the major exceptions, in this regard, is the 'fair use' exception. Fair use allows certain users to use copyrighted work without the authorization from right holders, such as using the copyrighted works for research purposes, teaching, library archiving, commentary, criticism, news reporting, amongst others. The defence can more appropriately classified into three taxonomies: the first is referred to "creative fair use", which essentially means that creators

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<sup>54</sup> Ibid, Chapter 2, Section 201(b).

<sup>55</sup> Ibid, Chapter 3, Section 302(a).

<sup>56</sup> Ibid, Chapter 3, Section 302(b).

<sup>57</sup> Ibid, Chapter 3, Section 302(e).

use other creators' copyrighted works to create their own works. The question of how much of the copyrighted work was used is a key consideration in this regard in terms of deciding whether the use in question is fair or not. The second can be described as "personal fair use", which effectively means that an individual uses a work for learning or for entertainment purposes only. Note, however, that copying the whole work and putting it on the market is not allowed. And, third, "educational fair use" refers to the use of the copyrighted work in question for the purposes of teaching and research, amongst others. As can be seen from these descriptions, the fair use exception seeks to strike a balance between protecting the copyright owner's market share and the public interest.<sup>58</sup>

Suffice it to say, in accordance with Chapter 1, Section 107 of the US Copyright Act, to determine whether the use of a work amounts to fair use, four factors must be taken into account, including (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>59</sup> These requirements are, however, very subjective factors, which may, in turn, lead courts to measure whether each requirement has

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<sup>58</sup> Henry Mitchell and others, 'DMCA: A Balanced Public Policy Brief' (University of California, San Diego, Department of Computer Science and Engineering, CSE291, December 10, 2004).

<sup>59</sup> Copyright Law of the United States, Section 107.

been met on a random basis. In short, therefore, the principle of 'fair use' appears to be applied on a case-by-case basis in practice. This theme will be discussed in greater detail in chapter 6.

### **3.2.1.2. The Digital Millennium Copyright Act of 1998**

In September 1995, the U.S. government published a report, the Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995), which discussed the nature of intellectual property law in light of the digital era. The report gave a number of suggestions, such as revising the relevant copyright law as well as operationalising relevant legislation. Later, in December 1996, two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, were both passed by the WIPO, aimed at combating digital piracy on a global scale. The U.S. has ratified both treaties. In an effort to enhance the protection of copyrighted works in the digital era,<sup>60</sup> as well as comply with the obligations arising under the two WIPO treaties,<sup>61</sup> the Digital Millennium Copyright Act of 1998 (DMCA) was enacted. This Act was passed by Congress on 12 October 1998, and was signed into law by President Bill Clinton on October 28 1998.<sup>62</sup> Unlike the Copyright Act, which only prohibited the unauthorized copying of copyrighted work, the DMCA has extended the

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<sup>60</sup> , 'Copyright - Policies'.

<sup>61</sup> The treaties are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

<sup>62</sup> DMCA.

scope of protection to the issues not only relating to copying, but also access to digitally copyrighted work.

The DMCA is comprised of five parts, respectively dealing with (1) the WIPO Copyright and Performances and Phonograms Treaties Implementation Act, (2) the Online Copyright Infringement Liability Limitation Act, (3) the Computer Maintenance Competition Assurance Act, (4) Miscellaneous Provisions, and (5) the Vessel Hull Design Protection Act.

The first significant provision contained in the DMCA relates to anti-circumvention. The DMCA makes it illegal to provide any products and service that are intended on circumventing the technical measures which are used by right holders to protect their works. Additionally, the Act prevents breaking of encryption when it is done to access the copyrighted works. To combat circumvention, the DMCA criminalizes the production of technology, devices or services which are used to circumvent technical measures. It also criminalizes the act of circumventing an access control as well. The penalties to be imposed for the infringement of digital works, as provided for under the DMCA, are stricter than any previous copyright legislation. However, if anti-circumvention is engaged in by non-profit libraries, archives and schools,

infringers would be exempt from criminal prosecution and civil damages.<sup>63</sup>

The issue of anti-circumvention is further explored in chapter 7 of this thesis.

The next important provision of the DMCA concerns the liability of online service providers. Online service providers are not liable for infringement if they are simply the medium for transmission or routing of infringing materials and they did not know about the infringement when they provided access to materials or guided the users to the illegal materials. Unless the providers knew the materials in question are infringing materials, or the right holders have provided advance notice to the online service providers, providers would not be liable for copyright infringement. This provision is also called the 'safe harbour' provision.

#### *(1) Application Object*

According to this provision, the application object of the limitations of copyright infringement could be classified into circumstances: transitory digital network communications which are used for transmitting, routing or providing connection for information;<sup>64</sup> caching, which arises where service providers automatically and temporarily store material accessed by a person online

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<sup>63</sup> s.1204(b) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.103 DMCA.

<sup>64</sup> s.512 (a) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

rather than service providers themselves;<sup>65</sup> user storage which arises where service providers store material and information as directed by users,<sup>66</sup> and information location tools, which concern those situations where service providers refer or link users to an online location by directory, index, reference, pointer, or hypertext link.<sup>67</sup>

## *(2) Conditions*

It appears that service providers are protected from liability in many circumstances. However, in order to take advantage of a safe harbour, ISPs must abide by several conditions. More specifically, with regard to the first two safe harbours described above, the conditions imposed are quite general in nature, mainly relating to material that is processed programmatically without any deliberation on the part of the service provider. The latter two conditions, by contrast, would apply where the service provider:

*“(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;*

*“(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or*

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<sup>65</sup> s.512 (b) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

<sup>66</sup> s.512 (c) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

<sup>67</sup> s.512 (d) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

*“(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;*

*“(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and*

*“(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity...”<sup>68</sup>*

In accordance with these conditions, a service provider must remove the infringing material from the Internet once they have gained actual knowledge of the infringement, have become aware of the infringing facts or circumstances, or have received notification of a claimed infringement. Otherwise, they will not be protected by the safe harbor provision.

### *(3) Notice and Takedown*

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<sup>68</sup> s.512 (c) and (d) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

In order to effectively apply the safe harbour policy, a “notice and takedown” policy is established by the DMCA. With regard to the storage or the provision of links to infringing material, service providers will be liable only if they have actual knowledge of the infringing activity, or an awareness of facts and circumstances from which an infringement is apparent, and do not appropriately address it.<sup>69</sup> The “notice and takedown” regime provides that when service providers gain sufficient knowledge as to an infringement, they must respond expeditiously. In addition, under certain circumstances, if service providers become aware of a “red flag” from which the infringement is apparent, even without notification, they will lose the protection from the safe harbour policy if no action is taken.

For example, in the case of *Viacom International Inc. v. YouTube, Inc.*,<sup>70</sup> the plaintiff, Viacom, an American global mass media company, sued the defendant, YouTube, a video-sharing site owned by Google, alleging that the defendant had engaged in a large number of copyright infringements by allowing users to upload and view thousands of videos which were owned by Viacom without authorization.<sup>71</sup> The Court ultimately ruled in favor of the defendant, YouTube, after considering in some detail four issues: whether

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<sup>69</sup> s.512 (c) and (d) Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code in s.202(a) DMCA.

<sup>70</sup> *Viacom Intern. Inc. v. YouTube, Inc.* 940 F Supp 2d 110 (2013) United States District Court, S.D. New York.

<sup>71</sup> *Ibid*

YouTube had knowledge or awareness of any specific infringement; whether YouTube willfully blinded itself; whether YouTube had the “right and ability to control” infringing activity; and whether any clips were syndicated.<sup>72</sup> More specifically, on the facts of the case, the Court held that YouTube had no actual knowledge of any specific instance of infringement of Viacom’s works, and thus could not have “willfully blinded itself”. Even further, the Court found that “there is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity”.<sup>73</sup> For this reason, the Court found that YouTube did not have the “right and ability to control” infringing activity. More generally, it also found that YouTube neither manually selected nor delivered the videos during its operation. As such, it was held that YouTube was protected by the safe harbor rules and was therefore not liable for the alleged infringement.<sup>74</sup>

In sum, in view of the above, it can be argued that the DMCA provides strong protection for copyrighted work transmitted by use of Internet technology in this the digital era.

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

### **3.2.2. The United Kingdom**

Before engaging in an examination of the development of copyright protection in the UK, the origins of copyright law in most European countries would, at the very outset, be briefly introduced. In a number of European countries, the original method of copyright protection was to control and regulate the use of printers by governments. In the fifteenth century, the printing technology was invented, which led to multiple works being rapidly created. With improvements in the speed associated with reproducing such works, information and ideas were spread faster than ever before. That said, it is noteworthy that dissent also became rampant during this period. Additionally, in the context of the UK, increasing speeds with which works were printed, as well as decreasing printing price, brought the issue of piracy to the fore. In this regard, the government sought to control the use of printing, and required owners of printing companies to have official licenses for the purposes of reproducing works. The context of such licenses included the exclusive right to print certain works for a fixed period of time, as well as the right to prohibit other printers from printing the same works during that period. The Licensing Act of 1662 was subsequently enacted, which established a register of licensed books, along with the requirement to deposit copies of books to be

licensed.<sup>75</sup> This Act was applied until May 1695, when parliament decided to not renew said legislation.

The 1709 Statute of Anne was subsequently passed. It is well regarded as the first specific copyright statute in the UK, and the world, by extension.<sup>76</sup> This Act came into force in April 1710, and afforded publishers of books, for the very first time, legal protection of 14 years, plus a renewal period of another 14 years, if the author was still alive.<sup>77</sup> The statute also granted legal protection of 21 years for any book which had been already in print. Additionally, the issue of encouraging public learning was addressed by the statute, thereby reversing the position that all works belonged to booksellers forever, as in the case of previous regulations.<sup>78</sup>

With the development of technology, especially rapid developments in printing, copyright protection also gradually developed. The Copyright Act 1814, the Copyright Act 1833, the Copyright 1842, the Married Women's Property Act 1870 and 1882, for instance, were enacted. The types of works protected were continuously extended, thus covering musical works, creative works of married women, amongst others.

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<sup>75</sup> Intellectual Property Office, 'History of Copyright' <<http://www.ipo.gov.uk/types/copy/c-about/c-history.htm>> accessed 29 August 2011.

<sup>76</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, During the Times Therein Mentioned.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

In 1886, the Berne Convention was enforced, which was the first international treaty on copyright law. In order to extend the protection afforded by the Berne Convention to foreign authors, the UK acceded to the convention on September 1887, and has since passed the International Copyright Act 1886.

In order to follow the recommendation regarding the revision of UK law so that it could keep abreast with the revised Berne Convention, the Copyright Act 1911 was promulgated. Through this Act, the law makers attempted to consolidate various existing Acts into an integrated system. To this end, the 1911 Act consolidated the Engraving Copyright Act 1734 and the Fine Arts Copyright Act 1862. More generally, it is also important to note that the 1911 Act also abolished previous regulations concerning licensing as provided for under Licensing Act 1662, and confirmed that copyright was established from the time new work was created.

As a result of further technological developments, as well as the gradual improvement in the international system of copyright protection, the Copyright Act of 1956 was promulgated. The main amendments contained in this Act were that the duration of copyright protection was to be extended to the

author's lifetime plus 50 years thereafter.<sup>79</sup>

Today, the Copyright, Designs and Patents Act 1988 ("CDPA1988"), as amended by EC Directives and other legislation, is the current piece of copyright legislation in operation in the UK. Compared with Copyright Act 1956, the 1988 Act and its related amendments have extended the duration of protection from 50 years to 70 years after the death of the author.<sup>80</sup>

More generally, it is important to note that the history of copyright protection in the UK was characterized by the passage of several pieces of regulations, such as the Information Society Directive,<sup>81</sup> the Electronic Commerce (EC Directive) Regulation 2002,<sup>82</sup> and 1996 Defamation Act. Additionally, it can also be argued that UK is the first European country to have specifically dealt with internet service providers' liability,<sup>83</sup> through its enactment of the Digital Economy Act 2010,<sup>84</sup> the Internet Watch Foundation (IWF),<sup>85</sup> the Internet Service Providers' Association (ISPA UK),<sup>86</sup> amongst others.

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<sup>79</sup> Copyright Act 1956.

<sup>80</sup> Section 12, Copyright, Designs and Patents Act 1988.

<sup>81</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

<sup>82</sup> The Electronic Commerce (EC Directive) Regulations 2002.

<sup>83</sup> Kamiel Koelman and Bernt Hugenholtz, 'Online Service Provider Liability for Copyright Infringement' (Workshop on Service Provider Liability, Geneva, December 9 and 10, 1999) 20.

<sup>84</sup> Digital Economy Act 2010.

<sup>85</sup> Internet Watch Foundation (IWF) is the UK Hotline for reporting criminal online content. To find more information about IWF, please see the official website <<https://www.iwf.org.uk/>> accessed 1 February 2015.

<sup>86</sup> The Internet Services Providers' Association (ISPA UK) is the UK's Trade Association for providers of Internet services, which the purpose of this association is to bring together the

### 3.2.2.1. The Statute of Anne

The Statute of Anne, which was enacted in 1709, came into force in 1710. It is well regarded as the first full-fledged piece of copyright legislation in the U.K. As the title of the Act intimates, its primary purpose was to encourage learning, by vesting the copies of printed books in the authors or purchasers of such copies.<sup>87</sup>

Regarding as the specific contents of the statute, it is important to note that two new concepts were introduced by the Act. First, the legal right of authorship was provided for, although the relevant details concerning the nature of authorship were not made explicitly clear. Second, the published works were vested a fixed term of protection. As for the duration of protection, the statute granted legal protection for 21 years to any book which had already been in print.<sup>88</sup> Additionally, the Act was the first time that publishers of books could be granted legal protection of 14 years,<sup>89</sup> plus another 14 years if the author was still alive.<sup>90</sup> During the period of protection period, the Act provided that copying was the sole liberty of authors, and that any printing or reprinting of books without consent may be considered as an

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UK internet industry to provide essential support through innovation, knowledge and experience in order to benefit the UK economy and society. To find more information about ISPA, please see the official website <<http://www.ispa.org.uk/>> accessed 7 March 2014.

<sup>87</sup> Statute of Anne.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

infringement.<sup>91</sup> The statute also introduced a series of punitive measures aimed at controlling copyright infringement.

The Statute of Anne had the advantage of slowly chipping away at the monopoly ascribed to many booksellers. A number of provisions which were contained in the Act were designed to ensure that no monopolistic abuse could occur in the book industry. Article 1, in particular, provided that 21 years of protection were to be afforded any book that was already in print.<sup>92</sup> However, after this period of protection had elapsed, the book was moved into the public domain for public use. Moreover, Article 4 out-rightly restricted the control of book prices by the booksellers, thereby avoiding exorbitant or unreasonable prices.<sup>93</sup> Suffice it to say, it is noteworthy that the statute introduced the requirement to deposit nine copies of a book to certain libraries throughout the country. Copies of published books which were deposited in university libraries were also accessible to the public. This was said to be of benefit to the production of new books as well as in improving education.

In short, then, the Statute of Anne is arguably the origin of modern copyright law. As intimated above, the Statute is the first piece of legislation to mention authors' rights, and established useful measures to protect the rights of

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<sup>91</sup> Ibid.

<sup>92</sup> Article 1, *ibid.*

<sup>93</sup> Article 4, *ibid.*

authors and booksellers.

### **3.2.2.2. Copyright, Designs and Patents Act 1988**

The Copyright, Designs and Patents Act 1988, also known as the CDPA, is the current copyright law in the UK. The Act was passed by the Parliament of the United Kingdom on 15<sup>th</sup> November 1988, and came into force on 1<sup>st</sup> August 1989.<sup>94</sup> This Act has over the years been amended by a number of EC Directives as well as other legislation. The current Act governs the rights afforded creators of literary, dramatic, musical and artistic works; this right concerns control over the ways in which their works may be used. It restates and amends almost completely the statutory basis of the United Kingdom's 1911 and 1956 Copyright Acts. The new Act brings the UK's law into conformity with the Berne Convention for the Protection of Literary and Artistic Works. Additionally, the Act contains a number of amendments to the law regarding registered designs and patents, and creates an unregistered design right.

The subject matter in relation to which the CDPA is concerned includes (1) literary work; (2) dramatic work; (3) musical work; (4) artistic work; (5) typographical arrangement of published editions; (6) sound recordings; (7) films and so on. In contrast to the Copyright Act 1956, the CDPA abolished

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<sup>94</sup> CDPA.

the distinction between 'works' (literary, dramatic, musical and artistic works) and 'subject matter' (sound recording cinematograph films, broadcasts, etc.) which was contained in the 1956 Act.<sup>95</sup>

In order to qualify for protection, the Act requires a series of criteria to be satisfied. The first of these is the requirement of originality.<sup>96</sup> This essentially means that the author produces the work with some 'labour, skill or effort'.<sup>97</sup> In other words, the work in question must have been created by the creator and not be copied from the previous works. It is, however, noteworthy that the requirement of 'originality' only applies to literary, dramatic, musical and artistic works. Sound recordings films, broadcasts and the typographical arrangement of published editions do not need to satisfy the requirement of originality in order to qualify for protection.

With regard to authorship or first ownership of the copyright in works, copyright is automatically vested in the author or owner once the work has been created. In the other cases, right holders are identified based on the nature of the work in question. For instance, the authorship of a sound recording is usually the producer. The author of a film is the producer and the

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<sup>95</sup> 'What Types of Works does Copyright Protection Encompass?' (*Knowledge Base Law*) <[http://kb-law.info/wt\\_dev/kbc.php?article=116&land=UK&mode=1&lang=EN](http://kb-law.info/wt_dev/kbc.php?article=116&land=UK&mode=1&lang=EN)> accessed 4 January 2012.

<sup>96</sup> CDPA s1(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—(a) original literary, dramatic, musical or artistic works, (b) sound recordings, films, and (c) the typographical arrangement of published editions.

<sup>97</sup> Bently and Sherman, *Intellectual Property Law* 93.

principal director.<sup>98</sup> With regard to works jointly authored,<sup>99</sup> authorship, in the majority of cases, is vested in all authors of the works in question.<sup>100</sup> In relation to first ownership of copyrighted works, if a literary, dramatic, musical or artistic work is created by an employee, the first owner of the copyrighted work in question is the employer, unless an agreement is made to the contrary.<sup>101</sup>

Regarding the scope of exclusive rights, different subject matter are ascribed differing rights. Generally speaking, exclusive rights include the rights of reproduction, publication, performance, adaptation, broadcasting and communication, amongst others.<sup>102</sup> Further, exclusive rights in respect of performances, in accordance with Section 182- 188 of the CDPA, include the right of the performer to authorize the recording and broadcasting of his performances. In the absence of the performer's consent, the use or broadcast of recordings would be deemed as an infringement of the performer's rights.

In so far as the duration of copyright protection is concerned, it is important to note that each category of work is matched to a corresponding length of

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<sup>98</sup> CDPA s9.

<sup>99</sup> Ibid s10(1) In this Part a "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

<sup>100</sup> Ibid s10.

<sup>101</sup> Ibid s11(2).

<sup>102</sup> Ibid Chapter II Rights of Copyright Owner.

protection. More specifically, the CDPA, as amended, has established a term of protection of 70 years from the death of the author or creator, if known, for the literary, dramatic, musical or artistic works; otherwise, copyright in the work would last for 70 years after the work was created or published. Related to this point is the fact that the Copyright Regulations of 1992 provide that computer programs are to be regarded as literary works; these are granted a term of copyright protection of 50 years after the work is made.<sup>103</sup> Copyright in sound recordings and broadcasts generally subsists for 50 years.<sup>104</sup> Additionally, copyright in films subsists for 70 years from the date of the death of the last principal director, author or composer, or if the authorship is unknown, 70 years about copyright protection will start from the creation or the first released.<sup>105</sup> With regard to broadcasts and cable programmes, the Act provides that copyright subsists for 50 years after the first broadcast or transmission of such works to the public. It is noteworthy, however, that a repeat broadcast or cable programme will not generate a new copyright duration.<sup>106</sup> Finally, for typographical arrangements of published editions, 25 years of copyright protection are afforded, starting from the end of the calendar year in which the work was first published.<sup>107</sup> For all of the

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<sup>103</sup> Ibid s12.

<sup>104</sup> Ibid s13A.

<sup>105</sup> Ibid s13B.

<sup>106</sup> Ibid s14.

<sup>107</sup> Ibid s15.

aforementioned subject matter, once the period of copyright protection has elapsed, the work will move to the public domain and become public property.

With regard to remedies afforded in consequence of an infringement, it is important to note that a copyright owner has the right, under the CDPA, to take legal action against the infringer. Courts are empowered, in this regard, to offer damages, injunctions, and account of profits by the Act. Notwithstanding this, however, if a defendant did not know and had no reason to believe that the work was under copyright protection, damages will not be awarded against him.<sup>108</sup> Suffice it to say, in addition to the remedies mentioned above, due to the rapid development of technology, s97A provides new kinds of remedies, including website blocking. In this context, it is instructive to note that an application for a website blocking order under s97A was made in 2011 by major Hollywood film studios against BT in respect of the Newzbin or newzbin2 websites.<sup>109</sup> This was a test case, which ultimately provided a series of new rules on how the web blocking process should work in future. This case concerned an application for online copyright infringement by the claimant, the Motion Picture Association of America (MPAA), which represented major Hollywood film studios. The argument was that the respondent, British Telecommunications, which was the largest internet

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<sup>108</sup> Ibid s97.

<sup>109</sup> *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 1981 (Ch) Chancery Division.

service provider in the United Kingdom, had infringed copyright in a large number of films and television programmes.<sup>110</sup> More specifically, the argument was that the website offered access to unauthorized copies of films and music. The claimant accordingly sued the defendant, arguing that the Newzbin site encouraged widespread copyright infringement by indexing copyrighted content without authorization. The court thus ruled that the defendant was liable for copyright infringement. The Newzbin site was temporarily shut down thereafter.<sup>111</sup> However, the Newzbin was later brought back online, under the new name "Newzbin2". Interestingly, it used the same code and database as its predecessor. For this reason, the claimant applied for a s97A CDPA website blocking order in an effort to block access by BT's subscribers to a website located at [www.newzbin.com](http://www.newzbin.com) (Newzbin2).<sup>112</sup>

On the facts of the case, the Court found that the service offered by the defendant had been used to infringe the copyright in the works in question. More specifically, the court found that the defendant had actual knowledge of every individual infringement. For this reason, Arnold J issued an injunction under Section 97A of the CDPA.<sup>113</sup> This was the first time that British courts have issued a website blocking injunction on the ground of copyright infringement, which arguably sets an important precedent for future cases.

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

Suffice it to say, it is noteworthy that several persons, apart from the original applicants, later applied to be joined as respondents to the proceedings, which, in effect, meant that a new set of facts had to subsequently be decided upon.<sup>114</sup> In this case, some auxiliary rules in terms of the implementation of website blocking were established, such as the appropriate form of the order and issues of cost, amongst others.<sup>115</sup>

On the basis of the aforementioned cases, it is arguable that the applicable standards relating to the implementation of s97A have essentially been established. However, in 2015, another case, *Twentieth Century Fox Film Corporation and others v Sky UK Ltd and others*, concerning an application for website blocking, has created some new issues regarding the implementation of s97A.<sup>116</sup> In this case, the claimant, MPAA, brought an action against the defendants, Sky UK Ltd, a major internet service provider in the United Kingdom, for having offered access to a large number of infringing films and unauthorized television programmes. The claimant applied for a website blocking order under s97A. However, as the websites included popcorn time type sites, as opposed to streaming sites similar to the BT sites

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<sup>114</sup> *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 2714 (Ch) Chancery Division.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Twentieth Century Fox Film Corporation and others v Sky UK Ltd and others* [2015] EWHC 1082 (Ch) Chancery Division.

discussed in the previous section, the issue of whether the court had jurisdiction to hear the matter had to be first determined. The court ultimately held that, “applying settled law to the facts, the court had jurisdiction under s 97A of the Act to make a blocking order in the present case and where such order was proportionate in the exercise of its discretion.”<sup>117</sup> Notwithstanding this decision, however, it is at least arguable that new issues under s97A may continue to arise in future due to rapid developments in technology; this might require that the provision be continuously strengthened in future.

Finally, the issue of limitations and exceptions, as introduced by the CDPA, is also worth briefly examining. In the UK, "fair dealing" is an appropriate limitation and exception to the exclusive rights granted by copyright law to authors or creators of a work.<sup>118</sup> Such limitation or defense is intended to prevent an action for infringement from being entertained. The fair dealing defense is relied upon for the purposes of private use, research and private study for non-commercial purposes, criticism, review, news reporting, caricature, parody and pastiche.<sup>119</sup> Additionally, in accordance with Section 31(1), incidental inclusion of a copyrighted work in an artistic work, sound recording, film, or broadcast would not be considered as an infringement of

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<sup>117</sup> Ibid.

<sup>118</sup> For general information, 'Fair Dealing' <[http://en.wikipedia.org/wiki/Fair\\_dealing](http://en.wikipedia.org/wiki/Fair_dealing)> accessed 20 April 2012.

<sup>119</sup> CDPA s28B, s29-30, s30A.

copyright.<sup>120</sup> Moreover, according to the provisions of Chapter III of Part I of CDPA 1988, fair dealing is also applicable to educational use, libraries and archives as well as public administration.

With regard for the test for fair dealing, if the purpose of dealing with the work in question falls within the enumerated categories, in practice the next step will be to consider the fairness component of the dealing. As there is no definition of when dealing is considered to be "fair" in the Act, the determination of fairness has developed through case law. Chapter 6, in particular, will consider the case law on fair dealing in some detail.

### **3.2.2.3. Digital Economy Act 2010**

The Digital Economy Act (DEA) was given Royal Assent to on 8 April 2010, and came into force on 8 June 2010.<sup>121</sup> The DEA is an Act designed to regulate digital media. In order to deal with the dramatic increase in internet piracy in the UK, the Act provides a number of measures aimed at solving the problem of illegal file sharing and downloading. For instance, in accordance with the DEA, internet service providers are required to provide lists of copyright infringement and inform those who 'allow infringement'.<sup>122</sup> The DEA also created a series of sanctions aimed at preventing copyright infringements,

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<sup>120</sup> Ibid s31.

<sup>121</sup> Digital Economy Act 2010.

<sup>122</sup> Ibid s4.

such as disabling internet access to those who constantly surf illegal sites, as well as limiting the speed or restricting access by infringers who frequently access illegal websites.<sup>123</sup>

The DEA established a system which aims to prevent online infringement as well as effectively control infringers. It also introduced technical measures and other limits to internet access so as to reduce the possibility of an infringement. Because the operational details of the Act are generally not defined by the Act itself, Ofcom has had to issue a series of regulatory codes.<sup>124</sup> On 28 May 2010, Ofcom published a draft consultation, called the Draft Code of Practice, aimed at stipulating the processes that must be followed, as well as the rights and obligations of rights owners, ISPs and subscribers.<sup>125</sup> The draft was further enhanced and later finalised in 2012, pursuant to the “Online Infringement of Copyright and the Digital Economy Act 2010”, which constitutes the notice of Ofcom’s proposal to make by order a code for regulating initial obligations.<sup>126</sup>

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<sup>123</sup> Ibid s9.

<sup>124</sup> Ofcom is the communications regulator in the UK. It regulates the TV and radio sectors, fixed line telecoms and mobiles, plus the airwaves over which wireless devices operate.

<sup>125</sup> ‘Draft of Code of Practice to Include Processes to be Followed, Rights and Obligations of Rights Owners, ISPs and Subscribers’ (Ofcom, 28 May 2010) <<http://stakeholders.ofcom.org.uk/consultations/copyright-infringement/>> accessed 5 March 2012.

<sup>126</sup> ‘Online Infringement of Copyright and the Digital Economy Act 2010’ (Ofcom, 26 June 2012) <<http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>> accessed 15 August 2015.

Since the passage of the DEA, one of the main controversial points has been the question of whether the Act has been successfully implemented in practice. According to a report published by the BPI in 2010, a large amount of music continued to be downloaded illegally.<sup>127</sup> It showed that specific legislation to govern this area of digital media was quite necessary. Notwithstanding the passage of the DEA in response to this report, it is arguable that the Act, in many respects, remains ineffective in terms of resolving the problem of illegally downloaded music, and potentially, other challenges that might arise in future. For example, Section 4 (1) stipulates that ‘an Internet service provider must provide a copyright owner with a copyright infringement list for a period...’. This has been criticised as being unfair to some innocent people. More specifically, it has been argued that an IP address of a computer cannot definitively prove the identity of the person who has illegally downloaded an item, as it only identifies a router in a household, which might very well serve several computers. This essentially means that innocent people could be sued under the DEA for ‘allowing’ this infringement. Additionally, other concerns have been raised about the adverse influence of this provision on business offering internet access to their customers, such as libraries and airports.<sup>128</sup> The reality is that, nowadays, a multitude of public

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<sup>127</sup> BPI (British Recorded Music Industry) Ltd, *Digital Music Nation 2010: the U.K.'s Legal and Illegal Digital Music Landscape* (2010).

<sup>128</sup> David Meyer, ‘Open Wi-Fi ‘outlawed’ by Digital Economy Bill’ (*ZDNet*, 26 February 2010) <<http://www.zdnet.com/open-wi-fi-outlawed-by-digital-economy-bill-3040057470/>> accessed 15 May 2012.

areas provide public access to WIFI in the UK. On the basis of the DEA, public entities, such as libraries, universities and airports, amongst others, may need to put a stop to offering this service in an effort to avoid liability under the DEA.<sup>129</sup> Furthermore, it has also been argued that it is impossible to administer shared networks' wireless access points through existing technical methods. As such, if the Act is fully enforced, millions of innocent customers would be adversely affected. For instance, because of Section 4(1), infringers' information has to be submitted to copyright owners. Unfortunately, however, some of these 'infringers' might very well be innocent users, and thus subject to potentially having their privacy violated.<sup>130</sup>

More generally, it is important to note that although the DEA has imposed certain obligations relating to online copyright infringement by internet service providers, and has, in fact, enacted relevant rules regarding penalties in this context, the EU law, and, in particular, Article 12 of the E-Commerce Directive,<sup>131</sup> requires that internet service providers be given substantial

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<sup>129</sup> Lilian Edwards, 'In the Thick of It: How the Digital Economy Bill is Trying to Kill Open Wi-Fi Networks' (*theguardian.com*, 30 November 2009) <<http://www.theguardian.com/technology/2009/nov/30/open-wi-fi-digital-economy-bill-government>> accessed 15 May 2012.

<sup>130</sup> 'BT to Challenge Digital Economy Act' (*www.broadcastnow.co.uk*, 10 January 2011) <<http://www.broadcastnow.co.uk/news/regulation/bt-to-challenge-digital-economy-act/5022107.article>> accessed 20 May 2012.

<sup>131</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Article 12 of the E-Commerce Directive defines a 'safe harbour' rule for the service providers who provide the services in relation to access to a communication network, or the automatic transmission of third party content through a network. It states that Member States are obliged to immunise the service providers from any liability for damages and criminal penalties which would otherwise arise from acting as a 'mere conduit' for (i.e. merely

immunity from liability where they have only supplied the 'pipes' through which infringing digital content passes. In such circumstances, service providers, to a certain degree, will be afforded some protection where subscribers are alleged to be using their services unlawfully to download or transmit copyrighted works.

In conclusion, in view of the foregoing, it can be argued that, notwithstanding the DEA, the UK needs to do more to protect the digital media industry. More particularly, stronger enforcement of copyright legislation is absolutely necessary.

### **3.2.3. Canada**

Before 1924, Canada did not have its own copyright law. As such, copyright in Canada was regulated by British laws and legal frameworks.<sup>132</sup> More specifically, from 1842 to 1911, copyright in Canada was governed by the Imperial Copyright Act, whose aim was to prohibit the importation of reprints into Britain and its colonies.<sup>133</sup> In 1889, 1890, 1891 and 1895, Canada tried to enact its own copyright legislation, but were denied from doing so by the

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transmitting) information. The conditions of this immunity are as follow: (a) the ISP did not initiate the transmission in issue; (b) the ISP did not single out the recipients of the transmission except by way of an automatic response to the request of another person; and (c) the ISP exercised no editorial function in relation to the information transmitted. This rule has been implemented in the UK by the adoption of the Regulation 17 of the Electronic Commerce (EC Directive) Regulations 2002 afterwards.

<sup>132</sup> PATRICK B. O'NEILL, 'A History of Dramatic Copyright and Performance Right in Canada to 1924' (2001) 22 Theatre Research in Canada.

<sup>133</sup> Ibid.

British authorities.<sup>134</sup> In 1911, however, when a new Copyright Act was passed in the U.K., Canada was finally authorized to enact its own copyright laws.<sup>135</sup>

In 1921, the first piece of domestic copyright law, the Copyright Act, was passed by the Canadian Parliament, and entered into force in 1924.<sup>136</sup> The provisions of the Act were almost identical to the provisions contained in the British Copyright Act of 1911. Interestingly, the provisions of the Canadian Copyright Act was not amended until 1988. The 1988 amendment sought to keep abreast with the rapid development of technology, such as computers, photocopier and other media recording devices. The amendment which was ultimately introduced in 1988 had its origins in a number of studies which were conducted in the 1950s, including the 1954-1956 "Royal Commission Report on Patents, Copyright, and Industrial Design", the 1977 "Proposal for Revision of the Law", the 1984 "White Paper on Copyright", as well as the 1985 "Report on a Charter of Rights for Creators."<sup>137</sup>

These studies collectively led to copyright form, albeit in two main phases.

Phase one, which begun in 1988, involved several meaningful modifications,

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<sup>134</sup> Jay Makarenko, 'Copyright Law in Canada: An Introduction to the Canadian Copyright Act' (13 March 2009) <<http://mapleleafweb.com/features/copyright-law-canada-introduction-canadian-copyright-act#history>> accessed 5 May 2012.

<sup>135</sup> Ibid.

<sup>136</sup> Jeremy De Beer, 'Copyrights, Federalism and the Constitutionality of Canada's Private Copying Levy' (2006) 51 McGill Law Journal 46.

<sup>137</sup> Makarenko.

including the legal protection for computer programs, the clarification and extension of moral rights, and new rights for visual artists to exhibit their works in public, amongst others. Phase two of copyright reform took place in 1997. The changes introduced included the establishment of a compensation system for private copying, such as a levy on blank audio tapes or CDs used for private copying; provisions granting exclusive book distributors legal protection in the Canadian market; new remuneration rights for producers and performers of sound recordings; new exceptions regarding the use of works by non-profit educational institutions, libraries, museums, broadcasters, and disabled people, allowing them to copy or use copyrighted works in specific circumstances without the permission of the copyright holders or paying royalties. In addition, the 1997 amendments also included a mandatory review of the Act. In Further to this review, Bill C- 60 was drafted in 2005, followed by Bill C- 61and Bill C-32. Unfortunately, however, these Bills have yet to be passed into law, for various reasons.

Suffice it to say, it is important to note that Canada has entered into a number of international agreements, which have significantly influenced the development of copyright protection in Canada. First, Canada acceded to the Berne Convention and Universal Copyright Convention in 1998<sup>138</sup> and in

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<sup>138</sup> Sara Bannerman, 'Canada and the Berne Convention: 1886-1971' Doctoral Dissertation, Carleton University <<http://www.cjc-online.ca/index.php/journal/thesis/view/113>> accessed 12 June 2011.

1962,<sup>139</sup> respectively. Second, Canada also entered into various bilateral and multilateral free trade agreements, which have undoubtedly influenced the country's regulation of copyright. In 1989, for example, Canadian copyright law was modified to meet the requirements of the Canada-United States Free Trade Agreement.<sup>140</sup> Further, in 1994, the Copyright Act was once again amended in order to fully comply with the North American Free Trade Agreement, which included a rental right for sound recordings and computer programs.<sup>141</sup> Third, in 1997, Canada signed onto two new treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which address copyright protection in the digital era.<sup>142</sup> It is noteworthy, however, that these two treaties were only ratified by the Canadian Government in May 2014, and later came into force on 13 August 2014.<sup>143</sup>

Notwithstanding the foregoing, however, it is arguable that the relevant law on copyright protection in Canada in the context of the digital era remained very outdated until the late 20th century. Before 1997, at which point Canada signed both the WIPO Copyright Treaties and the WIPO Performances and

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<sup>139</sup> 'Universal Copyright Convention of 6 September 1952, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI' (*WIPO*) <[http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=208](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=208)> accessed 15 June 2011.

<sup>140</sup> *Intellectual Property and Private International Law: Comparative Perspectives* (Toshiyuki Kono ed, Bloomsbury Publishing 2012).

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> 'Treaties and Contracting Parties' (*WIPO*) <[http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=1540C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1540C)> accessed 15 May 2015.

Phonograms Treaty, the Canadian government became aware of this problem and tried to address digital technologies and related internet issues by adopting appropriate laws. A succession of Canadian government agencies, including the Standing Committee on Canadian Heritage and the Government's Competition Policy Review Panel, had admitted that the then Copyright Act needed to be reformed. In light of these suggestions, the government finally acknowledged the importance of copyright in promoting innovation, attracting investment, as well as in keeping pace with the WIPO Treaties; as such, in 2008, Canada made a multilateral declaration to reform its laws so as to better address digital disputes.

That said, Canada still continued to struggle with the issue of insufficient protection of copyright in the digital era, particularly because it was the home to some of the world's most popular online illegitimate file-sharing internet sites. Piracy of software has remained very rampant in Canada, which begs the question as to whether Canada is compliant with the international standards espoused by the World Customs Organization. In this context, it can be argued that, in order to solve the myriad difficulties discussed above, Canada had no choice but to modernize its copyright law.

### **3.2.3.1. The Copyright Act of Canada**

The Copyright Act of Canada was passed in 1921, and came into force in

1924. It represented the first copyright law in Canada.<sup>144</sup> The Act was substantially amended in 1988, 1997, 2012 and 2015. According to the Act, copyright is vested in the right owner, and aims to prevent the unauthorized copying or use of copyrighted works by others. Copyright, within the context of the Act, automatically arises after the creation of a work, without the need for further action. In most of cases, authors of a work, the performers of a performance, the makers of a sound recording and the broadcasters of a broadcast are the first owner of the copyright in question.<sup>145</sup> However, if an employee is the author, the copyright will belong to the employer.<sup>146</sup> As to the duration for copyright protection, the Act makes it clear that life of the author and 50 years after his death is the appropriate duration, although several exceptions apply in this regard depending on the subject matter in question.<sup>147</sup>

In regard to the question of subject matter, the Act enumerated different types of materials, such as original literary work, dramatic work, musical work artistic work, computer program, communication signal, performer's performance, and sound recordings, amongst others. That said, it is noteworthy that copyright, within the context of the Copyright Act, only extends to the expression of those subject matters. Ideas or facts are not amenable to copyright protection.

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<sup>144</sup> Beer.

<sup>145</sup> Article 24, Copyright Act (R.S.C., 1985, c. C-42).

<sup>146</sup> Article 13, *ibid.*

<sup>147</sup> Article 6, *ibid.*

As regards the relevant criteria for copyright protection, originality, fixation, and nationality are necessary requirements. Originality means that copyright only subsists in original works. Fixation, by contrast, means that original work must be expressed in some material form; it must not only be an idea in the mind. The requirement of nationality means that, at the time when the work was created, the creator must be a citizen or permanent resident of Canada, or a citizen or subject of a foreign country which is a member of a bilateral or multilateral agreement to which Canada is also a member.

In addition, according to the provisions of Part III of Canadian Copyright Act, there are a number of limitations and exceptions which allow people to use copyrighted works without any compensation or the permission from copyright holder. By analyzing the nature of these exceptions, they could be classified into two categories, exemptions and compulsory licenses.

With regard to exceptions to copyright infringement, the Act makes it clear that users can use copyrighted works without permission of right owners or without paying royalties in certain circumstances. Three types of exceptions arise in this regard. The first allows users to use copyrighted works without permission for certain purposes, such as news reporting, criticism and review,

academic research and private study.<sup>148</sup> The second relates to limitations on protection of particular types of works. For example, users are allowed to copy computer programs for backup purposes or for the functional operation of their own programs.<sup>149</sup> The third allows certain entities to use copyrighted in specific circumstances, such as in educational institutions or charitable organizations.<sup>150</sup>

Compulsory licenses are another type of exception introduced by the Copyright Act. These arise where copyright owners are required by law to allow users to use their work at a specified royalty rate. One of the most important areas of compulsory licenses involves the retransmission of radio and television programs. According to the Article 31 of the Canadian Copyright Act, cable and satellite companies are allowed to capture and sell signals to their customers without the permission of right owners. However, they are required to pay a preset royalty fee to right holders.<sup>151</sup>

### **3.2.3.2. Bills to amend the Copyright Act**

It is noteworthy that, on a number of occasions, the Canadian government sought to amend the Canadian copyright act. However, due to political opposition, some of the Bills that were aimed at securing reform failed to

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<sup>148</sup> Article 29, 29.1 and 29.2, *ibid.*

<sup>149</sup> Article 29.24, *ibid.*

<sup>150</sup> Article 29.5, *ibid.*

<sup>151</sup> Article 31, *ibid.*

become law. For example, in June 2005, Bill C- 60, which aimed to enhance the protection of right holders, particularly in the areas of computer and online copying of works, was brought to parliament by the Liberal government led by Prime Minister Paul Martin. It was, however, not subsequently passed into law, due to the fall of the Martin government in 2005.<sup>152</sup> That said, in summer 2008, the question of amending Canada's copyright law was once again considered by the Conservative government led by Prime Minister Stephen Harper. Bill C- 61 was introduced during this period, whose contents were identical to the previous Bill C- 60 and, by extension, the American DMCA. Ultimately, however, with the calling of the September 2008 election, the Bill was not passed into law.<sup>153</sup> Moreover, Bill C- 32, which was brought forward on 2<sup>nd</sup> June 2010, suffered the same fate as its predecessors, as it did not become law following the May 2011 election.<sup>154</sup>

In view of the foregoing, it is arguable that political obstacles are one of the main reasons why copyright protection in Canada has developed relatively slowly. That said, it is certainly a positive development that Bill C- 11, which was tabled before parliament in September 2011, and which was identical to C- 32, received Royal Assent on 29 June 2012. The Act was subsequently

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<sup>152</sup> Emir Aly Crowne-Mohammed and Yonatan Rozenszajn, 'DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada?' (2009) 2 *Journal of Information, Law & Technology* 2.

<sup>153</sup> *Ibid.*

<sup>154</sup> Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform* (University of Toronto Press 2014) 190.

amended, through a series of rules aimed at addressing digital copyright protection.<sup>155</sup>

In sum, it can be argued that although the system of copyright protection in Canada developed rather slowly at the initial stages, it has markedly improved in the recent years, especially in the area of digital copyright protection. In this regard, it is submitted that some of the Canadian rules in respect of P2P technology should be relied upon by China in so far as its reform of copyright legislation is concerned.

### **3.2.4. Australia**

Australian copyright law was historically influenced by British law as well as international treaties.<sup>156</sup> Before 1900, the copyright laws which existed in some Australia's cities were deeply influenced by British copyright law.<sup>157</sup> However, with the establishment of the Federation in 1901 and the promulgation of a Commonwealth Constitution, the regulation of copyright has been effectuated at the federal level.<sup>158</sup>

The Copyright Act of 1905 came into force in 1907. It was the first federal

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<sup>155</sup> Copyright Act (R.S.C., 1985, c. C-42) in 2012.

<sup>156</sup> Mark Davison, Ann Monotti and Leanne Wiseman, *Australia Intellectual Property Law* (3 edn, Cambridge University Press 2016) 196.

<sup>157</sup> Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney University Press 2007) 14.

<sup>158</sup> Sam Luttrell, 'Copyright Enforcement in Australia' (2008) 11 *International Trade and Business Law Review* 3 4.

Australian copyright statute in the country's history.<sup>159</sup> To the extent that it represented a departure from British copyright law, it can be said that the Copyright Act of 1905 was a milestone in the development of Australian copyright law.

Following the passage of the British Copyright Act 1911, the Copyright Act of 1912 was enacted in Australia shortly afterwards. This Act declared that the British Copyright Act 1911 was to have legal force in Australia from 1912 onwards.<sup>160</sup> Australia henceforth became part of the British imperial copyright system, and the Copyright Act of 1911 thus played a foundational role in the Australian copyright law in the first half of the 20<sup>th</sup> century.<sup>161</sup> The statute remained in force until the Copyright Act 1968 was enacted, which had the effect of replacing the Copyright Act of 1912.<sup>162</sup>

The Copyright Act of 1968 came into force on 1 May 1969, and is still in force today, albeit that it has been modified on several occasions in order to keep pace with developments in the modern society. For example, the Copyright Amendment (Digital Agenda) Act 2000 was a major piece of amending legislation that sought to reform the Copyright Act of 1968,<sup>163</sup> so as to expand

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<sup>159</sup> Ibid.

<sup>160</sup> Article 3, Copyright Act 1912.

<sup>161</sup> Robert Burrell, 'Copyright Reform in the Early Twentieth Century: the View from Australia' (2006) 27 *Journal of Legal History* 239-240.

<sup>162</sup> Article 3, Copyright Act 1912.

<sup>163</sup> Copyright Amendment (Digital Agenda) Act 2000.

the scope of copyright protection to digital and online technologies.<sup>164</sup> Another important amendment to the Copyright Act 1968 was that of the Copyright Amendment Act of 2006.<sup>165</sup> This amendment represented the first time that Australia comprehensively introduced anti-circumvention provisions.<sup>166</sup> In addition, a number of new exceptions for users in the digital environment have been added, such as the parody or satire exception.<sup>167</sup> Of note also is the fact that the provisions of the Act concerning criminal copyright infringement were expanded by this Act, thereby protecting copyright in the digital era in Australia more effectively than before.<sup>168</sup>

As both Australia and China are major consumer countries of copyright works, the copyright industry in Australia has developed greatly overtime.<sup>169</sup> For this reason, it is instructive to study the Australian copyright legal system in order to gain various perspectives on how China's system of copyright protection can be improved in future. Given the important role played by the Copyright Act 1968 and the Copyright Amendment (Digital Agenda) Act 2000 in so far as

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<sup>164</sup> Emily Hudson, 'The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions' (2006) 14 *Australian Law Librarian* 25 25.

<sup>165</sup> Copyright Amendment Act 2006.

<sup>166</sup> Copyright Amendment Act 2006.

<sup>167</sup> Sally McCausland, 'Protecting "a fine tradition of satire": the new fair dealing exception for parody or satire in the Australian Copyright Act' (2007) 29 *European Intellectual Property Review* 287 287-288.

<sup>168</sup> Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967 982, 1002-1010.

<sup>169</sup> Yao Chen, 'Australian Copyright Industry' *China Culture Daily* (Beijing City, 7 September 2015) Huanqiu Cankao 3. <<http://www.culturalink.gov.cn/portal/pubinfo/001002/20150907/6b147b2437594b2a9ef5fee2fe25da31.html>> accessed 15 February 2016.

the development of copyright in Australia is concerned, both of these instruments will be specifically examined hereafter.

### **3.2.4.1. The Copyright Act 1968**

The 1968 Copyright Act came into force on 1 May 1969, and, as intimated above, remains in force today, albeit subject to numerous amendments overtime. The latest version of the Act follows an amendment on 27 June 2015.<sup>170</sup> The Act aims to balance the rights of the creator, or copyright owner, to manage and protect their own works against the needs and the rights of the public to use these works. The amendment was also aimed at bringing the law into line with the latest technological developments in the field, such as the internet. By example, in order to protect copyright in the digital era, Article 115A was recently added by the 2015 amendment. This provision is aimed at regulating internet service providers, a particularly recent development in the digital era.<sup>171</sup> When compared to the 1968 Copyright Act, it thus can be argued that balancing the disparate interests described above was a gradual development that culminated in the 2015 amendment.

Due to the influences of British copyright law, the Berne Convention as well as other international copyright treaties, the Copyright Act enacts detailed

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<sup>170</sup> Copyright Act 1968 (consolidated as of June 27, 2015).

<sup>171</sup> Article 115A, *ibid.* It is about the injunctions against carriage service providers providing access to online locations outside Australia.

provisions regarding the types of protected works and exclusive rights afforded copyright holders. With regard to subject matter of protection, Part III of the Copyright Act identifies four categories, namely, literary works, dramatic works, musical works and artistic works.<sup>172</sup> Part IV of the Act, however, affords copyright holders rights in “other subject matter”, including materials protected by neighboring rights, such as sound recordings, films, and broadcasts and published editions.<sup>173</sup>

In relation to the scope of exclusive rights, it is noteworthy that different kinds of subject matter attract different rights. For instance, right holders of literary works have rights of reproduction, publication, performance, adaptation, broadcasting and communication through information networks.<sup>174</sup> In contrast to literary works, right-holders of artistic works have more limited rights. More specifically, they have no right to control the public display of artistic works.<sup>175</sup> That said, it must also be borne in mind that right-holders of other subject matters, that is, dramatic works and musical works, have the rights of reproduction and communication to the public, amongst others.

In so far as ownership of copyright is concerned, it is important to note that after the creation of a work, copyright automatically arises. In the majority of

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<sup>172</sup> Part III, *ibid.*

<sup>173</sup> Part IV, *ibid.*

<sup>174</sup> Article 31(1)(a), *ibid.*

<sup>175</sup> Article 31(1)(b), *ibid.*

cases, the first right holder will be the author or producer of the broadcast. However, in relation to an employee who creates work within the employment context, the first right holder is the employer. Additionally, according to Division 5, part IV of the Act, performers and directors are given part ownership rights in sound recordings and in cinematograph films, respectively.<sup>176</sup> In most cases, the term of copyright protection extends for the life of the author, plus 70 years after his death. It should, however, be noted that in respect of television and sound broadcasts, 50 years after the broadcast was made is the appropriate duration of copyright protection.<sup>177</sup>

Finally, the issue of "fair dealing", in the context of the Act's exceptions, must be elaborated upon. Fair dealing is a limitation to the exclusive rights to which copyright holders are entitled. The exceptions, in accordance with the 1968 Copyright Act, include research or study,<sup>178</sup> criticism or review,<sup>179</sup> parody or satire,<sup>180</sup> reporting news<sup>181</sup> and judicial proceeding,<sup>182</sup> respectively. An additional criterion is that the use in question also needs to be "fair". The issue of fairness is decided by reference to several conditions, such as the nature of the work, the nature of the use and the effect of the use in any commercial market for the work. In addition to the fair dealing rules above, however, the

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<sup>176</sup> Ibid, Division 5 of the Part IV.

<sup>177</sup> Article 95, *ibid.*

<sup>178</sup> Article 40, *ibid.*

<sup>179</sup> Article 41, *ibid.*

<sup>180</sup> Article 41A, *ibid.*

<sup>181</sup> Article 42, *ibid.*

<sup>182</sup> Article 43, *ibid.*

Act also includes exceptions relating to reproducing literary works, newspaper articles or periodical published for private use.<sup>183</sup>

### **3.2.4.2. Copyright Amendment (Digital Agenda) Act 2000**

The Copyright Amendment (Digital Agenda) Act was enacted in 2000 and entered into force on 4 March 2001.<sup>184</sup> The aim of this instrument is to keep the legal protection of copyright in Australia on par with the development of digital technologies in the modern digital era.<sup>185</sup> At the time of its enactment, the most significant international developments were the adoption of the WIPO Internet Treaties, which are aimed at regulating various copyright issues that arise in the technological age.<sup>186</sup> In order to conform to the standards established in these international treaties, although Australia was not a signatory state, the Digital Agenda Act was enacted to reform Australia's copyright law in line with evolving international norms.<sup>187</sup> Some of the amended provisions will be introduced and discussed in some detail in the following sections.

The Digital Agenda Act introduced a new technology neutral right of

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<sup>183</sup> Article 43C, *ibid.*

<sup>184</sup> Copyright Amendment (Digital Agenda) Act 2000.

<sup>185</sup> Gaye Middleton, 'Copyright Beyond the Digital Frontier - Australia's Proposed Digital Agenda Reforms' (1999) 10 *Journal of Law and Information Science* 52 52.

<sup>186</sup> Simon Fitzpatrick, 'Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty' (2000) 22 *European Intellectual Property Review* 214 214.

<sup>187</sup> Middleton 54.

communication to the public,<sup>188</sup> which replaced the previous broadcasting right, which applied only to wireless telegraphy, and the cable diffusion right, which was limited to the transmission of copyrighted works over wires.<sup>189</sup> This is an exclusive right of right owners to communicate copyrighted materials to the public.<sup>190</sup> According to the Act's interpretation section, the term "communicate" means "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter."<sup>191</sup> In other words, digital media has been included into the types of works that can be transmitted. In addition, the phrase "to the public", as used in the Act, means "to the public within or outside Australia".<sup>192</sup> In light of this interpretation, the transmission of copyrighted works to audiences outside Australia is protected by copyright law.

With regard to the issue of liability, the Digital Agenda Act contains provisions addressing internet service provider's liability for online copyright infringement. More specifically, the Act provides that indirect liability may arise in relation to the right of reproduction, the new right of communication to the public and the

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<sup>188</sup> Ibid 55.

<sup>189</sup> Fitzpatrick 223.

<sup>190</sup> Tanya Aplin, 'Contemplating Australia's Digital Future: the Copyright Amendment (Digital Agenda) Act 2000' (2001) 23 *European Intellectual Property Review* 565 565-566.

<sup>191</sup> Item 6, Copyright Amendment (Digital Agenda) Act 2000.

<sup>192</sup> Item 16, *ibid*.

principles surrounding authorization of infringement.<sup>193</sup> The legislation therefore established a series of rules that foster an examination of whether service providers should be liable for copyright infringement.<sup>194</sup>

It should also be noted that the Digital Agenda Act added provisions relating to technological protection measures. Anti-circumvention measures have been enacted to protect the right of copyright owners in the digital era.<sup>195</sup> Appropriate remedies, including both civil and criminal penalties, have also been adopted by the Act.<sup>196</sup> Although the anti-circumvention rules were not perfect in this amended Act, particularly regarding the lack of guidance in so far as the fair dealing rules are concerned,<sup>197</sup> the amended Act was the first to introduce the concept of technological measures to Australian copyright law.

All in all, the Digital Agenda Act has reformed Australia's traditional copyright law greatly, thereby bringing the law in line with the digital age, by broadening the scope of copyright law.<sup>198</sup> The amended Copyright Act 1968 therefore better addresses the copyright issues that arise in the digital environment, whilst continuing to balance the interests of right owners and users in the

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<sup>193</sup> Aplin 572.

<sup>194</sup> Such as the Section 43A, Section 36 (1) in the Copyright Amendment (Digital Agenda) Act 2000.

<sup>195</sup> 116A, Copyright Amendment (Digital Agenda) Act 2000.

<sup>196</sup> 116D, *ibid.*

<sup>197</sup> Aplin 574-575..

<sup>198</sup> Sarah Waladan, 'A Copyright Law Update 2000-2006' (2006) 14 Australian Law Librarian 23 23.

digital era.

In sum, given the impressive quality of Australia's system of copyright protection, it can be argued that Australian copyright legislation should be further studied, and, where appropriate, relevant developments should be emulated by China, thus improving the country's system of copyright protection in the digital era.

### **3.2.5. China**

In China, the emergence of copyright protection could be traced back to the development of typography, as described in chapter 2. Although there were various regulation which, in some respects, had a copyright dimension, there was no formal legal or administrative copyright protection in China until relatively recently. After the People's Republic of China was established by the Communist Party in 1949, the country which, was at the time a war-ravaged nation, needed to be urgently resuscitated in many fields, including technology and intellectual output. To this end, a number of pronouncements, publications and author remuneration policies were issued in quick succession.<sup>199</sup> For example, the "Decisions on the Fundamental Principles of Developing People's Publishing Work" was issued to emphasize the

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<sup>199</sup> Qu 64.

importance of the publishing industry,<sup>200</sup> and the “Draft of Temporary Regulations on Remuneration of Literary and Social Science Books” was published to regulate authors’ remuneration and promote the quality of literary works.<sup>201</sup> However, as a result of a series of political campaigns in China, especially in the decade following the Cultural Revolution, almost all of the established systems on copyright protection were destroyed.

From 1978, however, after a series of reforms and the opening-up policy were adopted in China, discussions about the development of the copyright system once again gained momentum. As a result of having signed onto a number of international conventions, treaties and agreements, as well as entering into various international organizations, the Copyright Law of the People’s Republic of China was promulgated on 7 September 1990, entering into force on 1 June 1991.<sup>202</sup>

Notwithstanding these developments, however, it is important to note that online copyright protection had not been included in the 1991 law. In 2001, the Copyright Law was, however, amended, thereby adding relevant provisions on online copyright protection. The Copyright Act was subsequently amended

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<sup>200</sup> ‘Xin Zhongguo Chuban 50 Nian Da Shiji (1949-1958) (The Important Matters about Publication in the Fifty Years Since the Establishment of People’s Republic of China)’ ([www.1A3.cn](http://www.1A3.cn)) <<http://www.1a3.cn/cnnews/xwsx/200909/6778.html>> accessed 22 March 2013.

<sup>201</sup> Ibid.

<sup>202</sup> Copyright Law of the People’s Republic of China.

a second time, in accordance with the Decision on Amending the Copyright Law of the People's Republic of China at the 13<sup>th</sup> Meeting of the Standing Committee of the Eleventh National People's Congress and re-promulgated on 26<sup>th</sup> February 2010. The law entered into force on 1 April 2010.

With the growing awareness of the importance of copyright protection among the public, a series of copyright-related legislation have been promulgated, which today collectively represent a robust and comprehensive system of copyright protection in China. An important example, in this regard, is the Regulations for the Implementation of the Copyright Law of the PRC, which was adopted in 1991 and revised in 2002. Additionally, in order to implement the Berne Convention, the Universal Copyright Convention and several bilateral copyright treaties which were concluded between the PRC and various foreign countries, the government of the PRC passed the Regulations on Implementation of International Copyright Treaties in 1992, which sought to protect the rights and interests of foreign right holders in China. It is also noteworthy that the Regulation on Protection of Computer Software of PRC was passed in 2002, first time that the issue of online infringement was directly addressed in law.

That said, because of the rapid development of the internet, it is arguable that copyright law alone cannot address the myriad complexities and challenges

that arise in this regard. In order to resolve existing problems, it is submitted that judicial interpretations have to be drawn up to complement the Copyright Law. Instructive examples of such interpretations include the judicial interpretation of November 2000, and the Measures for the Administrative Protection of Copyright on the Internet of May 2005. Of note also is the fact that the Regulation on the Protection of the Right of Communication through an Information Network entered into force in 1 July 2006, to exempt network service providers from liability. Additionally, the Public Pledge has been introduced to address the problems associated with online defamation actions. However, because of a general lack of enforcement, it is not very useful in practice. In this context, it can be argued that China still has a long way to go in the area of copyright protection, especially in the digital era.

### **3.2.5.1. Copyright Law of the People's Republic of China**

The Copyright Law of the People's Republic of China was adopted at the 15th Meeting of the Standing Committee of the Seventh National People's Congress on 7 September 1990. It was subsequently amended in accordance with the Decision on Amending the Copyright Law of the People's Republic of China at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on 27 October 2001. The law was also amended, pursuant to the Decision on Amending the Copyright Law of the People's Republic of

China at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on 26 February 2010, which took effect from 1 April 2010.<sup>203</sup>

With regard to the contents of the Copyright Law, it is important to note, at the very outset, that it protects various "works", including, works of literature, art, natural sciences, social sciences, engineering and technology which are created in any of the following forms: (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic works; (4) works of the fine arts and architecture; (5) photographic works; (6) cinematographic works and works created by a process analogous to cinematography; (7) graphic works such as drawings of engineering designs and product designs, maps and sketches, and model works; (8) computer software; and (9) other works as provided for in laws and administrative regulations.<sup>204</sup>

In so far as the scope of the right created by the Act, it is noteworthy that both copyright and neighboring rights are covered, including the right of publication, authorship, revision, integrity, reproduction, distribution, rental, exhibition, performance, presentation, broadcasting, communication through information network, cinematography, adaptation, translation and compilation, amongst

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<sup>203</sup> Ibid.

<sup>204</sup> Article 3, *ibid.*

others.<sup>205</sup>

In terms of the duration of copyright protection, the Act makes it clear that said term is the life of the author, plus 50 years after his death.<sup>206</sup> However, in respect of cinematographic and photographic works and works created by a company or organization, the term is 50 years after the first publication.<sup>207</sup>

There are, however, a few limitations and exemptions created by the Copyright law. For instance, in accordance with Article 22, a work could be used without the permission from the copyright holders or the payment of remuneration to the right owners where: (1) the right holder's published work is used for purposes of the user's own personal study, research or appreciation; (2) in order to introduce or comment on a certain work, or explain a certain point in one's own work by appropriately quoting the right holders' published work; (3) in order to report current events, albeit that quotations of a published work should be used by the media, including newspapers, periodicals, and radio and television programs; (4) publishing or rebroadcasting by the media in those circumstances where the article was published by another media outlet on current political, economic or religious topics, except where the author declares that such publishing or

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<sup>205</sup> Article 10, *ibid.*

<sup>206</sup> Article 21, *ibid.*

<sup>207</sup> *Ibid.*

rebroadcasting is not permitted; (5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted; (6) translation, or reproduction in a small quantity of copies of a published work by teachers or researchers for the purposes of teaching; (7) use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties; (8) where, in order to display or preserve a copy of the work, a library, archive, memorial hall, museum or art gallery reproduces the work which is in its collection; (9) performance of a published work, where no fees are charged and no payments are made to the performers; (10) copying, drawing, photographing or video-recording an art work that is displayed in an outdoor public place; (11) translating a published work of a Chinese citizen, legal entity or other organization from the Han language into minority national languages for publication and distribution in the country; and (12) translating a published work into Braille for publication.<sup>208</sup>

In sum, it is submitted that notwithstanding the basic provisions included in the Copyright Law, as described above the rapid development of technology means that the rules relating to online infringement or other digital-related issues are at present still seriously inadequate. In this regard, it is arguable

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<sup>208</sup> Article 22, *ibid.*

that in order to social develop in an efficient manner, it might perhaps be inevitable that the law must be amended again in the near future.

### **3.2.5.2. The PRC Registration of Copyright in Computer Software**

The Measures for Registration of Copyright in Computer Software ("the Measures 2002") were issued by the National Copyright Administration on 20th February 2002, and entered into force on the same day.<sup>209</sup> The Measures 2002 apply to the registration of (a) copyright; (b) exclusive licenses; and (c) assignments of copyright, in respect of computer software.<sup>210</sup>

The current Measures 2002 are, in fact, a replacement of the Measures on Administration of Software Products which was promulgated on 27th October 2000. The 2002 Measures are therefore meant to bring the Regulations on Protection of Computer Software, which came into force on 1st January 2002, in line with China's obligations under the WTO Agreement and the GATT TRIPS Agreement. More specifically, compared with the Measures on Administration of Software Products, the 2002 Measures remove the prerequisite that computer software have to be registered before legal or administrative proceedings on infringement could be brought.

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<sup>209</sup> The Measures for Registration of Copyright in Computer Software (2002).

<sup>210</sup> Article 3, *ibid.*

More generally, it is noteworthy that although the registration of copyright in respect of computer software is not mandatory, the Measures make it clear that registered computer software will be given priority protection by the State. Registration is also beneficial, as it facilitates the reduction of litigation fees, and ensures greater certainty in transactions.

### **3.2.5.3. Regulation on the Protection of the Right to Network Dissemination of Information**

The Regulation on the Protection of the Right to Network Dissemination of Information was adopted at the 135 Executive Meeting of the State Council on 10 May 2006, and was promulgated on 1 July 2006. The regulation was subsequently amended in 2013.<sup>211</sup> This is arguable the first time that specific principles were set formulates to better protect copyright within China, through restraining digital copyright infringements.

Compared to the traditional copyright law in China, which lacked specific rules to deal with digital copyright issues, the Regulation has created a new right for right owners; that is, the right to network dissemination of information, which is arguably a positive response to the continuous development of technology in the modern era. The Regulation defines a series of issues, mostly relating to copyright protection in the internet industry, such as users' rights and the right

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<sup>211</sup> 2006 Regulations.

of right owners, safe harbor provisions, the liability of Internet service provider and anti-circumvention rules, amongst others. In this context, it can be argued that the Regulation, as a supplement to China's current copyright law, has, to some extent, better balanced the interests of key stakeholders in the area of digital copyright protection.

### **3.3. Conclusion**

Traditional notions of copyright protection have been challenged by the rapid developments in technology. This chapter has examined the P2P file sharing technology, and has argued that, in the context of the information age, the relevant legislation on this area needs to be enhanced.

This chapter was divided into two parts. First, in order to lay the ground work for the discussion of the challenges associated with P2P file sharing technology, this chapter has specifically analysed several working theories in terms of the different types of P2Ps. Second, the relevant copyright legislation in a few selected countries, particularly those legislations which cover the issues surrounding digital copyright protection, were examined by this chapter. This provided a rich and robust understanding of the development of copyright protection in different countries across the globe. In addition, by analysing the various copyright-related legislation from selected countries, this chapter has argued that the robust methods adopted by these countries to protect

copyright in the digital era should also be transplanted in China.

Notwithstanding the foregoing, however, in order to afford maximum protection to copyright in China, the next chapter will examine the history and culture behind the gradual development of copyright protection in China. In this regard, useful suggestions will also be provided.

# **CHAPTER 4**

## **Unmasking the Normative Influence of History and Culture on the Gradual Development of Copyright Protection in China**

### **Exclusive Summary**

As a nation's own cultures and traditions could impact on the development of its legal system profoundly, this chapter will critically assess the influence of history and culture on the gradual development of copyright protection in China. By introducing and analysing China's unique history and culture, the evolution of copyright protection in China will be showed in this chapter. In the meantime, the gaps between protecting the copyright in the current legislations and in practice will be discussed and pointed out respectively. In this regard, therefore, several possibilities for the future reform will be explored at the end of this chapter.

### **4.1. Introduction**

Given that China is the birthplace of four great inventions,<sup>1</sup> it is perhaps a reasonable expectation that the country's invention and innovation would remain ahead of the world. However, compared to its level of invention and innovation, it is perhaps disappointing that China has yet to develop

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<sup>1</sup> The four great inventions include the compass, gunpowder, papermaking and printing.

comprehensive protection for what is created when one applies ink typed to paper.<sup>2</sup> On the basis of legislation in relation to intellectual property, however, it would appear that the Chinese government has put in great efforts to promulgate formal legal measures to protect intellectual property. The current legislation, such as the Copyright Law as well as other intellectual property laws, have been designed as close as possible to the expectations of other western developed countries, with the aim of benefiting all aspects of communication between countries. Notwithstanding this, however, in practice, the protection of intellectual property remains closer to rhetoric than reality in China.<sup>3</sup>

As it has long been recognized that different legal systems are deeply implanted in the cultures and traditions from which those legal systems evolve,<sup>4</sup> the key question arises as to why copyright protection has never taken hold in China. To effectively answer this question, this chapter is written from the perspectives of the history and tradition of China, and, in particular, the Chinese political culture. The central argument, in this context, is that there are a few cases which suggest that the demand for copyright protection has for long time existed in China, from ancient China until today. Several

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<sup>2</sup> Alford 1.

<sup>3</sup> Ibid.

<sup>4</sup> Mitchel B. Wallerstein, Mary E. Moguee and Robin A. Schoen, *Global Dimensions of Intellectual Property Rights in Science and Technology* (National Academy Press 1993) 151; Alan S. Gutterman and Robert Brown, *Intellectual property laws of East Asia* (Sweet & Maxwell Asia 1997) 19, 21.

important copyright cases will illustrate this point. Finally, by exploring China's specific national conditions, some suggestions will be made as to the future development of copyright protection in China.

## **4.2. Copyright Protection in the Context of Chinese History and Culture**

Whenever the words “China” and “Copyright” appear in the same sentence, the images of rampant piracy immediately dominate normative thinking.<sup>5</sup> The normative view of China, which has solidified over the years, is that private property and relevant copyright concepts are too foreign and abstract for China and its political and judicial systems to understand.<sup>6</sup> In order to fully understand the formation of this idea, this chapter will, from the perspectives of Chinese history and culture, analyze the reasons why copyright protection in China has been problematic.

China, which is conventionally referred to as a country with five thousand years of history, is recognised as one of the oldest continuous civilizations in the world. In fact, its economic and technological developments serve as a reminder that China was a forerunner in numerous fields for a number of

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<sup>5</sup> Peter S. Goodman, ‘Pirated Goods Swamp China: Official Crackdown Has Little Effect’ *The Washington Post* (Washington, DC, 7 September 2004) Washington Post Foreign Service E01 <<http://www.washingtonpost.com/wp-dyn/articles/A535-2004Sep6.html>> .

<sup>6</sup> Ibid, “...Communist country of 1.3 billion people, the concept of private property is neither fully understood nor valued, let alone the abstract notion of intellectual property...”

centuries. Chinese civilization can be traced back to the twenty-first century B.C., with the advent of the first dynasty, Xia.<sup>7</sup> Although the initial dynasties did not completely consolidate China into a nation-state, the imperial dynasties began to do so in 221 BC.<sup>8</sup> The imperial dynasties lasted until the overthrow of the Qing dynasty, and the subsequent formation of the Republic of China in 1911.<sup>9</sup> A series of theories, ideas and doctrines, in this long history, used to appear, and still be appear today. It is because of these essences of human wisdom that the country was established, and subsequently developed with its own national characteristics.

#### **4.2.1. Confucianism**

Chinese history is characterised by two dominant ancient writers - Confucius in the 5<sup>th</sup> and 6<sup>th</sup> centuries BC and Mencius in the 3<sup>rd</sup> and 4<sup>th</sup> centuries - who largely developed what became known as "Confucianism". Due to the far-reaching impact of Confucianism in China, it could be said that some of the ideas from Confucianism influenced the legislation passed in each imperial dynasty, and, in many respects, continue to affect the legal enforcement of copyright in China today. As for Confucianism in the society, it plays a major role as a systematic code of interpersonal communication,<sup>10</sup> and could also

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<sup>7</sup> Robert L. Worden, Andrea Matles Savada and Ronald E. Dolan, *Federal Research Division, Library of Congress, China- a Country Study* (4 edn, 1988) Ch5.

<sup>8</sup> Ibid Ch5, 11-13.

<sup>9</sup> Ibid Ch5, 29-30.

<sup>10</sup> Michael Dillon, *China: a Historical and Cultural Dictionary* (Curzon Press 1998) 62.

be seen as a practical, political and social doctrine, rather than a religion or a religious theory.<sup>11</sup>

Confucius, living in ancient China during a time of great chaos and feudal rivalry, known as the Warring States Period (Zhan Guo Shi Dai), wrote and published numerous books. Among these, the most famous is “The Analects”, which is a collection of his sayings by his pupils. With respect to the creed of the writings and beliefs of Confucius, most of them did not become popular until well after his death.<sup>12</sup> As time went on, Confucianism, in some degree, became a cultural antecedent, leading the social ethos of the time.

According to Confucius' writings, the doctrines that characterise Confucianism are based on honesty. Gradually, Confucianism evolved into four categories. The first is 'li', which means 'ritual', or 'to sacrifice'.<sup>13</sup> The second is 'xiao', which means 'filial and piety'.<sup>14</sup> The third is 'zhong', which means 'loyalty'.<sup>15</sup> And, the fourth is 'ren', which means 'humaneness'.<sup>16</sup> By considering their content and form, it could be argued that these categories are very similar to

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<sup>11</sup> Yongming Chen, *Zhongguo Zongjiao Chuantong Confucianism and China's Religious Tradition* (Religious Culture Press 2003) 109-131.

<sup>12</sup> Dillon 204.

<sup>13</sup> Hyung I. Kim, *Fundamental Legal Concepts of China and the West: a Comparative Study* (Kennikat Press 1981) 30-31.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

the Western concept of “natural law”.<sup>17</sup> In other words, Confucianism theory, which is inherently based on the principles of natural law, advocated ‘rule by etiquette’, ‘rule by virtue’ and ‘rule by man’, which constituted the central tenets of the then state administration, which profoundly affected later dynasties.

To introduce Confucianism, the word ‘harmony’ must, at the very outset, be comprehensively explored. In Confucianism, ‘harmony’ is a moral standard designed to cultivate order and peace internally and externally.<sup>18</sup> Confucius thought that the ultimate political goal is to achieve ‘proper order’ and therefore create harmony in the world.<sup>19</sup> It is expressed in one of Confucius’s most important doctrines, namely that there is a proper order to all things in the universe, including human society.<sup>20</sup> Therefore, in order to create a harmonious society in Imperial China, Confucian’s philosophy was applied more or less to all kinds of social activities, not only in terms of running a family or a village, but also in the management of the state. One of the central areas of focus for Confucius relates to the question of how to deal with human relations, such as the relationship between parent and child, ruler and subject, husband and wife, sibling, and friends. In this context, Confucianism adopted the method of rule by rites, which became a practice of national

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<sup>17</sup> Dillon 62-63.

<sup>18</sup> Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press 2000) 172.

<sup>19</sup> Ibid.

<sup>20</sup> Rodney L. Taylor, *Confucianism* (Facts On File 2004) 57.

administrations that subsequently followed. Rule by rites is characterised by social order and control being strictly observed. For example, in a family, the leader was usually the eldest person, while the other family members were to be disciplined and guided by their leader. The same principle applies in the context of the government, in that ministers must obey their rulers' orders. In other words, the question of who had a say was determined almost exclusively on the basis of seniority.

In addition, it is also important to note that the Chinese state's reliance on family heads, village elders, and guild leaders to apply local custom, as embodied in family rules (*jia cheng*),<sup>21</sup> guild charters (*hang zhang*),<sup>22</sup> and other less formal expressions of such practices, should be seen as akin to a controlled delegation of authority.<sup>23</sup> As the Chinese family was seen as a microcosm or the state in miniature, imperial Chinese emperors used the method of applying local custom by family heads, village elders, and guild leaders, to control the flow of ideas. For example, a parent, as the leader of a family, had an obligation to provide for both the spiritual and physical well-being of their children, while the children, in turn, were expected to be loyal and productive. In this context, it seems that filial piety and obedience inculcated in family life were the training ground for loyalty to the ruler and

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<sup>21</sup> Hui-Chen Wang Liu, *The Traditional Chinese Clan Rules* (J. J. Augustin 1959).

<sup>22</sup> William T. Rowe, *Hankow: Conflict and Community in a Chinese City, 1796-1895* (Stanford University Press 1992).

<sup>23</sup> Alford 11.

obedience to the constituted authority of the state.<sup>24</sup> In short, family relations were emphasised by Confucianism to the extent that the populace was exhorted to be loyal to the emperor and the state, which were identified as having the highest public interest.<sup>25</sup> However, the concept of private right, including copyright, as described in chapter 2, was not at all mentioned in Confucianism.<sup>26</sup>

## 4.2.2. Taoism

Apart from Confucius, who has profoundly influenced Chinese history and culture as intimated above, another famous philosopher in Ancient China was Lao Tzu, the founder of Taoism. Compared to the other traditional cultures, Taoist culture, originating from the spring and autumn periods as well as the warring states period, and was the biggest influence on ancient Chinese intellectuals.<sup>27</sup> According to the theory of Taoism, 'inaction' is considered to be the highest realm.<sup>28</sup> In this regard, Taoists advocated the importance of nature, and argued against fights and struggles. In ancient China, the doctrine of inaction used to be one of the popular political ideological trends during the

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<sup>24</sup> Ibid 20.

<sup>25</sup> Zhengyuan Fu, *Autocratic Tradition and Chinese Politics* (Cambridge University Press 1993) 103.

<sup>26</sup> Luo Li, 'How Has Chinese Traditional Culture an Impact on China's Intellectual Property Legal System? Would this Influence Be a Problem in the Protection of Folklore by the Intellectual Property Legal System?' (2010) 5 *The International Journal of Interdisciplinary Social Sciences* 269 271.

<sup>27</sup> Handong Wu and Yi Wang, 'A Brief View of Chinese Traditional Culture and Copyright System' [1994] *Chinese Journal of Law* 19.

<sup>28</sup> Ibid 20.

period of pre-Qin dynasty. Later, however, apart from Taoism, other schools of thought, such as Legalism, Confucianism, School of Naturalists and Syncretism, more or less absorbed the idea of inaction, albeit through different means.

Almost every school of thought was affected by the theory of inaction, and later Confucianism was appreciated by emperor Han Wu Di as embodying this theory; as such, all other theoretical schools, but for Confucius, were rejected. Confucianism, which encapsulates the idea of inaction has taken a dominant position in Chinese history, and deeply influenced most aspects of the Chinese society. This, interestingly, resulted in the decreasing influence of Taoism. That said, the tenet of 'inaction', as originated in Taoism and later encapsulated in Confucian, continued to play an important role in the later Chinese dynasties.

The essence of the theory of inaction was that social morality should be governed by the principle of doing nothing that goes against nature. For this reason, people's inclination to vindicate their rights was suppressed during this era. On the basis of the theory of 'inaction', Lao Tzu expected people to 'manifest plainness, embrace simplicity, reduce selfishness, hold few desires,

banish wisdom and discard knowledge'.<sup>29</sup> These are said to be the most fundamental expressions in terms of 'inaction' in the cultural field. In addition, Lao Tzu also considered that 'sin is derived from the demand for desire'.<sup>30</sup> In this regard, the vindication of rights within a formal legal system was discouraged; people could dare not claim that they deserved the protection of certain rights. This suggests that, during this period, ancient Chinese intellectuals were extremely conservative. In other words, they were determined to keep all aspects of society as they were, rather than trying to make improvements or create new things. In this context, it is perhaps axiomatic that the issues of literature property or copyright protection did not feature prominently during this period of time.

In hindsight, due to the foregoing ideologies of schools examined above, intellectual property, especially copyright protection, was not properly developed in ancient China. However, under these schools, the values with Chinese characteristics gradually developed. In this regard, therefore, some of the culture notions, which may be the factors that impact the copyright protection in China, are analysed hereafter.

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<sup>29</sup> Lao Tzu, *Tao Te Ching* (Digireads.com Publishing 2004) Chapter 19.

<sup>30</sup> *Ibid* Chapter 46.

### **4.2.3. Traditional Cultural Notions**

Due to the profound influence of the different schools of thought discussed above, a series of Chinese traditional cultural notions had been subtly implanted into the minds Chinese people, which arguably had a far-reaching effect on the development of copyright protection in China. This will explore the various cultural elements specific to China which explain why copyright protection in China has not garnered the level of primacy as perhaps in other countries.

#### *1. The Family-Based and Interpersonal Sharing Cultural Ideology*

China has been a clan and acquaintance society since ancient times, which has resulted in the creation of a family-based and interpersonal sharing culture. Family members, as a general rule, share and dedicate all of their belongings, not only physical materials, but also spiritual needs, to the family without questioning. Because of this close relationship, people's possession of knowledge about intellectual property in ancient China was quite limited. In addition, as people habitually shared their belongings in daily life, the boundaries between the personal field and the group field, private sphere and public sphere, were often blurred and arguably vague. The concepts of 'you' and 'I' in Chinese culture were not defined as clear as those in the West. As such, there was no sense of the sacredness of private property in ancient China. In this regard, private rights and private law were therefore very rare or

altogether non-existent in ancient China. In short, because intellectual property rights are essentially private rights, it was never fully appreciated by Chinese people, particularly in so far as their legal consciousness of such rights are concerned.<sup>31</sup>

Chinese traditional culture primarily valued the spiritual interests as well as the collectivist spirit, rather than individualist material interests. For example, a person who created a work usually paid attention to the fame which was brought from the work, though not the wealth. Additionally, creators not only focused on pursuing the spiritual interests inherent in the work, but also willingly dedicated the knowledge, which was owned by them, to develop the society and country as a whole.

An additional factor is the claim by most Chinese people that the privatisation and monopolisation of knowledge is wrong. From a Chinese perspective, because knowledge is from the country, such knowledge should be freely shared and distributed amongst citizens. Against this backdrop, the sharing of unpaid information, including the free sharing and transmission of knowledge, was deemed to be a kind of virtue under the moral ethos of ancient China. On the basis of this tradition, Chinese people got used to sharing knowledge,

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<sup>31</sup> Li 271, and Mo Zhang, 'From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China' (2008) 5 Berkeley Business Law Journal 317-326.

which was collectively owned, and therefore could not accept or understand why intellectual property should be regarded as private property. Based on this kind of thinking, freely 'borrowing' or copying other people's intellectual property for a variety of purposes could not be deemed as an illegal activity. In recent years, however, even the Chinese government has realised the importance of intellectual property protection, and has therefore promulgated a series of intellectual property legislation to this effect. Notwithstanding this, however, the Chinese public continues to follow 'traditions', thereby infringing copyright, albeit unconsciously.

## *2. The Moderate and Conservative Cultural Ideology*

The second factor which influences the implementation of copyright protection in China relates to the country's moderate and conservative cultural ideology. As Chinese people have been profoundly influenced by Lao Tzu's theory of 'inaction', they continue to prefer the style of moderation and conservation, rather than innovation in their daily life. For example, in other areas of life, if a Chinese person has to deal with a particular issue, he may, in all likelihood, choose to solve it by following precedent, rather than by finding his own way. Against the backdrop of this so-called 'psychological convergence', technological invention and various other innovations were not respected or strongly encouraged by the public from time immemorial. Chinese people

would rather choose the methods which were passed down from their ancestors for production and living.<sup>32</sup>

Compared to intellectual property, which celebrates social division and the spirit of ingenuity, the traditional methods of production in China always emphasized the knowledge of mankind and the peer experience, thus avoiding originality. This has arguably adversely eroded the development of intellectual property protection in China. Moreover, ancient China countenanced the traditional thought of policy physiocracy and restriction of business, which meant that it was almost impossible to engage in innovation and creation in that era. In other words, the ideology of moderation and conservation is one of the reasons why the protection of intellectual property is difficult to be accepted by the Chinese public nowadays.<sup>33</sup>

### *3. Belongingness and Common-Seeking Cultural Ideology*

The third traditional school of thought which has influenced the development of intellectual property in China is the 'belongingness and common-seeking' cultural ideology. In China, there is an old saying from Confucius that, 'inequality is not scarcity.'<sup>34</sup> This, in effect, means that people in China do

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<sup>32</sup> Xiushan Ma, 'Qianxi Zhongguo Zhishi Chanquan Wenhua (A Brief Analysis of the Culture in Chinese Intellectual Property)' [2005] Zhongguo Zhishi Chanquan Fazhan Zhanlue Luntan Lunwenji (The Collections on the Development Strategy of China's Intellectual Property) 4.

<sup>33</sup> Zhong Yu, 'Fazhi Zhilu Yu Zhongyong Zhidao (The Approach to Rule of Law and the Doctrine of Middle Way)' (2001) 1 Fujian Legal Science 60 60-61.

<sup>34</sup> Confucius, *The Analects* (Burton Watson tr, Filiquarian Publishing, LLC. 2006).

not worry about poverty, but rather about the uneven distribution of wealth. This suggests that the idea of equality is deeply embedded in Chinese culture. The belongingness and common-seeking cultural notion is hard to change, as Chinese people remain interested in this style no matter what situations they are in. To this end, although the market economy was introduced and applied in China for decades, the traditional culture of equality has not undergone any fundamental change.

However, because of this equality psychology, combined with market economy whose purpose is the maximization of profit, an abnormal psychology, that is, the psychology of obstructionism, has been created. For example, some enterprises, after observing that other enterprises which owned advanced technology produced well-known brands or best-selling products, decided to follow the trend and produce counterfeits rather easily. This has led to the copyright in a number of well-known brands and advanced technologies being infringed. That said, although the local government was aware of the infringements by these enterprises, little enforcement action was taken as the profits which were made in this regard promoted local economic development. The government, as result, overlooked infringements and even encouraged illegal uses, albeit surreptitiously. In light of this, copyright protection could not be effectively applied in China, even if copyright-related

policies and legislation have of late been comparatively full-fledged and relatively developed.

Because the belongingness and common-seeking cultural ideology, as discussed above, enterprises themselves have maintained two anachronistic attitudes which have meant that copyright cannot be fully protected in China. The first is that some forms of competition between enterprises are irrational. For example, a cluster of enterprises, running the same type of business, producing the same or similar products, would usually choose price competition to attract customers to the market. The winner can carry on its business. However, the others would choose to either exit the market or reproduce the brand-name products or 'use' techniques from other larger enterprises in this regard, without the right holders' authorization. The second is that some enterprises, as right holders, do not focus on technological innovation, which has indirectly created more opportunities for counterfeiters and infringers to capture market space. In view of these attitudes, copyright legislation promulgated thus far by the government has largely remained ineffective in practice.

From a management perspective, it is noteworthy that, as the relevant government departments were primarily concerned with the continued survival of similar enterprises than the technical advancements which have occurred

in respect of some enterprises, advanced technologies found it difficult to be established as the standard in various industries. In light of this, it can be argued that the 'belongingness and common-seeking' cultural ideology that existed at the management level may have led to a problematic situation whereby the weak is protected in a variety of ways, while the strong is quite often ignored. The motivation on the part of enterprises to innovate has therefore been gradually weakened, and a psychology of infringement has indirectly been encouraged.

In short, it is submitted that by exploring traditional cultural notions that operate in the minds of Chinese people, Chinese people appear to have their own understanding of the appropriate meanings that should be ascribed to knowledge and intellectual property, which are different from, and at times even antithetical to, the nature of intellectual property protection itself. In other words, because ideas of how intellectual property is understood in China, as described above, run quite contrary to the basic premise of intellectual property protection, that is, a private right that affords right holders protection,<sup>35</sup> infringements of copyright works continue to occur quite frequently among the masses in China.

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<sup>35</sup> Wenjun Liu, 'Discussion on Intellectual Property's Private Right Nature' (2004) 2 Nature and Science 84 84.

#### 4.2.4. 'Knowledge' from a Chinese Perspective

Aside from the reasons identified above, another important consideration which must be elaborated upon relates to how Chinese people construe 'knowledge'. This may, in effect, be another reason that explains why infringement of copyright frequently occurs in China.

The term 'knowledge' is no stranger to China. As an ancient country, China has a 5000-year-long civilization, and has been the birthplace of numerous significant inventions, such as paper, the compass, gunpowder, and printing (both woodblock and movable types).<sup>36</sup> In this context, it is perhaps axiomatic that Chinese people countenance 'knowledge', as they are good at creating new things. Notwithstanding this, however, even if knowledge is seen as an important thing in the minds of Chinese people, they do not believe that knowledge is an exclusive thing which should be privately owned. Therefore, copying or using intellectual inventions, which are created on the basis of another person's knowledge, has traditionally been viewed as not amounting to a wrongful action. Similarly, if creators realised that their works have been reproduced or used without authorization, they would traditionally not consider that their copyright has been infringed. In this regard, right holders might perhaps be described as complacent. By way of example, since ancient times, Chinese people have preferred to cite the classics to write articles; this

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<sup>36</sup> Yinke Deng, *Ancient Chinese Inventions* (Cambridge University Press 2011).

cultural practice has since been inherited and reproduced. Additionally, if a person owned advanced knowledge or cultural practices which he himself has created, it might very well consider it to be his absolute pleasure to share those intellectual achievements or allow them to be quoted at no cost, irrespective of whether the users in question have obtained his permission.

From Chinese people's point of view, imitation is the basis of continuous and stable development of human society, while innovation is the source of improvement to the whole society.<sup>37</sup> Essentially, imitation is viewed as inherently part of the nature of human beings. By way of illustration, it is perhaps axiomatic that a baby who grows to become an adult must have engaged in some degree of imitation. By analogy, the human society could not be developed without imitation. In short, then, Chinese people believe that imitation is the underlying basis of new creations, and that knowledge, therefore, should be free to share and used. There is also a somewhat elementary view, too, that if imitation was limited or avoided at the start of human civilisation, the human society could not survive and evolve as it has until today.

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<sup>37</sup> 'The Ideas Clash between the Intellectual Property Culture and the Shanzhai phenomenon' (*State Intellectual Property Office of the P.R.C.*, 7 April 2009) <[http://www.sipo.gov.cn/yl/2009/200904/t20090402\\_448861.html](http://www.sipo.gov.cn/yl/2009/200904/t20090402_448861.html)> accessed 13 August 2014.

On a balance, then, it can be argued that, on the basis of the arguments advanced in this section, cultural perceptions of knowledge have contributed to the numerous instances of “infringements” and “piracy” that typically occurred throughout China. These cultural perceptions might also explain why relevant copyright legislation was not effectively enforced at the very beginning of the period where the concept of copyright protection first appeared in China.

That said, although we can agree that culture and history deeply influenced the development of copyright protection in China, it undeniable that copyright protection has increasingly played a key role in promoting social development in China. Indeed, it is because of the rapid development of science and technology that the issue of copyright protection has naturally been considered by right holders, as well as the public at large. In the next section, evidence will be presented in order to show the process of evolution of copyright protection in China.

### **4.3. The Requirements of the New Epoch — Copyright Protection**

Copyright is essentially a private right, which is established mainly on an economic basis, at least for right holders. When a conflict arises as to who should benefit from works, copyright is intended to adjust and balance the

relevant benefits. Thus, when printing technology became an advance mechanism in China, the issue of copyright protection was gradually considered by right holders. Although past practices, such as making unauthorised imitations,<sup>38</sup> played a crucial role in Chinese cultural life, cases relating to copyright protection could still be found in ancient China, even though there was no copyright legislation at that time.

In regard to the history of copyright protection in China, Professor Jonathan Ocko has argued that 'even if one cannot find it inscribed in codes or litigated in courts, and intellectual property rights consciousness, or sensibility, has probably existed in China for a long time.'<sup>39</sup> In the subsequent section, the factors which may have caused the demand for copyright protection, such as the development of printing industry, political control, the protection of authors' reputation and commercial benefit, amongst others, will be analysed in some detail by reference to a variety of events and cases.

### **4.3.1. Political control**

In the very early period of China's history, the issue of copyright protection first surfaced around the time of the development of the printing press. According to historical records, in 835 AD, a decree was issued to ban the

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<sup>38</sup> Alford.

<sup>39</sup> Jonathan Ocko, 'Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context' (1996) 8 Yale Journal of Law & the Humanities 559, 569-572.

inaccurate private printing of calendars. Against this backdrop, it can be argued that the printing technology in China was in use from at least the early ninth century.<sup>40</sup> That said, the purpose underlying printing at the time was that of political control; that is, control over printing was aimed at maintaining the emperor's authority as well as improving the social welfare system.<sup>41</sup> By way of example, citing the calendar printing case, Alford argues that questions of time and astronomy were central to the emperor's assertion that there was a link between human and natural events, which made the uncontrolled printing of calendars an overly sensitive issue. Added to this, Alford suggests that imperial orders were sometimes made to eliminate heterodox ideas or works disparaging the dynasty.<sup>42</sup>

Apart from stabilising the empire, there are several other reasons that might explain control over printing. For example, the dissension among printing editions which the Emperor Tang Xizong encountered in 881 when he took refuge in Sichuan from Huang Chao's rebellion suggests that privately printed calendars did, in fact, disturb the daily life of his subjects.<sup>43</sup> It also meant that the foundation of the empire could be affected by disarrayed printing, such as agriculture, which largely depended on an accurate calendar.

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<sup>40</sup> Houshu Fang, *Zhongguo Chuban Shihua (The History of China's Publishing)* (The Oriental Press 1996) 77.

<sup>41</sup> Ke Shao, 'An Alien of Copyright? A Reconsideration of the Chinese Historical Episodes of Copyright' [2005] *Intellectual Property Quarterly* 400, 406.

<sup>42</sup> Alford 15.

<sup>43</sup> Simon Leys, *The Burning Forest: Essays on Chinese Culture and Politics* (Paladin Grafton Books 1988) 181.

Additionally, publishing control was also used to reduce the apparent mistakes contained in the texts which were produced as a result of low quality commercial printing, as erroneous books were thought of as being capable of misleading readers. This was especially the case if the misprints were to have been believed as the correct understanding of some fundamental issues. This phenomenon is recorded by Chia who argues that 'lazy students simply memorised without understanding by relying on some books written exclusively for the skills of examinations.'<sup>44</sup> In short, then, the problem of uncontrolled printing was that misleading knowledge could easily misguide examinees, the natural corollary of which was that the statecraft they were to be mastered by would be jeopardised.

Due to the serious consequences which could be caused by misprinting, as well as the fact that supervision at that time had failed to deter this growing problem, especially in Fujian, a large number of cheap books with poor quality were printed and sold around the country. Against this backdrop, the Ming Government decided to enforce a strict policy in order to regulate vexatious commercial printers. This policy was further crystallized, thanks to the persistence of many scholars over the years. More specifically, it is noteworthy that this policy gained formal legitimacy through a decree which

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<sup>44</sup> Lucille Chia, *Printing for Profit: The Commercial Publishers of Jianyang, Fujian (11th-17th Centuries)* (Harvard University Press 2002) 121.

was issued in 1532 by the office of Fujian Province. Part of its contents read as follows:

The Five Classics and the Four Books are the most indispensable for students. The older editions were well printed, but now commercial printers, who aim at nothing but profits, issue pocket editions in small print and with many errors... This is harmful not only to beginners but to many candidates for degrees who have been disqualified because of the mistaken texts they have used, which is indeed a serious matter. This Office deems it necessary that all works published in this province, for circulation over the whole of the empire, be carefully collated to rectify the errors... Therefore this Office has petitioned the Judicial Commissioner to appoint competent instructors and students to collate all texts carefully. Characters, punctuation, and commentaries should all be made correct. Standard texts are accordingly to be printed and distributed to all printers in Jianyang to serve as a guide. All works must be checked before they are sold, Names of the block carvers are to be placed at the end of books to make possible the tracing of any mistakes committed... Anyone who disregards this decree will be punished, and will have his blocks destroyed. No lenience will be shown."<sup>45</sup>

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<sup>45</sup> Shao 407, see Kuang-Ch'ing Wu, 'InstituteMing Printing and Printers' (1943) 7 Harvard Journal of Asiatic Studies 203, 229-230. For its picture, see Chia 35.

In addition to the new policy, the Ming Government also established a supervisory office in Fujian in 1536.<sup>46</sup> Although sanctions, in practice, were not as strict as the words of the decree indicated, the government nevertheless routinely sequestered unqualified blocks and occasionally destroyed them.<sup>47</sup> In this connection, it can be argued that this series of measures created the vague idea of copyright protection in ancient China.

Moreover, the exercise of political control was also aimed at protecting military secrets and, therefore, national security in ancient China. Due to the continual threat from a number of strong nomadic kingdoms in northern China, the decree had to be operationalized, especially in the Song dynasty. In fact, one of the edicts from 1040 BC shows that a large number of books relating to governmental secrets were actually sold outside the Song Empire. After Su Zhe, a well-known official literati at that time, had completed his diplomatic mission to Liao, which was one of the nomadic kingdoms with vast territories in northern China, he said, 'I think that the north kingdoms have all the books our people printed in our empire. It is common to see the memorials of our officials, political discourses of our examinees which refer to our governmental policies, and military strategies.'<sup>48</sup> The situation in South Song dynasty at this time was worse than in any other period. This led to the empire being shifted

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<sup>46</sup> Chia 177.

<sup>47</sup> Ibid 179.

<sup>48</sup> Yuanfang Song and Baijian Li, *Zhongguo Chuban Shi (China's Publishing History)* (Zhongguo Shuji Press, Beijing 1991) 96.

to Southeast China due to the aggression faced from the northern kingdoms. Against this backdrop, strict decrees in relation to prohibiting the reprinting of the national secrets were issued, which read, in part, as follows:

[...] the frontier defence must be kept secretly... [So] the printing of any information relating to contemporary policies and national defence is prohibited hereafter.<sup>49</sup>

Meanwhile, the prescribed sanction could be described as very cruel. In this context, the decree stipulated that, "those who carve and print the emperor's edicts, central government regulations and information relating to contemporary policies and national defence will be flogged eighty times."<sup>50</sup>

In addition to political control, another reason for regulating printing related to the need to prevent the massive proliferation of pornographic books and pictures in China. That said, because pornographic books and pictures did not pose a serious threat to the public interest in the Qing dynasty, the government applied a series of gentle approaches to prohibit printing. This was intended to prevent moral decline. In this context, preaching and plea were chosen over the imposition of heavy penalties.<sup>51</sup>

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<sup>49</sup> Ibid 97.

<sup>50</sup> Ibid.

<sup>51</sup> Shao 408; Zhengxie Yu, *Kuisi Cungao*, Vol.9. Cited in Bozhong Li, 'Mingqing Jiangnan de Chuban Yinshua ye (Jiangnan Publishing Industry in the Ming and the Qing)' [2001] Chinese Economic History Forum.

On a balance, it is submitted that in ancient China, the control of printing by the government was similar, at least in some respects, to the concept of copyright in the modern society. More specifically, control over printing was related to the emperor's authority or to the need to maintain proper social conduct.

Notwithstanding this, however, it must be pointed out that although political control was adopted to solve some of the problems in terms of the printing industry, it did not possess a significantly monopolistic character in the publishing industry in imperial China. In fact, publishing monopoly for the purpose of political control only existed for a relatively short period in China's history.

#### **4.3.2. The rise of the Commercial Publishing Industry**

Apart from the political control exercised over publishing as discussed above, the issue of what is the appropriate role of commercial publishing in stimulating the emergence of copyright in China requires examination. More specifically, this section argues that the nature of intangible things which can be replicated infinitely, and the protection of private rights, such as author's reputation and right holder's benefit, may be another of the primary reasons which provided the impetus for the development of copyright in China, albeit gradually. This section will accordingly examine the origin of copyright

consciousness in China from a commercial publishing perspective, as well as those factors which may be relevant in terms of protecting the rights of authors and/or right holders.

## **1. Creativity and Originality**

With regard to literature creations, irrespective of the period of time within which they were created, there is a requirement that such works should be original; that is, they must be the creation of the author. The rights attached to such works accrue to the author. Although the Chinese cultural atmosphere is strongly influenced by Confucian and Taoism, as illustrated in the foregoing section of this chapter, to a certain extent, it can be said that there was still ample room for authors to pursue originality and creativity in China's history. In the following section, this issue will be discussed; the aim is to critically explore which circumstances of the past could be imitated, and why originality and creativity are required for new creations.

Alford once said that, 'the power of the past and its consequences for possession of the fruits of intellectual endeavour' is overwhelming in Chinese history.<sup>52</sup> According to this perspective, the past does have an admirable place in the minds of Chinese people. However, by dynamically analysing the significance of the past or traditions, it can be argued that Alford's emphasis

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<sup>52</sup> Alford 19-29.

on 'past' has only limited significance for the purposes of the discussion surrounding copyright protection. That significance lies in the effect of the past on imitation and replication; this suggests that Chinese people view past knowledge as contributing to the progression of creativity, and that the freedom to collectively use an intellectual innovation should not be impeded by copyright law.<sup>53</sup> Therefore, except for so-called 'classic knowledge', the general view in China is that other imitations or replications should be allowed. That said, in order to identify the extent to which imitation or replication is not allowed in Chinese culture, the importance of originality and creativity will be explained hereafter, by reference to the justification for plagiarism, and unauthorised imitation, amongst others.

It should be recognized that, in China, the past usually foreshadows the present. In other words, the establishment of the present needs an acknowledgement and appreciation of rules and paradigms linked to societal underpinnings, which usually emanate from the past. However, in order to comprehensively understand the relations between the past and the present, such relations must be considered dialectically.<sup>54</sup> In this regard, it can be argued that the past is not absolute, but is always updated by modern creativity. For example, if we were to examine the common law system, it

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<sup>53</sup> Shao 412.

<sup>54</sup> Lloyd I. Rudolph, *The Modernity of Tradition: Political Development in India* (University of Chicago Press 1967) 2.

would become immediately apparent that new cases are always judged by reference to similar cases previously decided upon; as time goes on, however, new rules will be created by reliance on previous cases, which will become so-called precedents for future cases.

The old Chinese saying which suggests that the future is always different from the past, contradicts the conventional understanding that the Tao of Confucianism is unchangeable. The core idea of Tao, which does not include any conception of individual creativity, holds that mere proficiency in the basic skills and common elements of music, for example, is insufficient to create an original and charismatic stanza.<sup>55</sup>

As for the requirement of originality, in general, it is defined as 'the ability to think independently and creatively'.<sup>56</sup> Generally speaking, throughout China's history, the importance of originality was repeatedly mentioned and ascribed considerable value by a number of well-known philosophers. For example, Confucius, although arguing that 'I transmit rather than create, I believe in and love the ancients,'<sup>57</sup> was nonetheless the creator of original work, evidenced by his compiling of various works, including selecting and arranging historians' sayings, making conclusions about the cause of events and by making critical

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<sup>55</sup> Herbert Fingarette, *Confucius: The Secular As Sacred* (Harper & Row Press 1972) 92-100.

<sup>56</sup> 'Originality' <<http://www.oxforddictionaries.com/definition/english/originality>> accessed 28 May 2014.

<sup>57</sup> Confucius, Book VII, CH.1

judgments on the character of several historical persons.<sup>58</sup> This, therefore, means that originality and creativity were never lacking in Confucius's works. Notwithstanding this, however, as the printing industry rapidly developed in the Song dynasty, and knowledge spread much faster and wider than before, scepticism about literary creation grew. Mencius, in particular, developed a theory of suspicion, and criticised the academic atmosphere at that time wherein which individuals imitated Confucius without any of their own thinking.<sup>59</sup> This idea was widely adopted in later works by other scholars. A prominent example is Cheng Yi, a well-known Confucian thinker, who noted that "students must first of all be able to doubt".<sup>60</sup> Another Confucian scholar, Zhu Xi, who created a number of innovations based on Confucian classical theory, also considered that "great doubts lead to great progress".<sup>61</sup> These examples suggest that a great creation should have the creator's own thinking, rather than merely imitating the past.

That said, the question arises as to how significant are the elements of 'originality and creativity'? A reputed poet from Qing Dynasty, Ye Xie, gave a very vivid and fitting explanation, which is that "generally speaking, the

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<sup>58</sup> Edward Pulleyblank, 'The Historiographic Tradition' in Raymond Dawson (Ed.), *The Legacy of China* (Oxford University Press 1964) 150.

<sup>59</sup> Mencius, *Wanzhang Zhangju* II. Quoted from Tu Wei-ming, *Way, Learning, and Politics: Essays on the Confucian Intellectual* (Wenzhong Qian and Qin Sheng trs, Shanghai Renmin Chubanshe 2000) 41.

<sup>60</sup> Shao 414.

<sup>61</sup> Susan Cherniack, 'Book Culture and Textual Transmission in Sung China' (1994) 54 *Harvard Journal of Asiatic Studies* 5, 26-27.

authors of the past and the present distinguish themselves from each other and consider themselves no ordinary being; they always contend themselves with their earlier authors and are never willing to be dependent and steal other's orts".<sup>62</sup> In this regard, it can be argued that originality and creativity are the essence of creation. If a work has been created without any unique features, including the application of an individual's own mind, his personal emotion and so on, such would not be worth reading, as a work without the individual's own mind is actually pointless after all.

However, although individual thinking, personality and emotion are prerequisites to the creation of new work, the importance of imitation cannot be denied, given that such is important to social development. But, to what extent should imitation be accepted without being deemed as plagiarism? It is noteworthy that imitation is still very necessary in many areas, especially in the field of education. In the educational arena, Chinese people have always had tremendous tolerance for imitation as they believed that imitation of works is the foundation of education.<sup>63</sup> For example, it is popular to learn calligraphy in China; people typically begin learning this by imitating the calligrapher's handwriting whom they worship, such as Zhenqing Yan and Gongquan Liu. The copybooks for calligraphy in relation to their handwriting can be found in

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<sup>62</sup> Ye Xie, *Yuanshi (Origin of Poetry)* (Renmin Wenxue Press 1979) 9.

<sup>63</sup> Benjamin Kaplan, *An unhurried view of copyright* (Columbia University Press 1967) 2.

almost any book market. However, this line-by-line imitation could not be deemed as plagiarism as this kind of imitation is done for educational purposes.

That said, there are certain circumstances in which imitation will not be allowed. For example, where there is excessive imitation during the process of creation, which takes away from the supposed originality in the work. Excessive imitations can also have moral implications; for instance, if someone, after copying the work of others, claimed to be the author of the work, such behaviour was defined as plagiarism in China's history, which is an act of theft because it involved stealing the intellectual fruit of the original author.

Based on the analysis above, therefore, it can be argued that imitation is a double-edged sword. If imitation is applied for the purpose of education, it is a very effective method of learning new things as well as in passing on cultural norms, especially in the areas of calligraphy and painting. In this context, the eminent scholar Wen Fong has argued that copying, without viciousness, is a form of art. In fact, a large number of treasured masterpieces of calligraphy and painting in ancient China, which were developed based on imitations,

have circulated, even until today.<sup>64</sup> That said, it is important to note that if someone copied the work of others and passed it off as his own, this would be seen as an act of plagiarism, which is not prohibited, even back then in ancient China.

#### *(A) Tolerance and Acquiescence*

Ancient intellectuals in China, who were deeply influenced by the notions of suitability and advantage as espoused by Confucius,<sup>65</sup> regarded value justice as higher than material gains. They preferred to maintain a good relationship with other people to the greatest extent possible, even if others may have already damaged their interests. Therefore, even where plagiarism was found to exist, some of the authors may have tolerated or ignored it completely. For example, Liangsun Qiu plagiarised ten articles from Ouyang Xiu, an essayist and poet in the Song Dynasty and signed his own name on those articles. Ouyang Xiu did not, however, condemn him, but spoke out to the issue of accountability with a laugh.<sup>66</sup>

#### *(B) Ridicule and Despise*

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<sup>64</sup> Wen Fong, 'The Problem of Forgeries in Chinese Painting' (1962) 25 *Artibus Asiae* 95.

<sup>65</sup> Confucius advocated that the suitability is more important than the advantage and emphasized that spiritual value orientation is greater than material value orientation, which are called the outlook on suitability and advantage.

<sup>66</sup> Tai Wei, *Dongxuan Bilu*, vol 4 .

Plagiarism, which refers to the stealing and publication of other author's ideas or expressions as they were one's creation, was condemned by the Chinese public. The monk, Hui Chong, a reputed artist in the Song dynasty, created a number of beautiful poems. However, there were some suggestions that some of his works were, to a limited extent, copies of his predecessors' works. He, however, later indicated in acerbic tone, 'the poet did not copy the ancient's works, it was because the ancient's words were quite similar as the author's.'<sup>67</sup>

### *(C) Warning and Dissuasion*

As the popularity of plagiarised work increased, a few conscientious scholars started to concern themselves with this problem. Some of them warned the later generation to avoid plagiarising their works. For example, in Confucian canon, Qu Li stated, "do not plagiarise, do not be similar",<sup>68</sup> which persuaded people to create work with originality and creativity, rather than purely copy classic works. In addition, Zai Hu, a writer in the Song Dynasty, noted in his work 'Shaoxi Yuyin' that 'if you copy other's work and purported that the work was written by yourself, the lie could not be kept forever; it would be nailed

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<sup>67</sup> Xiufu Jiang, *Jianglinji Zazhi* . The book was published in Song dynasty. This translation has been modified in accordance with its original Chinese version.

<sup>68</sup> *Li Ji*, vol Qu Li .

eventually.<sup>69</sup> These sentiments have played an important role in cautioning people to avoid plagiarism.

#### *(D) Resistance*

The ancients did not always deal with plagiarism in a negative way. Sometimes, they might have had a positive attitude to the unauthorized copying and use of their work. For example, Ban Liu, a historian in Song dynasty, wrote a book called 'Hanguan Yi'. However, the author's name was changed to Chang Liu after that person added a preface to the book. Subsequently, however, in Ban Liu's later years, he made slight changes to his book, and signed his name on the book once again.<sup>70</sup>

#### *(E) Litigation and Punishment*

The first recoded litigation in relation to copyright was in the Tang dynasty. The book 'Chaoye Qianzai' recorded that the scholar, Hongzhi Xin, wrote a poem, but that another scholar, Dingzong Chang, copied most of this work, only making minor changes thereto. In light of this, both persons indicated that they were the authors of the poem. Fortunately, officer Weizong Luo, who was from Guo Zi Jian (the highest educational administration in feudal China),

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<sup>69</sup> Zai Hu, *Shaoxi Yuyin Conghua* (Renmin Wenxue Press 1981).

<sup>70</sup> Du Xu, *Quesao Bian* (Shanghai Guji Press 2012).

made an impartial decision in the form of an official document, eventually giving over the copyright to Hongzhi Xin.<sup>71</sup>

All in all, then, it can be argued that, in the context of China's history, there were several approaches to the phenomenon of plagiarism. However, without copyright-related legislation in ancient China, authors' right could not, in practice, be effectively protected. That said, it is submitted that the increasing demand for the protection of rights in works was one of the reasons which gradually stimulated the emergence of copyright protection in China.

## **2. The Author's Reputation**

It is noteworthy that at the earliest stage of human society, even before the invention of printing, the forms through which works were expressed were very limited in nature. These works were usually expressed as carvings or handwritings. During this period, most of the authors felt proud, and, indeed, a sense of accomplishment, once they found out that their works were referenced by others.<sup>72</sup> When printing was invented, one particular form of printing - batch printing - allowed for the rapid proliferation and dissemination of books. As such, once a work was created, it could be known and quickly read by the public.

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<sup>71</sup> Zhuo Zhang, *Chaoye Qianzai* (Shanghai Guji Press 2000) Volume 2.

<sup>72</sup> Dafeng Zhou, 'Zhongguo Gudai Zhuzuoquan Fa Tanyuan' [2009] Faxue Zhi Chunag (The Widow of Law).

However, the new technique, which made printing become simpler and more efficient, also created a number of problems. For example, because of the new technique, the production cost of printing books was greatly reduced. Book printing thus became an industry to gain profits for authors and businessmen, in particular. Meanwhile, a growing number of pirate copies or unauthorized word changes occurred in many places at various times, which authors increasingly began to pay attention to. In other words, the idea of copyright was gradually taking root; such as, copyright can be aptly described as the proverbial offspring of the printing technology. In fact, it can further be argued that without the printing industry, people would not have needed copyright protection in China.<sup>73</sup>

A series of problems arose imperceptibly after the widespread application of the printing technology, such as plagiarism, unauthorized copying and manipulation. Against this backdrop, there was increasingly a tacit admission authors' rights would be damaged. For example, there was a realisation that bowdlerisation and counterfeiting of inscriptions would de-contextualise words from the original meaning ascribed to them, which may, in turn, mislead readers, thus ruining the authors' reputation. However, as Chinese authors cared very much about their reputations, they therefore found various ways to protect themselves against these violations. These examples effectively show

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<sup>73</sup> Yang, 40.

that authors' reputations were damaged in various ways in ancient China, and that ancient intellectuals increasingly expressed their dissatisfaction with the challenge of infringements.

In the early stage of the application of the printing technology, condemnation was one of the methods that authors applied as against unauthorized changes of their work's content. In the Tang dynasty, the reputed poet Juyi Bai had made a declaration in his new publications which were created after his popular poems had spread widely. He stated that 'There are 75 volumes and 3840 poems in this collection. Except the poems which have been recorded in it, the rest are definitely false.'<sup>74</sup> Another ancient writer, Sima Guang, who was a well-known historian in the Song dynasty, also addressed the issue of the unauthorized textual changes made in a postscript. He expressed the view that he did not allow Mr Zhao to print out and copy his work. In addition, it was unexpected that Mr Zhao would change both the name and the text of the work without any authorization. Therefore, he had collated and revised it to its original version.<sup>75</sup>

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<sup>74</sup> Juyi Bai, *Baishi Ji Houji (Postscript of Bai, Juyi's Collection)* (845), cited from Yuan Yi, 'Bai Juyi Weishenme Bijiao Fan- Chuban Shi Shang de Zuji Mingzhu Xianxiang (Why Juyi Bai was Bothered- The Phenomenon of Nicking Masterpieces in Publishing History)' (2000) 3 *Zhongguo Banquan (China's Copyright)* 8.

<sup>75</sup> Guang Sima, *Sima Wenzhengong Chuanjia Ji*, vol 71 , Song and Li 236.

After the print technology had been applied more widely, where authors' works were pirated, their reputations could be seriously damaged. Furthermore, during that period of time, the government, with its inaction to protect authors' rights in works, also deeply disappointed intellectuals. They thus became quite angry. By way of example, regarding the great poet, Shi Su, due to the advanced printing technique, his works had spread everywhere. However, a few of the works which carried Su's signature actually were not created by him. Su was offended with it and complained to his friend by letter noting that, 'My poems and essays are spread widely. However, some of them are supposititious and they are changed in a mess sometimes. I am angry when I read them.'<sup>76</sup> Also, in another letter, he said that 'I condemned the person who published the works because of the money only. I cannot wait to destroy those printing blocks. How can I have my works published by them?'<sup>77</sup> Another Qing artist, Banqiao Zheng, even used hateful words to warn those who pirated. In order to express his indignation, he said that, 'all of my poems have been published in this collection. If anyone intend to make unauthorized copies, alter the texts or change the name of my book after my death, I will demoniacally haunt him and whack his skull.'<sup>78</sup>

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<sup>76</sup> Shi Su, *Da Liumian DuCao Shu*, cited from Yi.

<sup>77</sup> Shi Su, 'Yu Chen, *Chuandao Shu*', cited from Yi.

<sup>78</sup> Banqiao Zheng, *Houke Shixu*, cited from Yi.

The government's inaction in relation to the protection of author's right was, however, improved in the South Song dynasty. The writer, Zhu Mu, wrote a classic in this regard, named 'Fangyu Shenglan'. After he published this book, by himself, in block printing, which took a large amount of effort from him and also cost him a lot of money, he was worried that his book would have been pirated by others. Thus, he petitioned the government for protection; this was intended to function as a deterrent to those who pirated works. The government finally considered the petition, and accordingly made the official announcement which expressly warned and prohibited this pirated act and declared that if any one dared to do so, he would have been prosecuted; those printing blocks would've been destroyed; and the sale would've been stopped immediately.<sup>79</sup>

On a balance, the foregoing examples suggest that authors in ancient China seriously cared about their reputations and thus the idea of copyright protection had already arisen in their minds whenever their works were pirated. Therefore, even though copyright protection as we know it today was not fully understood at the time, protecting author's reputation is one piece of evidence that demonstrates that copyright protection was demanded in ancient China.

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<sup>79</sup> Dehui Ye, *Shulin Qinghua* (Zhonghua Shuju 1957).

### 3. Commercial Investment

In ancient China, when printing had become an important industry, the concept of investment gradually became integral to commercial publishing. As a book was considered to be a non-competitive resource, it could be easily pirated at a very low cost, thus rendering the original commercial publisher incapable of competing.<sup>80</sup> In order to prevent unauthorized printing and, by extension, to ensure that investment in publishing was well worth it, the protection of copyright played an increasingly important role. In this context, it can be said that the demand for rights protection in commercial publishing was another reason which stimulated the advent of copyright in China.

To understand the significance of copyright in commercial publishing, it is important to appreciate the relevance of China's reading population. Due to the large amount of publishing that was demanded in the book market at the time, business competition in China was very fierce. Therefore, publishers sought to do everything in their power to enlarge their market shares, including, improving printing quality and bringing down the price. However, given that pirated books were produced at little cost, authors' investments suffered heavy losses. In order to attract customers, investors usually had to spend a lot of money in order to gain profits. For example, in order to capture

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<sup>80</sup> Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown Law Journal 287, 315.

a huge market share, investors had to diversify what they were offering. With regard to new publications, before new works and new editions of original texts could be published, the phrases 'new edition', 'revised edition' or 'expanded edition' were commonly used in their colophons.<sup>81</sup> In addition, in order to ensure a constant supply of original works or stimulate writers to produce new works, investors usually had to make considerable payments. For example, there is a paragraph in the colophon of a Ming version of an earlier novel *Fengshen Yanyi*, which emphasised, "I (Zaiyang Shu, the publisher and investor) spent a lot to buy the manuscript of this book as it is collated by ..., which has not been seen before."<sup>82</sup> In short, it can be argued that investors increasingly cared about how to effectively protect their rights.

In addition, in ancient China, it was a common phenomenon for authors to operate as publishers. This family-based industry in commercial publishing meant that authors, who were also the publishers, had to pay a tremendous amount of attention to the text itself, as well as having to collate, carve and print. As such, if the work in question was pirated and reproduced without authorisation, this was akin to a death blow to authors. In this context, the Ming publisher as well as the reputed author, Xiangdou Yu, harshly berated

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<sup>81</sup> Cherniack 80.

<sup>82</sup> Chuanfeng Zhang, 'Mingdai Keshu Guanggao Shulue (The Introduction to the Publishing Advertisement in Ming Dynasty)' (2000) 1 *Huzhou Shifan Xueyuan Xuebao* 79.

pirates of the time in one of his books, 'Baxian Chuchu Dongyou Ji'; it was stated that,

My novels which have been published all resulted from careful compositions of my heart. I worked so hard and calluses thus appeared on my hands. The investment cost me heavily which is difficult to calculate. Therefore, those pirates should be called scoundrels and knaves, which did not do anything but earn the profits from my works.<sup>83</sup>

As intellectuals put more and more emphasis on the protection of rights in relation to investments in publishing, the government in ancient China played a critical role in assisting them in securing their rights and interests. For example, a decree was included in the Book of Poetry, Conggui Maoshi Jijie (Cong-gui Commentary on Mao Poetry), which was published in 1248. In it, there was a proclamation declaring the publisher's exclusive privilege as follows:

According to the petition of the local magistrate, Weiqing Duan ...to the Directorate of Education (Guozijian): my late uncle Conggui Duan ... based on his lecture notes and the commentaries by ... many scholars' studies, has compiled [this book] named Cong-gui Commentary on

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<sup>83</sup> Chuanyu Zhu, 'Mingdai Chubanjia Yu, Xiangdou Chuanqi' (1987) 16 Zhongwai Wenxue (Chinese and Foreign Literature) 164. Pengsheng Qiu, 'Mingdai Suzhou Yingli Chuban Shiye Jiqi Shehui Xiaoying' (1992) 5 Jiuzhou Xuekan (Jiuzhou Academic Journal) 139, 152.

Mao Poetry. Only Mr Luo [the student of Conggui Duan] has obtained a refined edition and has collated it very carefully...I hereby have it printed in order to circulate it. My late uncle was a devoted scholar on the classics, and spent his whole life in composing this book. If any other publishers reprint this book for profit, I am afraid that the book will in most of the case be bowdlerized. This will not only be ungrateful to Mr Luo's intention, but also seriously desecrates the academic reputation of my late uncle ... This Office hereby declares that if any one dares to do so, the offender will be severely prosecuted without any mercy and the printing blocks will be destroyed, under the petition of the victims.<sup>84</sup>

Many similar decrees subsequently appeared all across ancient China. For this reason, it can be argued that investment in commercial publishing, which invariably had a direct impact on authors' and publishers' profits, stimulated the emergence of copyright protection in China.

### **4.3.3. Globalization in Modern China**

Compared to western countries, trade and commerce in imperial China was underdeveloped, not only locally, but also internationally.<sup>85</sup> However, at the

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<sup>84</sup> Lin Zhou and Mingshan Li, *Zhongguo Banquan Shi Yanjiu Wenxian (Historical Materials for the Studies of China's Copyright History)* (Zhongguo Fangzheng Press 1999) 4.

<sup>85</sup> Ulric Killion, *A Modern Chinese Journey to the West: Economic Globalization and Dualism*

beginning of the nineteenth century, after a series of wars, especially the Opium War (1839-1842), China lost many aspects of its sovereignty to foreign powers. The adverse results of these wars led to the imposition of a variety of treaties on China, which granted numerous trade concessions to foreigners.<sup>86</sup> Because of coercion and opportunism by the West, China gradually became a semi-colonial and semi-feudal society after the Opium War of 1840, which allowed foreign powers to step up their aggression against China. That said, due to the invasion of western economic, scientific, technological and cultural ideals into China, some aspects of the Chinese society were, however, improved, including the formation of the idea of a legal system.<sup>87</sup>

In addition, as trade increased during this time, the publishing industry was flourishing as never before. Trade can thus be considered as a necessary condition for the development of the concept of copyright and the appearance of copyright legislation in modern China. With regard to the rapid development of the publishing industry, such development could be summarized into two specific aspects. The first relates to technical improvements in printing, which meant that blocking protection and typography were replaced by letterpress printing, and thus printing efficiency was greatly increased. The second

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(Nova Science Publishers 2006).

<sup>86</sup> William E. Beaumont, 'The New Patent Law of the People's Republic of China (PRC): Evidence of a Second Chinese "renaissance"?' (1986) 27 IDEA: Journal of Law and Technology 39, 43.

<sup>87</sup> Jian Zhu, 'Lishi Jiyi Yu Chongxin Chanshi-Jindai Zhongguo Zhuzuoquan Guannian de Chansheng (The Memory of History and Reinterpretation-The Generation of Copyright concept in Modern China)' (2005) Humanity and Social Science Fujian Forum 69, 72.

aspect is that with the gradual rise of the modern publishing industry, the publishing enterprises which were managed by the capitalist mode of operation started to appear in China. In the initial stages, this kind of enterprise was run by foreign businessmen, but later, Chinese capitalists joined this mode of operation. For instance, the Commercial Press and the Civilization Press, which are the famous presses even unto today, were established during that period of time. Both of them applied an advanced printing technique in the process of production and operation. Compared with the previous printing technique, efficient printing by the new printing method created much more profit than before.

Furthermore, with the expansion of western powers' influence on China, western ideas were introduced in China, which played an important role in stimulating the eventual emergence of copyright in modern China. The pioneers who actively advocated for the establishment of copyright in China included Young John Allen,<sup>88</sup> a missionary from the American Southern Methodist Church. Allen came to China in 1859, and his most influential work was in the field of education. He worked at a government school before establishing the Anglo-Chinese College in Shanghai. Later, he facilitated the establishment of the Christian Literature Society of China, and edited the Church News (Jiaohui Xinbao), which ultimately became a journal with a wide

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<sup>88</sup> He also has a Chinese name, called Lezhi Lin (林乐知).

influence in late Qing dynasty. For example, in his article 'Banquan zhi Guanxi' (The relationships in Copyright), Allen noted that 'as authors contributed their mental and physical efforts to create the works, and publishers invested a lot to publish the work for the public [...] the rights of those knowledge contributors should be protected in return, which is the meaning of copyright...'<sup>89</sup> He therefore encouraged people to respect the copyright in books by, for example, not engaging in unauthorized reproduction. In short, although it can be argued Allen's propositions were espoused for missionary purposes, his ideas nonetheless permeated the copyright field; in other words, he was a champion for the enactment of copyright legislation in China.

Apart from western scholars, Chinese scholars also advocated copyright protection. One such scholar was Fu Yan, who played a leading role in introducing the idea of copyright from the West into China, by explaining how significant it was to establish a system copyright protection.<sup>90</sup> It is noteworthy that when his work, 'Shehui Tongquan' was published in 1903, he signed a contract with the Commercial Press, which was the first contract that made explicit reference to copyright in China.<sup>91</sup> In this contract, issues relating to the rights and responsibilities of both parties, the ownership of copyright and

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<sup>89</sup> Lezhi Lin, 'Banquan zhi Guanxi (The relationships in Copyright)' (1904) 183 Jiaohui Xinbao.

<sup>90</sup> Zhu 72.

<sup>91</sup> Edward Jenks, *Shehui Tongquan* (Fu Yan tr, The Commercial Press 1981).

copyright royalty, amongst others, were clearly expressed.<sup>92</sup> This contract was seen to be the precursor to China's copyright legislation.

With regard to the modern system of copyright protection, it is arguable that this was formally introduced when China signed a treaty in 1903, titled 'Zhongmei Xuyi Tongshang Xingchuan Gongyue' (Treaty Between the United States and China for the Extension of the Commercial Relations Between Them). In Article 11, it stated that:

Whereas the Government of the United States undertakes to give the benefits of its copyright laws to the citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens:—

Therefore the Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection, in the same way and manner and subject to the same conditions upon which it agrees to protect trade-marks, to all citizens of the United States who are authors, designers or proprietors of any book, map, print or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the

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<sup>92</sup> Shixin Guan, 'Zhongguo Zhuzuoquan Fa De Lishi Yu Weilai: Zhongguo Zhuzuoquan Fa Bainian Jiamou (The history and future of China's Copyright Law)' *Procuratorial Daily* (21 October 2010) Academic Section 3 <[http://newspaper.jcrb.com/html/2010-10/21/content\\_56112.htm](http://newspaper.jcrb.com/html/2010-10/21/content_56112.htm)> .

exclusive right to print and sell such book, map, print, engraving or translation in the Empire of China during ten years from the date of registration. With the exception of the books, maps, etc., specified above, which may not be reprinted in the same form, no work shall be entitled to copyright privileges under this article...<sup>93</sup>

As intimated above, this was the first treaty regarding copyright protection in China. In order to fulfil its obligations under the treaty, in 1910, China's first copyright legislation, 'Daqing Zhuzuoquan Lv' (Great Qing Copyright Code in 1910 AD), was promulgated by the government of the Qing dynasty. The drafting process of this important piece of legislation involved consulting copyright laws from other countries, such as the Japanese Copyright Law of 1899, U.S. copyright legislation, as well as copyright legislation from German, Hungary, Spain, France, U.K. and Belgium, amongst others. The Qing government also sent delegations to attend an international convention in Berlin in 1908; the purpose of this convention was to revise the Berne Convention for the protection of literary and artistic works. In short, the Qing government had a comparatively clear understanding of the copyright laws in many other countries, when it promulgated 'Daqing Zhuzuoquan Lv'.

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<sup>93</sup> Treaty Between the United States and China for the Extension of the Commercial Relations Between Them.

In so far as the content of this law is concerned, it can be said that this legislation ensured the same level of protection as copyright legislation in other countries.<sup>94</sup> Generally speaking, 'Daqing Zhuzuoquan Lv' was considered as an advanced copyright law at the time, making China's system of copyright protection appear main stream. However, it can be argued that this legislation was not drafted taking into account the need to develop an indigenous Chinese system of copyright protection. Compared with foreign countries' copyright laws, most of which were developed by their respective legal systems, there is a gap between copyright law in China and the Chinese own historical background.<sup>95</sup> For example, in the foregoing sections of this chapter, mention was made of traditional cultures in ancient China, such as the absence of the idea of private property and the concept of inaction from Taoism, amongst others; these were not transplanted into Chinese copyright law. Accordingly, although China's first copyright law was promulgated in 1910, as influenced strongly by western countries' legislation, it could not be effectively enforced right away.<sup>96</sup> In short, notwithstanding the "Daqing Zhuzuoquan Lv", there was still a long way to go for copyright protection to achieve its full potential in modern China.

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<sup>94</sup> Mingshan Li, *Zhongguo Jindai Banquan Shi (The Copyright History in Modern China)* (Henan University Press 2003) 111-114.

<sup>95</sup> Zhu 73.

<sup>96</sup> Yang 47.

More generally, it should be noted that, based on the content of 'Daqing Zhuzuoquan Lv', similar laws were promulgated by the Northern Warlords Government in 1915, and the government of Kuomintang of Republic of China in 1928, respectively.<sup>97</sup> However, because of the Japanese invasion during the two World Wars, followed by the outbreak of the civil war between the Communists and Nationalists, these laws had a limited effect during this period; in fact, they were not enforced in Mainland China after the Kuomintang retreated to Taiwan in 1949.<sup>98</sup> The 1928 copyright law was thus finally repealed in 1959 by China's government, and from then on, no copyright law existed in China until 1990.

After the People's Republic of China was established by the Communist Party in 1949, the war-ravaged nation needed to be urgently resuscitated in many fields, especially in the areas of technology and intellectual output. Accordingly, in order to stimulate new creations and reassure intellectuals that their rights would be well protected, a series of pronouncements about publication and author remuneration policies were issued in quick succession.<sup>99</sup> Notwithstanding this, however, the phenomenon of piracy still occurred quite frequently in China. In fact, piracy was even committed by

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<sup>97</sup> Zheng and Pendleton 87.

<sup>98</sup> Eberhard, Chapter 11 and 12.

<sup>99</sup> Alford 59-60; see also Qu 64.

official state-owned publishers and bookstores.<sup>100</sup> Of note, too, is the fact that authors did not typically receive any compensation when their works were reproduced without authorization.

Between 1966 - 1976, the Cultural Revolution occurred in China. Because of the political and social upheaval of the time, the intellectual environment was greatly affected. Various oppressive policies led to the emergence of anti-intellectualism and thus almost all of the established systems of intellectual property protection were eliminated, including those regulations and policies dealing with the protection of authors' right.<sup>101</sup> This led to piracy later becoming the official state policy, evidenced by the fact that all works could be published freely without any permission as all the copyrighted works were considered as the property of the state.<sup>102</sup> The authors could therefore not gain any economic benefit or requisite protection of their rights in their works. As such, the income earned by them was a base salary only.<sup>103</sup> This situation lasted until 1978. After 1978, a series of reforms, typically involving liberalisation, were introduced in China by the new President Xiaoping Deng, and a new generation of leaders.

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<sup>100</sup> Alford 61.

<sup>101</sup> Bryan Bachner, 'Intellectual Property Law', in Chenguang Wang and Xianchu Zhang, *Introduction to Chinese Law* (Sweet and Maxwell Asia 1997) 443.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

Xiaoping Deng realised that China needed to modernize and open up itself both economically and culturally to the world.<sup>104</sup> In particular, Deng and the other leaders of the time thought that an advanced intellectual property system would attract of foreign investors, and therefore stimulate the development of technology in China.<sup>105</sup> However, as the previous legal system was severely limited, it seemed that not only the area of intellectual property, but also all other aspects in the country needed to be reshaped. There was, however, at this point still a long way to go before a robust system of intellectual property protection in China could be operationalised.

With regard to the development of copyright law in China, it is important to note that, in keeping with continuing reforms and opening-up policies, China first signed the Agreement on Trade Relations Between the United States of America and the P.R.C. in 1979,<sup>106</sup> wherein which the Chinese government agreed to 'seek to ensure' protection for U.S. citizens' intellectual property, including copyright.<sup>107</sup> In the following year, China joined the World Intellectual Property Organization (WIPO).<sup>108</sup> It must note that when China signed the 1979 trade agreement with the U.S., the phenomenon of piracy was commonplace in China. Without the protection of copyright law, copyrighted

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<sup>104</sup> Alford 65-66.

<sup>105</sup> Ibid.

<sup>106</sup> Agreement on Trade Relations Between the United States of America and the People's Republic of China.

<sup>107</sup> Qu 42-43.

<sup>108</sup> 'Legal Information (China)' <[http://www.wipo.int/directory/en/details.jsp?country\\_code=CN](http://www.wipo.int/directory/en/details.jsp?country_code=CN)> accessed 29 August 2014.

works were at the time easily duplicated and freely sold by publishers.<sup>109</sup> Because of this, some authors chose not to publish their works in order to reduce further losses.<sup>110</sup> However, with economic development and a growing number of foreign investments taking root in China, foreign governments were able to put pressure on China to protect their nationals' works. The Chinese government, in consequence, drafted a few regulations, including interim instruments, in the mid-1980s aimed at securing copyright protection.<sup>111</sup> The P.R.C.'s first copyright law was later promulgated in 1990.<sup>112</sup>

In light of the rapid economic development which characterised the early 1990s, the 1990 Copyright law was felt to be inadequate in dealing with the challenges associated with emerging technologies, such as P2P technology and online TV.<sup>113</sup> In addition, because China was seeking to join the World Trade Organization (WTO) in the late 1990s, and was required to sign the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>114</sup> the 1990 Copyright Law had to be considerably amended. The amended copyright law was promulgated in 2001, and thereafter slightly amended again in 2010.<sup>115</sup>

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<sup>109</sup> Peter K. Yu, 'The Copyright Divide' (2003) 25 *Cardozo Law Review* 331, 357.

<sup>110</sup> *Ibid.*

<sup>111</sup> Bachner 444.

<sup>112</sup> Copyright Law of the People's Republic of China.

<sup>113</sup> Xiaoqing Feng and Frank Xianfeng Huang, 'International Standards and Local Elements: New Developments of Copyright Law in China' (2002) 49 *J Copyright Soc'y USA* 917, 920.

<sup>114</sup> TRIPS.

<sup>115</sup> Copyright Law of the People's Republic of China.

The foregoing discussion clearly indicates that although culture and history, as well as emerging technologies and economic contingencies, deeply influenced the development of copyright protection in China, it can nonetheless be argued that the copyright protection in China was inescapable. In fact, it can even be argued that since the development of the printing press, cases or issues related to copyright existed in almost every historical period. Notwithstanding this, however, it is clear that copyright legislation in China needs to be continuously enhanced so as to better respond to emerging complexities in this important area of law. Some of these enhancements are considered below.

#### **4.4. Suggestions**

Because of the distinct influence of history and culture on the gradual development of copyright protection in China, it is perhaps necessary to explore those methods which might be considered as being suitable for China's specific situation, rather than merely advocate for transplanting other countries' rules and practices. In this regard, the subsequent section will provide a series of suggestions, not only regarding the enhancement of relevant legislations, but also concerning improvements in respect of tax, education and pricing.

#### **4.4.1. Strengthening Legislation**

With regard to the issue of how to protect copyright in China, it is submitted that there is a need to constantly strengthen the current copyright law and related regulations. For example, the penalties which are prescribed in the current law are not strict or, indeed, severe enough to dissuade copyright infringements. The indemnity limit which was enacted in China's copyright law is far too low to sufficiently deter infringers. In this regard, there is a strong argument to be made that strengthening legislation so as to make the applicable penalties more robust, including potential criminal liability for more serious infringements, is something which should be seriously considered by China.

#### **4.4.2. The Imposition of Tax**

In order to balance competing interests as between copyright owners and users, the government should consider strengthening the applicable tax regime in respect of copyright works. For example, with the rapid development of the Chinese society, playing background music in stores has become a very common mode of operation by businesses wishing to stimulate consumption. Because copyrighted works are used to create profits, it is only fair that a specific tax should be imposed on merchants so as to

ensure that copyright holders receive a commensurate amount in royalties.<sup>116</sup>

In addition, regarding certain commercial performances, such as bands playing live music in bars or performers performing in theatres, it is submitted that performance groups should be required to pay a certain amount in royalties to the copyright administration department. This could be considered as another method of improving copyright protection in China.

More generally, it is arguable that two of the leading copyright-based organizations currently in operation in the U.K. should be introduced in China - that is, the Performing Right Society (PRS), which collects and distributes money on behalf of songwriters, composers and publishers, and Phonographic Performance Limited (PPL), which collects and distributes money on behalf of record companies and performers.<sup>117</sup> In this context, it should be made a requirement that only if a business possesses a PRS for Music licence that it will be permitted to play live music on their premises, such as, in a pub, theatre or nightclub. Similarly, only business premises with a PPL license should be allowed to play recorded music in public, such as in restaurants, beauty salons and hotels. The money collected, in this regard, should be considered as royalties, and used to protect the interests of right

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<sup>116</sup> 'Zai Jingying Changsuo Bofang Beijing Yinyue Weihe Yao Fufei? (Why merchants need to pay the fees for playing the background music in their business premise)' (*Music Copyright Society of China*) <<http://www.mcsc.com.cn/informationsCopy.php?partid=35&pid=542>> accessed 10 November 2014.

<sup>117</sup> 'Licence to Play Background Music (PRS)' <<https://www.gov.uk/licences-to-play-background-music>> accessed 11 November 2014.

owners. Meanwhile, license holders should continue to pay for copyrighted work.

In China, the Music Copyright Society of China levies tax from those merchants who play copyrighted works as background music on their premises. More specifically, since 2009, the Music Copyright Society of China has started to levy a tax on background music in a number of big cities across China, such as Guangzhou, Shanghai and Beijing. However, without formal management or the strict enforcement of regulations, a large number of business premises which play copyrighted music without authorisation have not been required to pay fees to the society.<sup>118</sup> This has arguably damaged the interests of copyright owners, and hindered the development of copyright protection in China.

In sum, then, it is arguable that the copyright based government departments and societies in China should establish a strict and specific implementing standard for levying tax on users of copyrighted works. Meanwhile, educational programs discussing copyright protection need to be operationalized in order to raise the level of awareness about copyright protection in the public arena. This will help people to understand the

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<sup>118</sup> Yan Qu, 'Gonggong Changsuo Beijing Yinyue Shoufei Wenti Tanjiu (The Exploration of Payment Issue of Background Music in the Public)' (2013) 11 People's Tribune.

importance of copyright, which may, in turn, persuade them to make the conscious decision to pay fees for the use of copyrighted works.

### **4.4.3. Education**

To better protect copyright in China, raising public awareness in relation to the need for copyright protection should be a key priority. In this context, one must bear in mind that China's society is influenced by its unique cultural background, which as stated before, includes private rights not being highly valued, at least when compared to western countries. In this regard, the question of how to convince the Chinese public to accept the concept of copyright and the need for them to start to pay attention to and protect copyright must be seriously considered. In other words, education should be considered as a very important approach going forward, which will cultivate an awareness of copyright protection from an early age.

In order to cultivate an awareness of copyright in childhood, a series of education models could be explored and adopted in China. For example, schools could offer extracurricular courses in intellectual property or copyright related disciplines, which will have the effect of raising awareness about copyright-related issues. Meanwhile, teachers could try to foster children's innovative abilities. With the growing number of new works which are being made by children, an increased consciousness to protect their own creations

must be stimulated. They must begin to think about how to protect their works, as well as how to respect other people's innovation. In addition, the education sector or domestic organizations and associations in the field of intellectual property rights protection should publish relevant extracurricular readings, as well as hold regular lectures to increase knowledge of intellectual property. Relevant information should also be disseminated to the wider community. Websites should also be used to spread knowledge of how intellectual property is protected in the U.S., so that there can be a discussion of what could be learnt and subsequently transplanted in China. Key points of reference might include *uspto.gov*<sup>119</sup> or *copyright kids*,<sup>120</sup> which are run by government or non-profit organisations.

Apart from universal education on copyright protection, there is also a need to improve the capacity of professionals in the field of intellectual property. With the rapid development of technology, especially in the digital era, issues related to copyright protection or other intellectual property rights have to be discussed with legal professionals who are responsible for implementing copyright law. The reality, however, is that, at present, capacity on intellectual property issues is very weak in China. While professionals have played an indispensable role in the development of intellectual property in China, and it is

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<sup>119</sup> USPTO.GOV, 'Welcome to USPTO KIDS!' <<http://www.uspto.gov/kids/>> accessed 19 October 2014.

<sup>120</sup> 'Welcome to Copyright Kids' <<http://www.copyrightkids.org/>> accessed 18 October 2014.

perhaps axiomatic that, without them, intellectual property will not be effectively protected, the capacity of these professionals still needs buttressing. The experiences gleaned from some developed countries, in this regard, could be explored. For example, in the U.K., intellectual property has been a major course of study in some universities, such as Queen Mary, University of London, and the University of Edinburgh. In addition, the approach taken by the U.S. can also be countenanced in China. The U.S. is one of the most developed countries in the world, which could be attributed to the fact that that country attaches great importance to the development of education and exploration of human resources. Additionally, in the U.S., most intellectual property professionals are properly trained by law schools all across America. In fact, all of the 183 law schools in the USA have been approved by the American Bar Association<sup>121</sup> to offer specialized education about intellectual property.<sup>122</sup> Furthermore, Japan is another country with a comparatively advanced legal system on intellectual property. In fact, Japan had adopted the approach of strengthening education so as to develop the intellectual property industry in that country. In addition, Japan, in order to successfully implement its intellectual property strategy, improved its intellectual property capacity. Because of Japan's so-called 'National IP

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<sup>121</sup> American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015* (ABA Publishing, 2014).

<sup>122</sup> 'Daxue Ying Chengwei Zhishi Chuangxin de Ceyuandi (University should become the birthplace of innovation)' (*State Intellectual Property Office of the P.R.C.*, 13 November 2006) <[http://www.sipo.gov.cn/yl/2006/201310/t20131023\\_842759.html](http://www.sipo.gov.cn/yl/2006/201310/t20131023_842759.html)> accessed 1 October 2014.

Strategy', intellectual property courses have been introduced on both undergraduate and postgraduate programs. According to available statistics, intellectual property education at university level was reinforced by adding intellectual property law courses in the curricula of more than 70 colleges, and by setting up specialized intellectual property postgraduate courses in certain universities.<sup>123</sup> Therefore, a number of professionals are effectively trained by Japan's Universities to play key roles in the protection of the intellectual property industry in Japan.

In sum, then, with the rapid development of society and the growing demands for intellectual property protection, especially copyright protection in the digital era, there is a need for universities and colleges in China to emulate the experiences of comparatively advanced models, by for example, preparing a team of intellectual property professionals. With a growing number of intellectual property professionals, it is envisaged that the value ascribed to intellectual property might be bolstered, thereby positively stimulating the development of intellectual property in China.

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<sup>123</sup> Mr. Hisamitsu Arai, 'Country Focus: IP Revolution – How Japan Formulated a National IP Strategy' (*WIPO Magazine*, June 2007) <[http://www.wipo.int/wipo\\_magazine/en/2007/03/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2007/03/article_0007.html)> accessed 26 September 2014.

#### 4.4.4. The Price of Copyrighted Work

In order to ensure that customers voluntarily choose to purchase copyrighted books and CDs or download copyrighted works from the internet after having paid a fee, the price of copyrighted works is also another of the factors which would determine whether customers will be willing to pay or download copyrighted works.<sup>124</sup>

Due to knowledge-specific properties, such as abstraction, replicability and especially non-excludability, once knowledge-related products enter into the market, they are easy to be illegally replicated, which is one of the reasons why the phenomenon of piracy and infringement has proliferated in China. However, although the quality of unauthorized copies and pirated works may be worse than the original ones, the price of the former is usually much lower than the latter. Additionally, at times the unauthorized available for download from the internet may even be free of cost. In light of this, therefore, customers would invariably choose to buy or download pirated works rather than expensive copyrighted works.<sup>125</sup>

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<sup>124</sup> Mengjie Wang, 'Wangluo Shidai Banquan Baohu Weihe Kunnan Chongchong (Why Copyright is Difficult to be Protected under the Digital Era)' *China Youth News* (Beijing, 1 April 2011) 7 <[http://zqb.cyol.com/html/2011-04/01/nw.D110000zgqnb\\_20110401\\_1-07.htm?div=-1#>](http://zqb.cyol.com/html/2011-04/01/nw.D110000zgqnb_20110401_1-07.htm?div=-1#>) accessed 5 July 2014.

<sup>125</sup> Kai Wu, 'Women Weishenme Mai Daoban: Daoban-Yichengwei Weihai Guojia, Shehui, Bing Raoluan Zhengchang Jingji Zhixu De Zhongda Wenti (Why We Buy the Pirated Works: Piracy- Has Become to a Significant Problem Which Harmed the Interests of the State and the Society, and Disturbed the Normal Economic System)' (2003) 35 *China Electronic & Net Publishing* 26, 27.

Fixing the price for copyrighted works can help to achieve a balance between the interests of right holders and the interests of users, and can potentially lead to more and more users paying for copyrighted works, though these works may cost them more than the pirated versions. However, the reality is that the cost of copyrighted works is much higher than the pirated works, as the former involve costs associated with royalties, advertising, promotion expenses and other market costs which are not attached to pirated products.<sup>126</sup> Therefore, on price alone, copyrighted works cannot compete against pirated works.

It should be noted that China is still a developing country. The challenge, in this regard, lies in the fact that copyrighted works are typically priced above the market price,<sup>127</sup> which effectively means that a multitude of people, and students, in particular, simply cannot afford overpriced originals, even though they might want to choose copyrighted works at the very outset.<sup>128</sup> For this reason, a news story from The New York Times dated 10 October 2009 recently reported that a number of Microsoft software are pirated in China.<sup>129</sup>

The article, citing the views of Matthew Cheung, an analyst at the research

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<sup>126</sup> Qi Zhu, 'Woguo Yinxiang Zhipin Shichang "Daoban" Xianxiang Yanjiu (The Study of Piracy in Chinese Audio-visual Product Market)' (2008) 22 *Journal of Chizhou College* 35, 35-36.

<sup>127</sup> Wang, accessed on 21 October 2014.

<sup>128</sup> Wu 27.

<sup>129</sup> Reuters, 'Software Pirates in China Beat Microsoft to the Punch' *The New York Times* (New York City, October 18 2009) Global Business <<http://www.nytimes.com/2009/10/19/business/global/19iht-windows.html>> accessed October 15 2014.

firm Gartner, explained that price was clearly a contributing factor to this disconcerting state of affairs. He said that, 'if you're trying to sell a program that costs 2000 yuan to a student living on 400 yuan a month, that's simply not going to work out for most consumers.'<sup>130</sup> As such, in order to support original copies and therefore reduce or ultimately eliminate piracy, Microsoft had to cut the price of its Office 2007 Home and Student Edition from 699 yuan to 199 yuan in the Chinese market in 2008. It would later go on to sell its low-end Windows 7 Home Basic version for 399 yuan, a modest price by western standards. This reduction, however, appears to have been more acceptable to Chinese people, given their relatively precarious living standards at that time.<sup>131</sup>

Suffice it to say, apart from reducing the price of copyrighted works, the Chinese government should also provide appropriate support to entities operating in China so as to improve copyright protection in the country. For instance, the government could make an agreement with publishers and producers of audio and video products that permits these entities to reduce the price of originals by following the guiding price stipulated by the government, a price which can be afforded by most of the civilians, and the government would give a certain amount of financial subsidies in return.

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

Furthermore, the government should also cooperate with publishers or websites to publish some essential books, or at the very least create and disseminate digital resources related to intellectual property protection in order to provide requisite information on the nature of intellectual property to the public. Should this long-term approach be taken, it is submitted that the consciousness of the public at large on the issue of intellectual property protection will be gradually enhanced.

Moreover, by virtue of the development of the internet, a large number of people use online services to download books, music and movies, among other things. To protect the copyright in these online works, websites which offer paid downloads or other paid services should ensure that these works are reasonably priced, and should constantly enhance the technology used so as to improve the quality of the online works and the convenience of the system used to provide access to these works. This is envisaged to enable users to choose to obtain copyrighted copies, rather than download poor quality works from illegal websites. Meanwhile, controlling the price so as to encourage more and more people to download works from the legal websites could be considered as a high-volume, low-margin business strategy, which

could be of tremendous benefit for website development, users, network operators and creators.<sup>132</sup>

## **4.5. Conclusion**

This chapter has provided a critical assessment of the influence of history and culture on the gradual development of copyright protection in China. One of the central themes of this chapter was that China's unique history and culture has had a profound impact on the manner and extent to which copyright is protected in China. Although the existence of legislation aimed at counteracting the negative aspects of history and culture on the protection of copyright in China have been enacted, this chapter, however, a number of gaps nonetheless exist in practice, which necessitate reform.

In order to effectively buttress copyright protection in China, this chapter has argued that there is a need for the whole society to collectively make an effort to assume responsibility. In this regard, the issue of copyright protection in China is not only about improving legislation, but also about undertaking various other measures, including the strengthening of tax, enhancing education and improving civilians' consumption capacity.

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<sup>132</sup> Wang, accessed on 5 July 2014.

In short, this chapter is of the view that in order to protect copyright, it is very important that copyright law and other related legislation in place be constantly improved so as to keep abreast with the progress of technology and the development of the Chinese society. By analysing and learning from advanced copyright legislation in other countries wherein which copyright has been better protected, and by considering the historical background of China's copyright, copyright law in China could become more effective.

In addition to promoting copyright protection from the perspective of constantly improving relevant legislation, this chapter has argued that a tax levy on the commercial use of copyrighted works could also be considered. Although a series of relevant regulations on this issue are already in existence in China, implementation has been weak. In light of this, it is submitted that China could learn from the manner in which other countries have regulated this delicate area. Additionally, this chapter has argued that, in order to establish legal consciousness about the importance of paying for copyrighted work, awareness-raising programs must be regularly organized. It is only when legal consciousness is raised among the whole society that tax regulations are likely to be smoothly implemented in China.

Moreover, education programs could strengthen awareness about copyright protection in the society as a whole. Education should therefore be

considered as another approach to enhancing copyright protection in China. With regard to the educational methods to be chosen, it is perhaps elementary that different people should be educated in different ways. For example, educational departments should advocate that both kindergartens and primary schools are required to create extracurricular courses about intellectual property in order to foster the idea of copyright protection from childhood. In addition, due to the development of society and the growing number of cases involving intellectual property protection, the demand on professionals in the field has become more urgent than ever before. By learning from the experiences of professionals in other countries, it is suggested that the study of intellectual property should be included as key areas of study in more Chinese universities and colleges. Furthermore, in order to raise awareness about copyright protection amongst the general public, the government or associations could regularly host lectures, and freely publish brochures, amongst other things, to spread information about copyright to the masses.

Finally, the price of copyrighted works, given its important role, must be seriously considered. If a price ceiling could be applied in respect of civilians, they may be able to purchase copyrighted works, instead of seeking to download pirated works, as is frequently the case in China today. In short, it is the contention of this chapter that the price of copyrighted work has to be

comprehensively analysed by key market participants to find appropriate solutions to the current challenges associated with copyright protection in China.

In the following chapter, further attention will be placed on more specific issues relating to copyright protection in the digital era. More specifically, the issues of liability involving the P2P system will be critically analysed and discussed in the next chapter.

# **CHAPTER 5**

## **Liability under the P2P System**

### **Exclusive Summary**

With the advent of digital technology, the cases involving in copyright infringement has become more and more various and complicated than before. Accordingly, this chapter will talk about the issues of liability under the P2P system.

The first part of this chapter will address the issue of primary liability. And the second part will examine the complexities and challenges of secondary liability in the digital age. A series of theories concerning secondary liability will be explained in detail. And some selected countries' relevant legislations and directives on this issue with secondary liability will be introduced and discussed as well. Also, by comparing with the relevant legislations in China, a number of problems will be pointed out and analysed respectively. In this regard, some suggestions will be provided at the end of this chapter, to improve China's copyright protection system in the future.

### **5.1. Introduction**

Copyright protection has markedly evolved over the centuries, from only protecting the right to control the replication of literary works at the very

beginning,<sup>1</sup> to later protecting the right to control the transmission of digital recordings of literary, dramatic, musical and artistic material on the internet today. More specifically, copyright protection has developed in a manner that attempts to keep up with appropriate changes in technology, including the increasing availability of computers and electronic files, among other things. In this context, copyright protection ensures that the exercise of any of the exclusive rights of a right owner, without the authorization, is regarded as an infringement of copyright, thus rendering the infringer liable. In general, infringement is divided into two classes - primary liability and secondary liability. Primary liability arises where a person infringes the copyright in a work by copying, performing, broadcasting, imitating or commercializing said work without the consent of the right holder.<sup>2</sup> This class of liability is comparatively easier to be determined, as evidence of an infringement is usually quite clear. However, the determination of secondary liability, which arises where commercial facilitators aid primary infringers,<sup>3</sup> is far more complicated, especially in the digital age, which is characterized by peer-to-peer file sharing (P2P) technology. It is against this backdrop that this chapter has been conceptualized. More specifically, the first part of the chapter will

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<sup>1</sup> *Copinger and Skone James on Copyright* (Kevin M. Garnett, Gillian Davies and Gwilym Harbottle eds, 15 edn, Sweet and Maxwell 2005) 392.

<sup>2</sup> Thomas Hays, 'The Evolution and Decentralisation of Secondary Liability for Infringements of Copyright Protected Works: Part 1' (2006) 28 *European Intellectual Property Review* 617.

<sup>3</sup> *Ibid.*

address the issue of primary liability, while the second part will examine the complexities and challenges of secondary liability in the digital era.

## 5.2. Primary Liability

Primary liability is generally understood as liability which arises in respect of someone who has directly infringed the interests of the right holder.<sup>4</sup> For example, primary liability will arise if a literary work is copied by someone without authorization from the right holder. Another example would be when someone illegally downloads music or movies by use of P2P technology. A further example of primary infringement arises where the P2P system not only provides internet service, but also provides internet content.<sup>5</sup>

However, with the development of technology, including P2P technology, right owners' relatively secure monopoly over the creation and distribution of copyright works has been seriously threatened in the digital era.<sup>6</sup> This is because advanced technology allows for the creation of infinite identical copies of digital content by anyone who so desires, autonomously and free of

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<sup>4</sup> Assaf Hamdani, 'Who's Liable for Cyberwrongs' (2001-2002) 87 Cornell Law Review 901 912.

<sup>5</sup> Ibid. For a more detailed discussion of primary liability, see Lisa Veasman, 'Piggy Backing on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups' (2007-2008) 30 Hastings Communications and Entertainment Law Journal 311, and Craig S. Wright, *The IT Regulatory and Standards Compliance Handbook:: How to Survive Information Systems Audit and Assessments* (Syngress 2008).

<sup>6</sup> Lital Helman, 'Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1539627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539627)> accessed 5 November 2014.

charge. More specifically, in relation to P2P technology, thousands of users may illegally download a particular copyrighted work all at the same time. For this reason, it is possible to have multiple primary infringers of the same work within a relatively short period of time. This is problematic in practice, given that ascertaining evidence of infringement, as well as finding each user who has infringed copyrighted works by use of P2P technology is virtually impossible. Despite this, however, it can be argued that because of the significant loss of benefits to right owners, it is impossible to ignore infringements committed through the use of P2P technology. In this context, secondary liability has become an emerging theme in digital technology related cases. More specifically, a number of regulations, treaties and legislation have been adopted by various countries in an attempt to address this quickly evolving issue. This theme is accordingly addressed hereafter.

### **5.3. Secondary Liability**

With the advent of P2P technology, the way that people communicate information on the internet has markedly changed, to the extent that internet users can now directly exchange information with each other with relative ease, and, increasingly, even without the need for a server. Notwithstanding this, however, the advent of P2P technology has been marked by both praise and controversy. According to a research report by CacheLogic, there are about 10 million GB of data, equivalent to around three billion music files or

five million movies, which are exchanged by computers around the world every day.<sup>7</sup> The vast majority of these music files, movies and literary works are, in fact, copyrighted works. Unfortunately, however, they are typically transmitted over the internet without permission from right owners. For this reason, it can be argued that the interests of copyright owners are being seriously damaged. The further development of the music, movie and publication industries has also been stymied.

The earliest piece of P2P technology originated during the dot-com boom and, more particular, with the advent of Napster.<sup>8</sup> During the period of Napster's existence (1999 to 2001), millions of users shared MP3-formatted song files with each other using Napster's servers. Napster was not, however, a legitimate P2P network, as it provided infringing contents stored on its own servers over the internet. More specifically, while the movement of MP3 files was effectuated between users' computers, Napster controlled the search process. For this reason, the Court found that there was an infringement, and, accordingly, issued an injunction against Napster. Although this case will be further explored later in this chapter, it suffices here to note that after Napster ceased operations, it later re-emerged on the internet, this time legally selling

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<sup>7</sup> Li You, 'Exploration of the Indirect Copyright Infringement Confirmative Rules of P2P' (2010) 12 Journal of Beijing University of Posts and Telecommunications (Social Sciences Edition) 34.

<sup>8</sup> M. Eric Johnson, Dan McGuire and Nicholas D. Willey, 'The Evolution of the Peer-to-Peer File Sharing Industry and the Security Risks for Users' (41st Hawaii International Conference, Waikoloa, HI, 7-10 January 2008).

online music. In short, Napster's success and, indeed, failure paved the way for the development of new P2P companies, including Gnutella, FastTrack, edonkey and BitTorrent.

That said, it is important to note that the technologies which emerged in the period after Napster utilized decentralized and hybrid P2P systems, as opposed to a centralized P2P system, as described in chapter 3. Because decentralized and hybrid P2P systems do not require a central server, it has become increasingly difficult to ensure copyright protection. The challenge, in this regard, lies in the fact that in the process of using P2P technology, internet service providers (ISPs), who upload files and/or facilitate the transmission of information, as well as users, who either upload or download the files, are involved. Generally speaking, it would have been quite easy to regard users who illegally download files by use of P2P technology as primary infringers, but with emerging P2P technologies, determining whether such use qualifies as fair use, according to the Berne Convention's three-step test, has become more and more difficult.

In view of the significant damage suffered by right owners whose works have increasingly been infringed, there have been calls by said persons all across the globe to have ISPs investigated and penalized through secondary

liability.<sup>9</sup> Right holders have taken this stance because of their realization that regulating P2P systems, tracing infringers, and compensating them for the loss suffered, are much easier if ISPs are targeted than if end users are sought after.<sup>10</sup> It has also been felt that this approach could provide the necessary incentive for ISPs to become more cognizant and sensitive in their management of P2P systems.<sup>11</sup> More specifically, there is an acknowledgment that the secondary liability of ISPs would force these entities to pay close attention to online infringements, which would, in turn, decrease illegal uploading and downloading via P2P technology, and thus would improve the internet environment.

### **5.3.1. Definitions of Secondary Liability**

Secondary liability for copyright infringement is the term used to describe the liability that arises in respect of someone other than a primary infringer of copyright. That said, it must be noted that no universal definition of secondary liability has been accepted to date. Suffice it to say, copyright cases from the U.S., Europe, the U.K. and other jurisdictions show that a number of factors are usually considered when courts are asked to determine the liability of ISPs, such as, an ISP's knowledge of infringing activities by its end-users; the intention of ISPs to infringe; any material contribution to the infringing activity;

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<sup>9</sup> Assaf Hamdani, 'Who's Liable for Cyberwrongs' (2002) 87 Cornell Law Review 901 910-912.

<sup>10</sup> You.

<sup>11</sup> Ibid.

its ability and right to control infringing activities; and any direct financial benefits that arise from the infringing activities.<sup>12</sup>

Courts from different countries, including the U.S., have developed specific theories for problematising secondary liability. These include the vicarious, contributory<sup>13</sup> and inducement liability theories.<sup>14</sup> These will be examined hereafter.

### 1. Vicarious Liability Theory

In order to establish a vicarious liability claim in respect of secondary infringement, right holders need to prove that (1) the primary infringement complained of was caused by others; (2) the accused vicarious infringer had the right and ability to control or supervise the underlying primary infringement; and (3) the accused vicarious infringer derived a benefit from the underlying primary infringement.<sup>15</sup> The benefit, in this context, is most often financial, but also a monetary reward, depending on the nature of the business involved.<sup>16</sup>

In short, most instances of vicarious liability in the digital environment arises in

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<sup>12</sup> Seagull Haiyan Song, *New Challenges of Chinese Copyright Law in the Digital Age: A Comparative Copyright Analysis of ISP Liability : Fair Use and Sports Telecasts* (Kluwer Law International 2011) 2.

<sup>13</sup> Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (Matthew Bender 2002), s.12.04(A)(2).

<sup>14</sup> *MGM Studios, Inc. v. Grokster, Ltd.*

<sup>15</sup> *Gershwin Publishing Corp. v. Columbia Artists Management* 443 F2d 1159 (2d Cir 1971) 1162. See also *Shapiro, Bernstein and Co. v. H.L. Green Co.* 316 F2d 304 (2d Cir1963) 308; *CoStar Group, Inc. v. LoopNet, Inc.* 373 F3d 544 (4th Cir 2004) 550.

<sup>16</sup> *A&M Records, Inc. v. Napster, Inc.*

respect of the centralized peer-to-peer system, given that ISPs are required to control or supervise illegal users.<sup>17</sup>

## *2. Contributory Liability Theory*

A contributory infringer is one who, with knowledge of the infringing activities, induces, causes, or materially contributes to the infringing conduct of another.<sup>18</sup> To invoke a contributory liability claim, right holders need to prove that (1) the primary infringement was caused by others; (2) the accused contributory infringer has actual or constructive knowledge of the infringing activities; and (3) the accused contributory infringer caused or materially contributed to the underlying primary infringement.<sup>19</sup> In practice, aiding and abetting is the single biggest characteristic that distinguishes contributory liability from vicarious liability.<sup>20</sup> That said, both vicarious liability and contributory liability could be claimed in one online file-sharing system. This occurred in the Napster case, as will be further discussed later in this chapter.

## *3. Inducement Liability Theory*

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<sup>17</sup> Ying Dong and others, 'Research on Intellectual Property Right Problems of Peer-to-peer Networks' (2002) 20 *The Electronic Library* 143 144.

<sup>18</sup> *NCR Corp. v. Korala Assoc., Ltd.* 512 F3d 807 (6th Cir 2008) 816. See also *Gershwin Publishing Corp. v. Columbia Artists Management* 1162, quoted in *Cable/Home Communication Corp. v. Network Prods., Inc.* 902 F2d 829 (11 th Cir 1990) 845.

<sup>19</sup> *NCR Corp. v. Korala Assoc., Ltd.* 816.

<sup>20</sup> Dong and others 144.

The Inducement Liability Theory was established in *MGM Studios, Inc. v. Grokster, Ltd.*<sup>21</sup> In this case, apart from the contributory and vicarious liability theories, the U.S. Supreme Court proposed a new secondary liability theory, by appropriate reference to patent law.<sup>22</sup> According to the Court, the inducement theory refers to “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>23</sup> In order to invoke inducement liability, both “affirmative intent” and “active steps” of an ISP need to be proved in a copyright infringement case.<sup>24</sup>

The first application of the theories of secondary liability described above to large-scale digital copying was not conceptually different from their earlier application to low-scale technology cases. This is evident from the decision in *M. Witmark & Sons v Pastime Amusement Co.*,<sup>25</sup> where the secondary infringer not only allowed the primary infringing activity, but derived benefits there from. In this case, the theatre owner ascertained rental fees from the primary infringing performers, which satisfied the elements of vicarious liability through his control of the theatre property. In addition, the theatre owner

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<sup>21</sup> *MGM Studios, Inc. v. Grokster, Ltd.*

<sup>22</sup> *Ibid* 936.

<sup>23</sup> *Ibid* 919.

<sup>24</sup> *Ibid* 936.

<sup>25</sup> *Pastime Amusement Co. v. M. Witmark & Sons* 2 F2d 1020 (4th Cir 1924).

made the theatre facilities available to the primary infringer, which amounted to a material contribution. This, in turn, satisfied the requirements of contributory liability because constructive knowledge of the infringing performances was found to exist.<sup>26</sup>

The aforementioned case represents the initial stage in the development of secondary liability. During this stage, most of the infringing cases recorded related to business-to-consumer transactions, as businesses always played a role in the infringing activity.<sup>27</sup>

With the rapid development of technology, the determination of whether a nexus exists that gives rise to secondary liability for the infringing activity has become more and more complicated. In *Sony Corp. of America v. Universal City Studios*, for example, Sony made and sold the Betamax system of home video recorders. In this regard, it was found to have had “constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material”.<sup>28</sup> Universal, in suing Sony for secondary copyright infringement, claimed that Sony’s new product, the Betamax video cassette recorder (VCR), would result in rampant

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<sup>26</sup> *Dreamland Ball Room v. Shapiro, Bernstein & Co.* 36 F2d 354 (7th Cir 1929).

<sup>27</sup> Hays 619.

<sup>28</sup> *Sony Corp. of Amer. v. Universal City Studios, INC.* 464 US 417 (1984) 439.

unauthorized copying of their copyrighted TV programs.<sup>29</sup> In 1981, the Ninth Circuit Court of Appeals held that Sony was liable for contributory infringement because of its actual knowledge of the unauthorized recording of TV programs by VCR users for time-shifting purposes.<sup>30</sup> However, in 1984, this decision was reversed by the Supreme Court.<sup>31</sup> The court transplanted a statutory provision from patent law into copyright law, holding a defence to secondary liability arises where an undertaking sells an article of commerce that is capable of significant non-infringing uses. In such cases, the supplier is not secondarily liable for the infringing uses, even though some of its customers may use the product for infringing uses.<sup>32</sup> For this reason, the Court held that, on the facts, Sony was not liable for contributory infringement since the time-shifting was fair use, since the VCRs could be substantially used for non-infringing purposes.<sup>33</sup>

Following this judgement, Sony's safe harbour rules for technological intermediaries were established. The essence of these rules is that technology developers or sellers should not be contributory liable if the technology in question will have substantial non-infringing uses. In this context, it can be argued that as digital network technology is a double-edged sword,

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<sup>29</sup> *Universal City Studios v. Sony Corp. of America* 659 F2d 963 (9th Cir 1981).

<sup>30</sup> *Ibid* 420.

<sup>31</sup> *Sony Corp. of Amer. v. Universal City Studios, INC.* 421.

<sup>32</sup> *Ibid* 440.

<sup>33</sup> *Ibid* 421 and 498.

which can be used for both legal and illegal purposes, it is unfair to hold ISPs liable for infringing activities caused by other parties, rather than ISPs. That said, the role of ISPs must be taken into account in order to avoid evasion of liability in those circumstances where exceptions for ISPs are misused. For this reason, a discussion of the role of ISPs is a necessary one in so far as the balance between the competing interests of stakeholders is concerned.

With the advent of P2P technology, technological intermediaries were frequently sued for providing P2P file-sharing technology to internet users who uploaded and downloaded copyrighted works without the permission of copyright holders. ISPs always, however, relied on Sony's safe harbour theory to defend any ensuing claim, arguing that their P2P technology could be substantially used for non-infringing purposes. This was the case in *A&M Records, Inc. v. Napster, Inc.*<sup>34</sup> In that case, the plaintiff sued Napster, arguing that the defendant's "P2P platform" facilitated users' storage of MP3 music files on their personal computer hard drives for others to search for, disseminate and download. Napster sought to rely on the statutory limitations to ISP liability as well as Sony's safe harbour provision. On the facts of the case, the Court found that there was contributory infringement, as Napster had or should have had actual knowledge of the infringing activity through the use of its technology and system. The Court also ruled that Napster had

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<sup>34</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F3d 1004 (9th Cir 2001) 1011.

materially contributed to the infringing activity by providing the searching methods and facilities to infringers.<sup>35</sup> For this reason, Napster was held to be liable for contributory infringement. On the separate question of vicarious liability, the Court held that Napster had the ability to control the infringing activities as it provided the centralized P2P system which was able to block users' access to its system.<sup>36</sup> In this context, Sony's safe harbour theory could not be relied upon in this case. Furthermore, it was proved that Napster had derived direct financial benefits from the infringing activities, as the evidence showed that Napster's revenue were directly dependent upon the number of times advertisements were viewed on its system. In other words, the more users registered, and thus accessed its system, the more interests was gained.<sup>37</sup> In short, Napster was also held to be vicariously liability. More specifically, although Napster's P2P system could have legal uses, it could nonetheless not rely on the safe harbour theory.

In the subsequent case of *Aimster Copyright Litigation*,<sup>38</sup> the defendant sought to rely on contributory and vicarious liability as did Napster. Compared with Napster, however, Aimster indirectly shared the files through its service. That is, Aimster users were able to swap music files in an online chatting

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<sup>35</sup> Ibid 1020.

<sup>36</sup> Ibid 1027.

<sup>37</sup> Ibid 1023.

<sup>38</sup> *In re Aimster Copyright Litigation* 334 F3d 643 (2003).

room enabled by an instant messaging service.<sup>39</sup> That said, on the facts, the Court considered that Aimster was precluded from liability. More specifically, Aimster could not rely on Sony's safe harbour theory, because it actually knew about the infringing activity of its users,<sup>40</sup> and its business model was, in fact, based on the volume of infringing uses of its technology.<sup>41</sup> In addition, Aimster was found not to have implemented a proper policy to prevent users of its service from becoming repeat infringers. Rather, Aimster invited repeated infringers, showed them how they could infringe with ease using its system, and even taught them how to violate the copyright in works.<sup>42</sup> For this reason, the Seventh Circuit Court, though not fully accepting the vicarious liability argument, nonetheless affirmed the contributory infringement claim, and accordingly held that Aimster's reliance on the safe harbour theory should be rejected.

In view of the above-mentioned rulings, ISPs sought to implement P2P technology in a more cautious manner. This did not, however, prevent courts from finding them liable for infringement. In the *MGM Studios, Inc. v. Grokster, Ltd*, for example, a suit was brought by numerous members of the entertainment industry against the decentralised P2P programme, Grokster. Although the plaintiff sought to argue that contributory liability and vicarious

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<sup>39</sup> Ibid 646.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 655.

liability should be found, an important consideration was the fact that, unlike Napster, which had a centralised server, Grokster operated a decentralized P2P system. In other words, Grokster did not retain any control over the use of their software once the user had downloaded the copyrighted materials.<sup>43</sup> In light of this, the District Court found that, despite the fact that Grokster knew about the infringing activity of its users and derived financial benefits from the infringement, it was not liable for copyright infringement, primarily because of its decentralized system as well as the other non-infringing uses to which its system was put.<sup>44</sup> The Ninth Circuit Court later confirmed this decision, effectively agreeing with reasons provided by the lower court.<sup>45</sup>

This ruling was, however, subsequently appealed to the Supreme Court. The Court, in this context, considered evidence about Grokster's active inducement of copyright infringement as well as the fact that the legal/non-infringing uses argued by the respondent only accounted for 10% of all uses.<sup>46</sup> Perhaps the most instructive element of the judgement, however, is the fact that the Supreme Court did not adopt either of the two claims requested by the plaintiffs, but rather developed a new secondary liability theory, which it considered to be "inducement liability", by reference to patent

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<sup>43</sup> *MGM Studios, Inc. v. Grokster, Ltd.* 928.

<sup>44</sup> *Ibid* 927.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 923.

law.<sup>47</sup> This theory holds that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”.<sup>48</sup> According to the Supreme Court, the inducement theory requires both “affirmative intent” and “active steps” by the defendant.<sup>49</sup> On the facts of the case, the Court was able to find several “active steps” which pointed to Grokster's inducement, such as making advertisements to attract users to use its servers<sup>50</sup> and providing customer support to assist users who had problems with downloading illegal materials.<sup>51</sup> With regard to the issue of “affirmative intent”, the Court pointed to Grokster's efforts to attract Napster's users,<sup>52</sup> as well as its failure to implement filtering or other technology to block infringing activity,<sup>53</sup> among other things. For this reason, the Court held that Grokster was liable for the infringing activity in question.

The aforementioned cases suggest that the most important reason for the Court's denial of the ISPs' claims to use Sony's safe harbour rules in order to preclude liability lies in the fact that the ISPs in these cases were able to supervise or control the uses of their services by their users and could have

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<sup>47</sup> Ibid 936.

<sup>48</sup> Ibid 919.

<sup>49</sup> Ibid 936.

<sup>50</sup> Ibid 925.

<sup>51</sup> Ibid 924.

<sup>52</sup> Ibid 925.

<sup>53</sup> Ibid 926.

actively encouraged these users to avoid the infringing activity. The only exception, in this regard, was the Sony case, to the extent that Sony could not supervise or control the use of its products, once the Betamax VCRs were sold. This ultimately suggests that Sony's safe harbour rules should be applied on a case by case basis.

In sum, the cases discussed above show the progressive development of the secondary liability theory in the U.S early on in the digital era. That said, it is important to note that these theories have to date been adopted by a number of other countries. Apart from these theories, however, there are also important pieces of legislation on this issue emanating from a number of countries. These will be explored in the subsequent section.

### **5.3.2. Legislation and Cases on Secondary Liability in Selected Countries**

Generally speaking, secondary liability, in the context of copyright cases, mostly arises in respect of digital technology, and, in particular, P2P technology. Of course, in theory, ISPs which provide file sharing technology platforms can be held liable for direct infringement if they directly provide infringing content stored on their own servers over the internet without the authorisation of right owners. However, in reality, with the development of P2P technology, ISPs, who typically only provide internet service, are more

frequently being held secondarily liable for copyright infringement attributed to the primary infringement activities of their end-users.

Nevertheless, in view of the massive amounts of information that travels over the internet today, it is perhaps unreasonable to expect ISPs to act as “internet police” in so far as the protection of copyright is concerned.<sup>54</sup> Thus, in an effort to strike an appropriate balance between protecting the rights of copyright holders whilst shielding ISPs from liability, a number of countries have developed specific ISP-related legislation, as well as criteria from case law, so as to restrict ISPs’ liability for infringement activities engaged in by others. This theme is further explored hereafter. More specifically, various pieces of legislation as well as relevant cases, which have had a great impact in the field of secondary liability in the digital era, will be introduced and critically analysed.

### **5.3.2.1. The U.S.A**

#### *1. Safe Harbour in the DMCA*

Apart from the secondary liability theories and Sony’s safe harbour rules established and developed by the common law, the U.S. legislature has also created statutory conditions that limit the liability of ISPs, which are called

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<sup>54</sup> Nimmer and Nimmer, s.12B.01(B)(2).

“Safe Harbour” provision in the section 512 of the DMCA.<sup>55</sup> Reliance on the safe harbour under section 512 of the DMCA is limited to providers who qualify as online content providers,<sup>56</sup> and who meet a two-fold criteria. The first is that the service provider has applied a policy of terminating repeat infringers, while the second is that the service provider has accommodated, but does not interfere with, standard technical measures which protect copyrighted works.<sup>57</sup> If both criteria are satisfied, then the safe harbour provision could be applied afterwards. It is also noteworthy that Sony’s safe harbour is absent from the DMCA’s safe harbour provision, although it preceded the DMCA by more than a decade. For this reason, the DMCA could be considered as revolutionary in terms of the regulation of P2P technologies in the digital environment.

By analysing the DMCA’s safe harbour provision, the ISPs which the activities fell into the following four categories might be exempted from some certain liability for infringement of copyright: (1) transitory digital network communications;<sup>58</sup> (2) system caching;<sup>59</sup> (3) information residing on systems or networks at the direction of users;<sup>60</sup> and (4) information location tools.<sup>61</sup>

According to the language of this provision, if ISPs satisfy the safe harbour

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<sup>55</sup> Helman 25.

<sup>56</sup> 17 U.S.C. § 512(k)(1).

<sup>57</sup> *Ibid*, at § 512(i).

<sup>58</sup> *Ibid*, at § 512(a).

<sup>59</sup> *Ibid*, at § 512(b).

<sup>60</sup> *Ibid*, at § 512(c).

<sup>61</sup> *Ibid*, at § 512(d).

conditions, they would be exempted from “monetary relief”, and, in appropriate circumstances, “injunctive” or “other equitable relief”. It does not, however, suggest that they will be exempted from all liabilities. More generally, it is also worth noting that the DMCA's safe harbour provision does not contain a standard to measure whether or not the act of an ISP constitutes an infringement; rather, the safe harbour provision could be applied as long as the act of the ISP in question is included in the range of acts covered by the Act.<sup>62</sup>

To determine whether an act amounts to an infringement, reference must be made to traditional copyright legislation. In this context, it can be said that the questions as to whether the act of an ISP is an infringement and whether said ISP could be protected from liability on the basis of the DMCA's safe harbour provisions are determined by reference to different systems. For this reason, it is possible that even if an ISP is regarded as an infringer under the traditional copyright statute, it still can nonetheless avoid liability by invoking the safe harbour provision. Additionally, it is possible that even if an ISP is held liable for an infringing activity, but is exempted from monetary relief on the basis of the safe harbour provision, it can nonetheless be subject to an injunction under section 512(j) of the DMCA.

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<sup>62</sup> *H. R. Rep. No. 105-551, Part 2* (1998) 64.

More generally, it is arguable that the safe harbour provisions and the relevant theories on secondary liability emanating from common law, as described above, are strongly associated with the aforementioned statutory provisions in practice. This can be illustrated in the following ways. First, even if an ISP has engaged in copyright infringement, including direct infringement, contributory infringement or vicarious infringement, it can be exempted from liability for monetary relief if the act in question satisfies the conditions associated with the various safe harbour provisions discussed above.<sup>63</sup> Second, the argument that there is a strong association between the respective safe harbour provisions is also illustrated by reference to section 512(c) and (d), which contain similar conditions. That said, because section 512(c), which precludes ISPs who unintentionally host infringing contents uploaded by users from liability, has most commonly been quoted in recent ISP liability cases, a discussion of its nature is warranted.

In order for section 512(c) to apply, the two general criteria outlined above must first be satisfied.<sup>64</sup> Apart from these criteria, however, section 512(c) also requires that the ISP: (1) does not have actual knowledge of the infringement or is not aware of facts or circumstances from which infringing activity is apparent; (2) does not receive a financial benefit directly attributable

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<sup>63</sup> Ibid 50.

<sup>64</sup> 17 U.S.C. § 512(i).

to the infringing activity, in a case in which the service provider has the right and ability to control such activity, and (3) upon obtaining such knowledge or awareness, or upon notification of claimed infringement from copyright owners or their agents, acts expeditiously to remove or disable access to, the infringing materials.<sup>65</sup>

The requirements of 512(c) are arguable quite similar to the conditions associated with contributory and vicarious liability introduced earlier in this chapter. In section 512(c)(1)(A), in particular, (i) and (ii) are nearly the same as the "knowing" element of contributory infringement. More specifically, although there is no specific condition of "materially contributed" in this provision, as internet services are provided by ISPs themselves, this condition is arguably already implied into the provision. Additionally, it can be argued that section 512(c)(1)(B) has included the elements of "control" and "direct financial benefit", which also arise in respect of vicarious infringement.

However, if a literal meaning is ascribed to section 512(c), it would appear that any ISP which is contributory or vicariously liable will be unable to rely on the exemption provided by the safe harbour provision. This is arguably paradoxical, because if the safe harbour provision can only be applied to service providers who are not contributory or vicariously liable, service

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<sup>65</sup> *Ibid*, at § 512(c)(1).

providers can only be precluded from liability on the basis of the safe harbour provision on condition that they do not need to be protected by that provision. However, part of the reasons given by Congress for making the safe harbour provisions is to fairly and reasonably judge the acts of ISPs,<sup>66</sup> thereby limiting their liability, and, by parity of reasoning, avoiding the overuse of the liability theories discussed above.<sup>67</sup> If the meaning of safe harbour is understood as described above, the safe harbour provision is arguably not able to limit ISPs' liability where they are subject to contributory or vicarious liability. For this reason, it is arguable that section 512(c) should be reconsidered in light of the original intention of Congress for making the safe harbour provision in the first place.

## *2. The Further Discussion of the Similar Language in the Secondary Liability Theories and the Safe Harbour Provision*

Due to the similarities between the language of safe harbour provision and the elements of secondary liability, and the lack of clear guideline in the existing case law, it might create a lot of uncertainty when determining secondary liability on the basis of section 512(c).<sup>68</sup> That said, in order to further

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<sup>66</sup> S. Rep. No. 105-190 (1998) 8.

<sup>67</sup> Jonathan Band and Matthew Schruers, 'Safe Harbors against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act' (2002) 20 *Cardozo Arts & Entertainment Law Journal* 295, 306-308.

<sup>68</sup> Edward Lee, 'Decoding the DMCA Safe Harbors' (2009) 32 *Columbia Journal of Law & the Arts* 233.

understand the relevant standards applicable to the various regimes, appropriate reference is hereafter made to case law.

#### (1) The Requirement of Knowledge

According to the standard of secondary liability, the secondary infringement requires knowledge in the contributory liability theory.<sup>69</sup> However, from the language of section 512(c), merely having the knowledge of another's direct infringement and having made a material contribution do not play a decisive role in determining whether an ISP would be liable for infringement. Rather, if an ISP, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the infringing material, it still can claim safe harbour protection.<sup>70</sup> In this context, section 512(c)(A) suggests that two categories of knowledge are legally recognised, actual knowledge and red flag awareness.<sup>71</sup> This, however, raises the question as to what is the relationship between the "knowledge" standard that applies in respect of contributory liability and that which obtains under the safe harbour provision. Because no explanation of what constitutes "actual knowledge" or, indeed, "red flag awareness" has been provided by the DMCA, common law has had to play a decisive role.

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<sup>69</sup> Apple Computer, Inc. v. Microsoft Corp. 821 F. Supp. 616 (N.D. Cal. 1993) 625.

<sup>70</sup> 17 U.S.C. § 512(c)(A)(iii).

<sup>71</sup> *Ibid.*, at § 512(c)(A).

### *A. Actual Knowledge*

For there to be actual knowledge, the service provider must have known that the third parties who provided the infringing materials have infringed the rights of right owners.<sup>72</sup> In practice, the question of actual knowledge is determined by reference to the actual acts of ISPs or internal emails.<sup>73</sup> In this regard, it can be argued that the approach to construing “actual knowledge” under the safe harbour provision is quite similar to that which obtains in respect of contributory liability.

However, to some extent, it can be argued that there are differences between “actual knowledge” which arises in respect of contributory liability and that which arises under the safe harbour provision. These difference are best illustrated by reference to various situations, described below, where one can infer the existence of “actual knowledge” in respect of contributory liability, but cannot do so with regard to the safe harbour provision.

The first of these situations arises where a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner fails to comply substantially with the requirement of said notice, as prescribed by the

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<sup>72</sup> Band and Schruers 306.

<sup>73</sup> Todd E. Reese, ‘Wading through the Muddy Waters: The Courts’ Misapplication of Section 512(c) of the Digital Millennium Copyright Act’ (2004) 34 Sw U L Rev 287 299. See also *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1020 (9th Cir. 2001).

DMCA.<sup>74</sup> This situation will not be considered under safe harbour provision when determining whether the service provider in question has actual knowledge or is aware of facts or circumstances from which an infringing activity is apparent.<sup>75</sup> Had this been the case, the notification system under the DMCA will become meaningless.<sup>76</sup> More specifically, an ISP will be said to have "actual knowledge" or "red flag awareness" if they have received a notification, but do not take instant action.

For example, in *Perfect 10, Inc. v. Ccbill Lic*,<sup>77</sup> the adult magazine, Perfect 10, sued a webhosting service, CWIE, and CCBill. Although the statute stipulated that compliance with its notification requirements must be "substantial", and the plaintiff had sent a notification regarding potential copyright infringement to CCBill and CWIE by letters and emails, the Court nonetheless emphasized that the language of the statute requires "substantial compliance with all of 512(c)(3)'s clauses."<sup>78</sup> More specifically, the court considered that if a copyright owner is allowed to "cobble together adequate notice from separately defective notices", this would create an undue burden for ISPs, which would be required to track all incoming correspondence in order to identify all the elements required by section 512(c)(3). At trial, the court

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<sup>74</sup> Eugene R. Sullivan, 'Lost in Cyberspace: a Closer Look at ISP Liability' 12 Entertainment Law Review 192 192-193.

<sup>75</sup> 17 U.S.C. § 512(c)(3)(B)(i).

<sup>76</sup> Reese 301.

<sup>77</sup> *Perfect 10, Inc. v. Ccbill Lic* 488 F3d 1102 (9th Cir 2007).

<sup>78</sup> *Ibid* 1108.

imposed an even stricter notification requirement, holding that a properly constructed notice must exist within the bounds of a single correspondence.<sup>79</sup> For this reason, although CCBill and CWIE had received several notices regarding potential copyright infringement, the Court held that these notices were defective. In other words, knowledge of the infringement could not be imputed to CCBill or CWIE; the application of section 512(c)(1)(a) was thus precluded.<sup>80</sup>

Secondly, if an ISP implements a monitoring system for its service, it cannot argue that the standard of actual knowledge or red flag awareness has been satisfied according to its monitoring system.<sup>81</sup> In the other words, except where the standard technical measures of section 512(i) apply, a service provider who monitors its service or affirmatively seeks facts that indicate the existence of an infringement cannot be regarded as having satisfied the safe harbour provision.<sup>82</sup> This is because an ISP does not have the responsibility to actively control or review its system. In addition, if the act of monitoring were to influence the element of “knowledge” in the DMCA, this may hinder or discourage service providers from monitoring their systems in future,<sup>83</sup> which is in contradistinction to the underlying purposes of the DMCA, including

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<sup>79</sup> Ibid 1113.

<sup>80</sup> Ibid.

<sup>81</sup> Reese 302.

<sup>82</sup> 17 U.S.C. § 512(m)(1).

<sup>83</sup> Reese 302.

protecting the rights of copyright owners. In short, then, it can be argued that in order to protect copyright, the safe harbour provision should not hinder the motivation of ISPs in this respect.<sup>84</sup>

It should be noted that the two situations identified above cannot be used to determine whether an ISP has reached the standard associated with the “knowledge” element under section 512. With regard to contributory liability theory, the DMCA does not give any guidance to explain whether these situations could be used to infer the existence of “knowledge” on the part of ISPs. However, as section 512 and secondary liability are established based on two different systems, and the judgement of the standard of “knowledge” in contributory liability cases is a purely factual exercise, these two situations should arguably be useful in inferring the standard of “knowledge” in contributory liability cases. Additionally, if the ISP has been judged to be liable for secondary infringement, it still could be protected by the safe harbour provision, as there is no conflict between these two systems.

### *B. Red Flag Awareness*

Apart from a lack of “actual knowledge”, the second way in which an ISP can be put on notice is through the “red flag” test.<sup>85</sup> Compared with the high

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<sup>84</sup> Charles S. Wright, ‘Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998’ (2000) 75 Washington Law Review 1005 1032.

degree of certainty associated with the “actual knowledge” test, the “red flag awareness” test, that is, “aware[ness] of facts or circumstances from which infringing activity is apparent”,<sup>86</sup> is far more uncertain in practice. Although case law as well as scholars in the field suggested that the “red flag” standard was equivalent to the meaning ascribed to “constructive knowledge” in respect of contributory liability,<sup>87</sup> the reality is that Congress did not adopt this construction in the DMCA. This would suggest that Congress preferred to establish a new standard for the “red flag” test in the DMCA. This argument can be supported on a number of bases.

Firstly, the specific meaning to be ascribed to “red flag awareness” gleaned from an assessment of the language considered and ultimately rejected by Congress in the process of drafting the DMCA.<sup>88</sup> For example, in Bills 2180 and 3209, the requirement of “knowledge” was defined as “information indicating that the material is infringing”.<sup>89</sup> The House, however, concluded that this language was too broad and unspecific, which could result in an undue burden being placed on ISPs.<sup>90</sup> In addition, the “awareness” standard

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<sup>85</sup> , *H. R. Rep. No. 105–551, Part 2* (1998) 53.

<sup>86</sup> 17 U.S.C. § 512(c)(1)(A)(ii).

<sup>87</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.* 213 F Supp 2d 1146 (2002) 1169; *Costar Group Inc. v. Loopnet, Inc.* 164 F Supp 2d 688 (2001) 705-708; Laura Rybka, ‘ALS Scan, Inc. v. Remarq Communities, Inc.: Notice and ISPS’ Liability for Third Party Copyright Infringement’ (2001) 11 DePaul-LCA J Art & Ent L 479 492; , *S. Rep. No. 105-190* (1998) 44.

<sup>88</sup> Irina Y. Dmitrieva, ‘I Know It When I See It: Should Internet Providers Recognize Copyright Violation When They See It’ (2000) 16 Santa Clara High Technology Law Journal 233 253.

<sup>89</sup> *Ibid* 254.

<sup>90</sup> *Ibid*.

did not adopt the “actual knowledge” requirement which was introduced in Senate Bill 1146. More specifically, as this Bill stated that ISPs should be required to take down certain materials only when they are notified of an alleged violation by a copyright owner,<sup>91</sup> copyright owners considered that this could encourage ISPs to turn a blind eye to copyright infringement committed through the use of their systems. For this reason, this construction was ultimately rejected.<sup>92</sup>

Compared with “constructive knowledge” in respect of contributory liability, which means that knowledge could be inferred from other facts rather than direct evidence of a copyright infringement,<sup>93</sup> the term “apparent”, which is used in respect of the “red flag” provision, means “manifest”, “open to view”, or “plain”.<sup>94</sup> Accordingly, it could be said that the requirement to be aware of “apparent” copyright infringement does not entail logical deduction or inference by an ISP.

By analysing the relevant statutory language, it appears that the standard of “red flag awareness” is comparatively looser than the standard of “actual knowledge”, but stricter than the standard of “constructive knowledge”. This

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<sup>91</sup> 105th Congress, S. 1146 (1997-1998) Title 1, Section 102, 512(b).

<sup>92</sup> Dmitrieva 254.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Black's Law Dictionary* (6 edn, West Publishing 1990) 96.

suggests that, in order for the standard of “red flag awareness” to be satisfied, there must be no reasonable doubt from the infringing activities.<sup>95</sup>

Secondly, the “red flag” test, was created to facilitate the examination of knowledge and awareness, as pointed out by the House Judiciary Committee report in May 1998. “Red flag” was defined in this report as “information of any kind that a reasonable person would rely upon.”<sup>96</sup> More specifically, the members of this committee emphasized that the newly created knowledge requirement was different from the then existing law, “under which a defendant may be liable for contributory infringement if it knows or should have known that material was infringing”.<sup>97</sup> Even further, the members of the House Commerce Committee concluded that the knowledge under “red flag” test could be identified from two aspects, one is that the ISP must know that the infringing material resides on its system, another is that the “infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”<sup>98</sup> However, without the further specific implementation standard on the basis of the “red flag” theory, various opinions from courts in this respect have been made in practice.

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<sup>95</sup> Dmitrieva 255.

<sup>96</sup> *WIPO Copyright Treaties Implementation Act and Online Copyright Infringement Liability Limitation: Report on H.R. 2281 of the House Comm. on the Judiciary, Report 105-551, Part 1, 105th Congress (1998) 25.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *H. R. Rep. No. 105–551, Part 2 (1998) 53.*

For example, in *Perfect 10 v. CCBill*,<sup>99</sup> the court rejected the plaintiff's argument that the "red flag" existed merely because the names of the two websites where the defendant provided services were titled "illegal.net" and "stolencebritypics.com", and that the defendant should accordingly have known that there was a tendency towards infringement.<sup>100</sup> More specifically, the Court held that the names associated with the websites did not definitively establish copyright infringement in and of themselves, though the words "illegal" or "stolen" were used, as this could very well have been "an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen". For this reason, the Court considered that it could not "place the burden of determining whether photographs are actually illegal on a service provider".<sup>101</sup> However, in the case of *Aimster*,<sup>102</sup> the Court rejected Aimster's argument, holding that "wilful blindness is knowledge",<sup>103</sup> and that, on the facts, an ISP's wilful blindness to infringement should be considered as constructive knowledge.<sup>104</sup> In the subsequent case of "*Hendrickson*",<sup>105</sup> when explaining the standard of "knowledge" in the safe harbour provision, the Court mistakenly relied upon

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<sup>99</sup> *Perfect 10, Inc. v. Ccbill Llc.*

<sup>100</sup> *Ibid* 1114.

<sup>101</sup> *Ibid.*

<sup>102</sup> *In re Aimster Copyright Litigation.*

<sup>103</sup> *Ibid* 650.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Hendrickson v. eBay, Inc.*

the meaning of actual knowledge as constructive knowledge,<sup>106</sup> rather than the standard of “actual knowledge” or “red flag awareness”.

(2) “Direct Financial Benefit” and “the Right and Ability to Control”

Apart from the understanding of “knowledge” discussed above, another two similar phrases appeared in both secondary liability theory and the safe harbour provision will be specifically analysed in the next. According to the vicarious liability theory, an ISP can be held liable if it has “a direct financial interest in such activities” and a “right and ability to control”.<sup>107</sup> According to the section 512, however, if, in a case in which the service provider has the right and ability to control an activity, said service provider receives a financial benefit that is directly attributable to the infringing activity, it would not be protected by safe harbour provision,<sup>108</sup> whose language is quite similar to the language of vicarious liability described above. Because of this striking similarity, some of the relevant cases and articles on this issue confused the elements of safe harbour and the elements of vicarious liability. This has resulted in a vexing debate as to whether the same standard associated with vicarious liability should apply to section 512(c)(1)(B). This question is hereafter addressed.

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<sup>106</sup> Ibid 1092-1093.

<sup>107</sup> *Gershwin Publishing Corp. v. Columbia Artists Management.*

<sup>108</sup> 17 U.S.C. § 512(c)(1)(B).

### *A. Direct Financial Benefit*

From a purely literal reading, it can be argued that the requirement of “direct financial benefit” as contained in the DMCA is the same as that which arises in respect of vicariously liability. In reality, however, courts which have been called upon to explain the notion of direct financial benefit in respect of vicariously liability have been sharply divided to date.

In so far as the section 512 standard of direct financial benefit is concerned, it is important to note that the DMCA does not provide any specific explanation in this regard. That said, pre-DMCA legislative materials suggest that this standard should be construed on its own. More specifically, it has been suggested that

[...] in determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one. In general, a service provider conducting a legitimate business would not be considered to receive a ‘financial benefit directly attributable to the infringing activity’ where the infringer makes the same kind of payment as non-infringing users of the provider’s service. Thus, receiving a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities would not

constitute receiving a 'financial benefit directly attributable to the infringing activity.'<sup>109</sup>

On the basis of this view, it would appear that the loose explanation typically associated with direct financial benefit in respect of vicarious liability could not be adopted to explain the equivalent standard as contained in the DMCA.

In practice, however, there appears to be a number of conflicting opinions about the appropriate interpretation to be ascribed to the standard in respect of vicarious liability and that which obtains under the safe harbour provision. For example, in *Costar Group Inc. v. Loopnet, Inc.*,<sup>110</sup> the court used the standard of "direct financial benefit", as postulated by Congress in the DMCA, to explain vicarious liability,<sup>111</sup> which, in effect, meant that the court applied a comparatively stricter standard of financial benefit than in ought to in respect of vicarious liability. Similarly, in other cases, the Courts have adopted a stricter standard when assessing financial benefit, thus requiring a higher burden of proof. For instance, in *Ellison v. Robertson*,<sup>112</sup> the court cited the DMCA's standard in order to determine whether the defendant obtained "direct financial benefit", notwithstanding the fact that the case concerned

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<sup>109</sup> , H. R. Rep. No. 105-551, Part 2 54.

<sup>110</sup> *Costar Group Inc. v. Loopnet, Inc.*

<sup>111</sup> Ibid 704-705.

<sup>112</sup> *Ellison v. Robertson* 357 F 3d 1072 (2004).

vicarious liability.<sup>113</sup> In this case, the third party posted, without permission, Harlan Ellison's works on a USENET newsgroup for access by AOL users. As intimated above, the court ascribed a stricter interpretation to the requirement of "direct financial benefit" than it should. To this end, the Court ultimately rejected the plaintiff's vicarious liability claim, as the plaintiff could not establish a relationship "between AOL's profits from subscriptions and the infringing activity taking place on its USENET servers."<sup>114</sup> In other words, there was found to be no evidence that "AOL attracted or retained subscriptions because of infringement."<sup>115</sup>

Notwithstanding the foregoing, however, in some cases, the courts have applied a comparatively loose explanation of financial benefit. In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*,<sup>116</sup> for example, the court supported Cybernet's "direct financial benefit" claim for safe harbour protection, which was mistakenly based on the equivalent standard which obtains in respect of vicarious liability. Additionally, in *Perfect 10, Inc. v. Ccbill Llc*, the Ninth Circuit pointed out that the elements in section 512(c)(1)(B) must be construed in light of their meanings at common law, which meant that "direct financial benefit should be interpreted consistent with the similarly-worded common law

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<sup>113</sup> Ibid 1079.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.*

standard for vicarious copyright liability.”<sup>117</sup> Further, in *A&M Records, Inc. v. Napster, Inc.*,<sup>118</sup> the Court found that although Napster was providing a free service at the time at which it was sued, it nonetheless gained a commercial benefit from the infringing activities by virtue of having increased its user base, which it had planned to exploit in the future.<sup>119</sup> For this reason, Napster was considered to have obtained a direct financial benefit from the infringing activities.

#### *B. The Right and Ability to Control*

There are many conflicting opinions about what standards should apply to the notion of “right and ability to control”. Generally speaking, U.S. courts have agreed that in P2P cases, “right and ability to control” means that service providers have the ability to block the infringer’s access or remove the infringing materials. For example, in the *Napster* case discussed above, the Ninth Circuit found that as the defendant, a P2P service provider, had the ability to block users’ access to materials or altogether terminate infringing users, it had the “right and ability to control” the infringing activities that occurred on its server.<sup>120</sup>

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<sup>117</sup> *Perfect 10, Inc. v. Ccbill Llc* 1117.

<sup>118</sup> *A&M Records, Inc. v. Napster, Inc.*

<sup>119</sup> *Ibid* 921-922.

<sup>120</sup> *A&M Records, Inc. v. Napster, Inc.* 1027. The court held that “Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index.”

However, in more recent cases, the courts have held that the requirement of “right and ability to control” under DMCA needs “something more” than the ability to terminate users’ accounts.<sup>121</sup> For example, in *Viacom Intern., Inc. v. YouTube, Inc.*,<sup>122</sup> the Ninth Circuit agreed with the Second Circuit’s explanation of “something more”; that is, service providers must exert substantial influence on the activities of users.<sup>123</sup> As for the notion of “substantial influence”, the Second Court that heard the *UMG Recordings, Inc. v. Shelter Capital Partners* case suggested that this includes “high levels of control over activities of users” or “purposeful conduct”.<sup>124</sup> In the later case of *Hendrickson v. eBay, Inc.*,<sup>125</sup> the Court adopted a much narrower approach in respect of the DMCA, in contradistinction to the standard applicable to vicarious liability. In this case, the District Court held that the “right and ability to control” infringing activities cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored on its system.<sup>126</sup> The court went further explained that as the DMCA specifically requires ISPs to remove or block infringing materials upon notification and to adopt and reasonably implement a policy against repeated infringers, Congress could not have intended for courts to hold that a service

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<sup>121</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.* 620 FSupp2d 1081 (2008) 1114.

<sup>122</sup> *Viacom Intern., Inc. v. YouTube, Inc.* 676 F3d 19 (2012).

<sup>123</sup> *Ibid* 38.

<sup>124</sup> *UMG Recordings, Inc. v. Shelter Capital Partners* 718 F3d 1006 (2013) 1030.

<sup>125</sup> *Hendrickson v. eBay, Inc.*

<sup>126</sup> *Ibid* 1093.

provider loses protection under the safe harbour provision of the DMCA because it engages in acts which are specifically required by the DMCA.<sup>127</sup>

In conclusion, then, it can be argued that the DMCA is one of the most important statutes in the U.S. in this area of law, as it provides the legal basis for copyright protection in the digital era. The DMCA's inclusion of the safe harbour provision represents the first time that the liability of the Internet service providers has been put on a statutory footing. This has influenced equivalent legislation in other countries.

Before the introduction of DMCA, there was no clear guidance on the liability for copyright infringement. This lacuna in the law was, however, solved with the introduction of the DMCA, which includes a safe harbour provision which ISPs can rely upon in appropriate circumstances. Where the requirements of the safe harbour provision are satisfied, a service provider might only be subject to limited liability for infringement, though it may be exempted from monetary, injunctive or other equitable relief. If, however, the safe harbour provision is inapplicable based on the facts of a particular case, the determination of the liability of will be based on the requirements of traditional copyright law.

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<sup>127</sup> Ibid 1093-1094.

With the establishment of the DMCA, the safe harbour provision has been widely applied in practice. However, when one compares the various interpretations of the safe harbour provision, as espoused by different courts over the years, it is arguable that courts sometimes confuse the relevant concepts or make inappropriate pronouncements on the relationship between the requirements of the safe harbour provision and the standards associated with secondary liability. Against this backdrop, it can be argued that the safe harbour provision needs to be further clarified in future.

### **5.3.2.2. E.U.**

In Europe, the legal basis for ISP liability, safe harbour, and appropriate remedies, is mainly provided for under three European Union directives, namely, Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic Commerce Directive); Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive); and Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (IPR Enforcement Directive), respectively. Among these three Directives, the Electronic Commerce Directive is arguably the most comprehensive instrument on the question of secondary liability in Europe. That said, the Information Society Directive is of particular relevance in the digital era, as it

focuses on ISPs' liability in a number of provisions, including Article 3, which concerns the right of communication to the public of works and the right to make available to the public other subject-matter. For the purposes of this thesis, however, the next section will introduce the Electronic Commerce Directive and a few provisions related to ISPs' liability under other Directives. Relevant cases will also be introduced and analysed hereafter.

### **5.3.2.2.1. The Electronic Commerce Directive**

Before the advent of the Electronic Commerce Directive, the standard for judging the liability of ISPs was divergent as between the Member States. The lack of harmonisation regarding the liability of ISPs prevented closer links from being formed as between Member States and their nationals, and prevented the free movement of information services. This is notwithstanding the fact that some countries had specific regulations on the liability of ISPs in place or relied on case law or general tort law in such cases. The European Commission, however, sought to enact the Electronic Commerce Directive in order to eliminate the aforementioned barriers, whilst contributing to the proper functioning of the internal market by ensuring the free movement of information services between the Member States.<sup>128</sup> The intention, in this regard, was to avoid the uncertainty caused by the development of cross-

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<sup>128</sup> Article 1(1), Electronic Commerce Directive. (The ECD aims to be a leading law that each Member State has to impose upon its own national law.)

border services, as well as distortions of competitions in the internal market.<sup>129</sup>

The Electronic Commerce Directive was promulgated on 8 June 2000. The Directive is explicit on the question of the liability of ISPs, and, in particular, in what circumstances they can benefit from the safe harbour provision. Although the Directive closely resembles the DMCA, to the extent that it provides a safe harbour provision, the limitation aspect of the Electronic Commerce Directive is quite different from that contained in the DMCA. This is perhaps because that the DMCA only touched on the liability of ISPs in respect of copyright-related infringing activities, while the Directive leaves the underlying law unaffected and thus the nature and scope of an ISP's liability remains the subject of the applicable law of each Member State. This means that the Directive addresses the issue of liability, not only in respect of copyright law, but also in respect of other areas of law. For example, the Directive provides that ISPs will not be held liable under any field of law, if the application of strict liability would impair the expansion of electronic commerce within the EU. This is sometimes referred to as the "horizontal" approach.<sup>130</sup>

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<sup>129</sup> Ibid, Preamble 40.

<sup>130</sup> Andrea Schulz, *Legal Aspects of an E-commerce Transaction: International Conference in The Hague, 26 and 27 October 2004* (Sellier, European Law Publishers 2006) 42.

The Directive adopts the definition of “Information Society Service” as prescribed by Directive 98/34/EC with regard to ISPs,<sup>131</sup> and defines the civil and criminal liability of ISPs which act as intermediaries.<sup>132</sup> Although a number of secondary liability cases have been decided on the basis of the Directive, there is no clear definition of secondary liability theory with regard to ISPs under EU case law, which is in contradistinction to the three kinds of secondary liability theory that apply in U.S. case law. With regard to the limitation of infringement liability on the part of ISPs, it is noteworthy that the Directive covers three types of services provided by intermediaries, which could be precluded from the liability under Articles 12-14 of the Directive.<sup>133</sup> These three types of services are: first, “mere conduit” - where the service provided is “the transmission in a communication network of information provided by a recipient of the service” or “the provision of access to a communication network”, the service provider is not liable for the information transmitted, if he/she performed this for the sole purpose of making the transmission of content more efficient. In others words, there is no liability if the service is of a mere automatic, intermediate and transient nature, and the ISP has neither knowledge nor control the content being transmitted.<sup>134</sup> The second is "caching" - where the service provided is "the transmission in a communication network of information provided by a recipient of the service",

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<sup>131</sup> Preamble 17, Electronic Commerce Directive.

<sup>132</sup> Ibid, Preamble 40.

<sup>133</sup> Ibid, Article 12-14.

<sup>134</sup> Ibid, Article 12.

the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service on their request, if this service is of a mere automatic, technical and passive nature; the ISP has neither knowledge nor control the content being stored; and the illegal content would be expeditiously removed or disabled access to once the ISP obtained the knowledge or awareness.<sup>135</sup> The third is "hosting" - where the service provided "consists of the storage of information provided by a recipient of the service", the service provider is not liable for the information stored, if the service provider does not have actual knowledge or awareness of facts or circumstances of illegal activities, and the illegal content would be expeditiously removed or disabled access to once the ISP obtained the knowledge or awareness.<sup>136</sup>

In short, those circumstances in which the liability of ISPs might be exempted under certain conditions, pursuant to the Electronic Commerce Directive, should be referred to as contributory liability. More generally, it is worth noting that as the Directive adopts the standard of "actual knowledge" as well as the "prohibition principle" to the determination of exemptions, if a service provider has actual knowledge of the infringement, but does not take any action to

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<sup>135</sup> Ibid, Article 13.

<sup>136</sup> Ibid, Article 14.

prohibit continuous infringement, it will be considered as having “materially contributed” to the infringement, thereby rendering it secondarily liable. That said, if an ISP could prove that certain measures have been taken to prohibit the infringing activity, it could be granted immunity from any ensuing liability.<sup>137</sup>

### **5.3.2.2.2. The Information Society Directive**

The proposal for the Information Society Directive was tabled in December 1997,<sup>138</sup> and the Directive was later passed in 2001.<sup>139</sup> The Directive was drafted in accordance with the recommendations contained in the Green Paper on Copyright and Related Rights in the Information Society of July 1995.<sup>140</sup> Two main purposes underlie this Directive. The first is to bring the relevant copyright laws in the European Union into line with the WIPO Internet Treaties, while the second is to harmonise certain aspects of substantive copyright law across the European Union. The latter purpose, in particular, is exemplified by Article 1, which stresses the importance of legally protecting

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<sup>137</sup> Pablo Asbo Baistrocchi, ‘Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce’ (2002-2003) 19 Santa Clara High Technology Law Journal 111 117-118.

<sup>138</sup> European Commission, ‘Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM/97/0628 final - COD 97/0359, Official Journal C 108 , 07/04/1998’ <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997PC0628:EN:HTML>> accessed 8 May 2015.

<sup>139</sup> European Union Information Society Directive.

<sup>140</sup> European Commission, ‘Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society - COM (95)/0382 final’ <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1895601&fileId=1895638>> accessed 9 May 2015.

copyright and other related rights in the “information society”.<sup>141</sup> Substantively, however, the Directive has been criticised for focusing on the rights of both authors and ISPs.<sup>142</sup> More specifically, it has been argued that the Directive's primary focus lies in the protection of the rights of performers, producers, broadcasters and institutional users in the information industry, and not the creators who provide the “invaluable content” that drives the industry.<sup>143</sup> With the rapid development of technology, the Directive's application has moved beyond centralized unstructured peer-to-peer systems, such as Napster's, to decentralized file sharing systems, such as Gnutella, Grokster and BitTorrent. Suffice it to say, in order to better unpack the relevant cases involving different file-sharing technologies, some of the Directive's key provisions on secondary liability will be explored hereafter.

Article 3 of the Directive makes mention of a new legal right, “making available to the public”, which is typically applied to online content in practice. More specifically, the right to communicate works to the public protects the transmission and distribution of copyright works which, while not presented in physical form to members of the public, are nonetheless transmitted via the internet or otherwise broadcasted.<sup>144</sup> Article 3(1), in particular, gives authors

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<sup>141</sup> Stefan Larsson, ‘The Path Dependence of European Copyright’ (2011) 8 SCRIPT-ed 8 15.

<sup>142</sup> Article 3, European Union Information Society Directive.

<sup>143</sup> Bernt Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’ (2000) 22 European Intellectual Property Review 499 501-502.

<sup>144</sup> Michael Hart, ‘The Copyright in the Information Society Directive: an overview’ (2002) 24 European Intellectual Property Review 58 58-59.

an exclusive right to permit any communication of their works to the public by wire or wireless means, including making them available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them, such as online or on-demand services.<sup>145</sup> However, Article 3(2) goes on to make it clear that performers, phonograms producers, film producers and broadcasters are only allowed to make available their performances, phonograms, films and broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them.<sup>146</sup> Film producers, for example, cannot therefore exercise control over the phonograms of their works other than through on-demand services.

Apart from the aforementioned provision, it must be noted that the Directive does not directly address the question of files transmitted on a peer-to-peer basis. Rather, it leaves it to the courts to exercise their discretion when deciding whether placing files in an ISP's shared folders also falls into the definition of "making available to the public".<sup>147</sup> *The Pirate Bay* case is instructive in this regard. In this case, the defendant, "The Pirate Bay" (commonly abbreviated TPB), perhaps best-known for using the BitTorrent protocol, served as an online index for digital content, including entertainment

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<sup>145</sup> Article 3(1), European Union Information Society Directive.

<sup>146</sup> Article 3(2), *ibid.*

<sup>147</sup> Foundation for Information Policy Research (FIPR), 'Implementing the EU Copyright Directive' <<http://www.fipr.org/copyright/guide/eucd-guide.pdf>> accessed 17 May 2015 73.

media. TPB operated as a torrent-indexing website tracker that allowed users to visit its website to upload and download “.torrent files”. In concrete terms, TPB merely pointed users to the files without keeping any parts of the files transferred by the users or hosting any actual content on its own servers.<sup>148</sup> Instead, it provided the services of organising, searching and indexing “.torrent files”. It also operated a tracker which facilitated the sharing of files among users.<sup>149</sup> In 2009, the website’s founders were found guilty in Sweden for assisting in copyright infringement.<sup>150</sup> The Court held that the defendants were liable for assisting in making copyrighted works available.<sup>151</sup> More specifically, the Court explained that copyrighted works are made available when “work is transferred to the general public”, such as when the work is made available to the public in a location other than that in which the general public can enjoy the work.<sup>152</sup> Relevant examples, in this regard, include works “transmitted by traditional methods, such as on the radio or television, and via internet websites, as well as works to which individuals can gain access in a location and at a time of their own choosing.”<sup>153</sup> In view of all the circumstances of the case, the Court considered that TPB satisfied the

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<sup>148</sup> Tara Touloumis, ‘Buccaneers and Bucks from the Internet: Pirate Bay and the Entertainment Industry’ (2009) 19 Seton Hall Journal of Sports and Entertainment Law 253 261.

<sup>149</sup> Ibid.

<sup>150</sup> Michael A. Carrier, ‘The Pirate Bay, Grokster, and Google’ (2010) 15 Journal of Intellectual Property Rights 7 9.

<sup>151</sup> The Pirate Bay, District Court Stockholm, Case no. B 13301-06, Judgment of 17 April 2009.

<sup>152</sup> Ibid 41.

<sup>153</sup> Ibid.

relevant condition under the Directive, as those downloading works could gain access to the work from a place and at a time of their own choosing. Moreover, the court held that the processing of files by an original seeder, as well as subsequent users who obtained all or segments of the current files, satisfied the condition of “making available to the general public.”<sup>154</sup> After the principal offense was satisfied, the court then went on to examine the complicity of TPB. In this context, it found that TPB (1) provided a website with “advanced search features”; (2) provided a website with “easy uploading and downloading facilities”; and (3) put “individual file sharers in touch with one another through the tracker linked to the site.”<sup>155</sup> For this reason, the services provided by TPB were considered as acts of complicity in that it facilitated, aided and abetted the offenses. To this end, it was held that TPB was liable for copyright infringement.<sup>156</sup> That said, it must be remembered that the TPB case was only analysed from the perspective of the rule concerning “making available to the public”; for this reason, the distinct issue concerning the safe harbour defence will be analysed separately in a later section.

Another instructive example on this issue is the case of *Finreactor*.<sup>157</sup> The defendant, Finreactor, was a peer-to-peer website, which shared copyrighted

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<sup>154</sup> Carrier 9.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid

<sup>157</sup> Pessi Honkasalo, ‘Case Comment: Criminal proceedings against the administrators of a BitTorrent tracker: Finreactor KKO 2010:47’ (2010) 32 European Intellectual Property Review 591 590-592.

files using the BitTorrent system. Finreactor's system was based on simultaneous file-sharing between users who had downloaded the torrent files to their own computers. Because access to Finreactor's network required that users register, the network was arguably publicly available. The challenge, however, arose from the fact that registered users could share music, films, games and software files among themselves without the permission of right holders. For this reason, the right holders sued Finreactor for copyright infringement.

On the facts, although the defendant sought to rely on the defence of safe harbour, asserting that Finreactor was not in fact a file sharing website, but a database consisting of hyperlinks and, consequently, the administrators supposedly could not have directly or indirectly infringed the copyrighted works, as this conformed to the exceptions contained in the Electronic Commerce Directive,<sup>158</sup> the District Court found the defendant guilty of copyright infringement, holding that they had aided the commission of a copyright offence.<sup>159</sup> For this reason, Finreactor was held to have not been

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<sup>158</sup> Mikko Manner, Topi Siniketo and Ulrika Polland, 'The Pirate Bay Ruling—When The Fun and Games End' <<http://www.roschier.com/sites/default/files/the-pirate-bay-ruling.pdf>> accessed 5 August 2015.

<sup>159</sup> Marja-Leena Mansala, 'Finland: Torrent files, Sharing and Copyright in the Finreactor Case' (*IRIS Legal Observations of the European Audiovisual Observatory*) <<http://merlin.obs.coe.int/iris/2010/7/article104.en.html>> accessed 29 June 2015.

qualified to rely on the safe harbour defence. It was thus liable for copyright infringement.<sup>160</sup> The defendant, however, appealed this decision.

On appeal, the Court of Appeal upheld the decision of the District Court.<sup>161</sup> A further appeal was brought before the Supreme Court of Finland, which found that a procedure whereby copyrighted data is distributed for copying in digital form can be regarded as making data available to the public.<sup>162</sup> Additionally, the file-sharing and copying which were facilitated via Finreactor's network were regarded as distributing and reproducing a work.<sup>163</sup> For this reason, the author's exclusive rights, that is, the right to make copies of the work as well as making said work available to the public, were held to have been infringed.<sup>164</sup> In addition, as maintaining and controlling the use of the network was an essential part of making the protected works available to the public, Finreactor, in providing the services that facilitated the unlawful use of the copyrighted works, was held to have been complicit in the commission of a copyright offence.<sup>165</sup> The Supreme Court thus upheld the decision of the Court of Appeal, effectively holding that Finreactor was liable for copyright infringement.<sup>166</sup>

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Honkasalo 592.

<sup>163</sup> Mansala.

<sup>164</sup> Honkasalo 591-592.

<sup>165</sup> Mansala.

<sup>166</sup> Ibid.

Another important judgment on the question of “making available to the public” is that of *Twentieth Century Fox Film Corp & Others v British Telecommunications Plc.* (“Newzbin case”),<sup>167</sup> which was briefly introduced in chapter 3. In this case, Newzbin, the defendant, was a British Usenet indexing website, which provided searching services for messages posted on UseNet services (this is the function equivalent of electronic bulletin boards). The messages posted in this regard not only included text, but also other types of files, such as films, software and music. The claimants brought an action against Newzbin for copyright infringement, arguing that they had communicated to the public infringing files. The defendant, by contrast, argued that the service they provided was quite similar to Google or any other search engine; that is, mere links to sites from which the files could be downloaded. More specifically, they contended that this did not amount to communicating the films to the public, and that they should therefore not be liable for their users' actions.<sup>168</sup>

The court did not, however, accept Newzbin’s argument. It explained that once users sought to download the files via the Newzbin’s website, the defendant would expend time and effort gathering the separate messages together rather than simply making available a link to a film of the user’s

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<sup>167</sup> *Twentieth Century Fox Film Corporation v British Telecommunications plc.*

<sup>168</sup> Victoria Evans, ‘Copyright Infringed by Usenet Aggregator’s Links to Infringing Material’ (10 May 2010) <<http://www.twobirds.com/en/news/articles/2012/copyright-infringed-usenet-aggregator-infringing-material-050510>> accessed 9 July 2015.

interest as provided by a third party.<sup>169</sup> The members would thus consider the films contained in Newzbin's index to have been made available to them by Newzbin.<sup>170</sup> Accordingly, it could be said that Newzbin had made the copyrighted files available to the public. As making copyrighted work available to the public is one of the author's exclusive rights, the court ultimately ruled that the defendant was liable for copyright infringement.<sup>171</sup>

### **5.3.2.2.3. Key Cases on ISP Liability in Europe**

A careful analysis of the various ISP liability cases decided upon by different European courts suggests that the limitation provision contained in the Electronic Commerce Directive for "hosting service" under the Article 14 is the most common issue. Generally speaking, courts have begun by addressing the question of ISPs' serving as a hosting service. If such ISPs satisfy the courts that they serve as a hosting service, the request for an exemption would then be considered. It is, however, important to note, in this context, that because the Directive only sets out basic requirements to aid Member States in deciding appropriate cases, each European jurisdiction has discretion regarding the appropriate interpretation to be ascribed to the Directive.

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<sup>169</sup> Ibid.

<sup>170</sup> Darren Meale, 'NewzBin2: The First Section 97A Injunction Against An ISP' (20 September 2011) <<http://jiplp.blogspot.co.uk/2011/09/newzbin2-first-section-97a-injunction.html>> accessed 29 June 2015

<sup>171</sup> *Twentieth Century Fox Film Corporation v British Telecommunications plc.*

More generally, it is also noteworthy that, further to Preamble 47 and Article 15, the requirement to terminate or prevent an infringement does not impose a general monitoring obligation on service providers. However, it is nonetheless possible for courts or competent authorities in the various Member States to impose a monitoring obligation on service providers, as required in certain cases.<sup>172</sup> Even further, the Directive appears to suggest that Member States are allowed to create their own rules in terms of the liability of service providers who provide hyperlinks and location services.<sup>173</sup> This effectively affords Member States significant discretion when applying the Directive in appropriate cases. This, however, means that cases raising similar material facts may nonetheless be decided differently in different Member States. To this extent, the subsequent section will critically analyse relevant case law regarding ISPs which serve as a “hosting service”.

(1) *Laffess v. MySpace*<sup>174</sup>

In this case, a French comedian, Jean-Yves L., otherwise known by the name “Lafesse”, sued MySpace, a social website, for having reproduced and

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<sup>172</sup> Article 15(2), Electronic Commerce Directive.

<sup>173</sup> Article 21(2), *ibid.* It states that “in examining the need for an adaptation of this Directive, the report shall in particular analyze the need for proposals concerning the liability of providers of hyperlinks and location tool services, “notice and take down” procedures and the attribution of liability following the taking down of content.”

<sup>174</sup> *Laffess v. MySpace* Tribunal de grande instance de Paris.

broadcasted his works without permission.<sup>175</sup> The French High Court of First Instance rejected the defendant's argument that it was providing a "hosting service" which could be considered as an exemption under Article 14 of the Electronic Commerce Directive, and accordingly ruled in favour of the plaintiff. As MySpace provided an editing tool and guided its users on how to incorporate structure to the content, including video uploading and broadcasts, and, more importantly, generated revenue from its advertisements, the Court found that the service provider was, in reality, the host of the information provided by its users. More specifically, it considered that the defendant did more with the data than solely providing space for storing the data. For this reason, the defendant could be considered as an editor. Accordingly, the Court concluded that MySpace could not benefit from the hosting limitation on liability under Article 14. In short, MySpace was found to be liable for copyright infringement.<sup>176</sup>

## (2) *The Tiscali Case*<sup>177</sup>

Similar to the case discussed above, the Tiscali case arose from an action brought in 2002 by two publishing houses against Tiscali Media (currently Telecom Italia). The action stemmed from the illegally reproduction and

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<sup>175</sup> Brad Spitz, "The Buttock' sues MySpace for copyright infringement" (11 July 2007) <<http://juriscom.net/2007/07/the-buttock-sues-myspace-for-copyright-infringement/>> accessed 10 December 2014.

<sup>176</sup> Ibid.

<sup>177</sup> *Tiscali case* Case 09-18855 Court of Cassation (Civil Chamber 1).

communication of a comic on one of the websites hosted by Tiscali Media.<sup>178</sup>

Tiscali provided free web space for its users to design their own webpages; these webpages could be created in a predefined structure, using a template, as well as editing tools provided by the ISP. The service provider then inserted advertisements into these pages in order to gain financial reward.<sup>179</sup>

For this reason, the Court of Cassation reversed the decision of the lower court which considered that Tiscali qualified as a hosting service and was accordingly protected against the copyright claim brought by the plaintiffs.

More specifically, the Court of Cassation ruled that the service provider was not entitled to enjoy the exemption from liability, and was thus liable for having infringed the copyright. This was because the webpage-design service and the gains generated therefrom went beyond the mere technical function of storage, as provided for by Article 14 of Electronic Commerce Directive.<sup>180</sup>

### (3) *Nord Ouest Production v. Dailymotion, UGC Images*<sup>181</sup>

In contrast to the foregoing decision, a French Court arrived at a different decision in a relatively similar subsequent case. In the Dailymotion case, the plaintiff, producer/ director/ distributor of the film “Joyeux Noël”, sued

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<sup>178</sup> Ignacio Garrote Fernández-Díez, ‘Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights’ World Intellectual Property Organization <[http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries\\_garrote.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf)> accessed 13 December 2014, 27-28.

<sup>179</sup> Ibid 28.

<sup>180</sup> Ibid.

<sup>181</sup> *Nord-Ouest Production v. DailyMotion, UGC Images* .

Dailymotion and UGC Images, for hosting copies of their film without authorisation.<sup>182</sup> On the facts of the case, Dailymotion was regarded as a hosting provider by the Court of First Instance,<sup>183</sup> but was nonetheless found liable for copyright infringement on the ground that it had actual knowledge of the presence of illegal content on its website, provided technical support for the infringing activities, and obtained a financial benefit from making available the copyrighted materials to its users.<sup>184</sup> More specifically, the court held that Dailymotion could not be protected under Article 14 of Electronic Commerce Directive.<sup>185</sup> Dailymotion, however, attempted to rely on the general obligation to monitor as provided by Article 6-I-2 21 of the Act of June 2004 on Confidence in the Digital Economy (LCEN), which it argued implemented Article 15 of Electronic Commerce Directive.<sup>186</sup> This was argument was, however, rejected by the Court, holding instead that the prohibition only applies to cases where the unlawful activities at issue were not generated or induced by the intermediary itself.<sup>187</sup> In other words, if the services provided

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<sup>182</sup> 'Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Tribunal de Grande Instance de Paris (3rd chamber, 2nd Section) decision of 13 July 2007' <<http://www.juriscom.net/actu/visu.php?ID=949.July2007>> accessed 15 October 2011.

<sup>183</sup> Christine Gateau, Winston Maxwell and David Taylor, 'The French Supreme Court Confirms that Dailymotion and an Aggregator of RSS Flows are Both Hosting Services Providers' <<http://www.lexology.com/library/detail.aspx?g=1fc53c40-cb31-440f-937f-8d2de627c752>> accessed 12 December 2014.

<sup>184</sup> , 'Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Tribunal de Grande Instance de Paris (3rd chamber, 2nd Section) decision of 13 July 2007'.

<sup>185</sup> Ibid.

<sup>186</sup> The Article 6-I-2 LCEN states that civil liability of technical service providers cannot be invoked if they did not have actual knowledge of the unlawful nature of the content or if, once they did have such knowledge, they took prompt action to withdraw the data or render access to it impossible.

<sup>187</sup> , 'Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Tribunal de Grande Instance de Paris (3rd chamber, 2nd Section) decision of 13 July 2007'.

by the intermediaries would help users infringe the copyrighted materials, ISPs are under a duty to prevent the infringing activities at issue.<sup>188</sup> In short, the Court ruled against the defendant. Dailymotion subsequently announced that it had taken the decision to install fingerprint filtering technology on its system, in order to filter and delete illegal materials.<sup>189</sup>

On appeal, the Court of Appeal, however, reversed this decision, holding that Dailymotion was not liable for the alleged infringement.<sup>190</sup> The Court of Appeal, however, agreed with the lower court that Dailymotion was to be regarded as a host provider, but found that Dailymotion did not have precise knowledge of a specific infringement, as the information contained in the formal notice sent by the plaintiff did not include the URL address of the internet page which hosted the infringing materials. This, according to the Court, did not fully satisfy the requirement of notice, to the extent that there is an obligation to describe and locate the disputed facts held against the other party, pursuant to Article 6-I-5 of the LCEN.<sup>191</sup> Furthermore, Dailymotion was held to have already taken necessary precautions in so far content stored on its website by adopting fingerprint filtering technology.<sup>192</sup> For this reason, the Court

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<sup>188</sup> Amélie Blocman, 'Decision of the Paris Court of Appeal on the Liability of Video-sharing Platforms' <<http://merlin.obs.coe.int/iris/2009/6/article18.en.html>> accessed 17 October 2014

<sup>189</sup> Song 15.

<sup>190</sup> Blocman.

<sup>191</sup> Ibid.

<sup>192</sup> 'Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Cour d'Appel de Paris, Judgement of May 6, 2009' <<http://www.legalis.net/spip.php?page=jurisprudence-274>>

considered that Dailymotion should be exempted from liability on the basis of Article 14 of the Electronic Commerce Directive. This decision was later affirmed by the Court of Cassation in February 2011.<sup>193</sup>

#### (4) *The Google Case*<sup>194</sup>

Compared with the cases discussed hitherto, the court in *Zadig Productions and others v. Google Inc, Afa*,<sup>195</sup> required the ISP in question to perform a certain level of monitoring so as to ensure that copyright was effectively protected. In this case, the plaintiff, Zadig Productions, which was the producer of a documentary called 'Tranquillity Bay', claimed damages against Google for unlawful use of copyrighted works which users had posted on Google's Video website. Although Google had, on a few occasions, removed the videos after it had received formal letters of notice from the plaintiff, Zadig claimed that once the defendant had been informed of the unlawful nature of the posting, it should have monitored its website for any further postings of the same content.<sup>196</sup> In this context, Zadig argued that Google did not take the

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decision&id\_article=2634> accessed 12 December 2014.

<sup>193</sup> 'Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Cour de Cassation, Judgement No. 165 of February 17, 2011' <<http://cyberlaw.stanford.edu/page/wilmap-france>> accessed 12 December 2014.

<sup>194</sup> *Zadig Productions and others v. Google Inc, Afa* .

<sup>195</sup> Ibid <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2072](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2072)> accessed 27 October 2014.

<sup>196</sup> Brad Spitz, 'Google Video Held Liable for Not Doing All It Could to Stop the Broadcasting of a Film' (29 November 2007) <<http://copyrightfrance.blogspot.co.uk/2007/11/google-video-held-liable-for-not-doing.html>> accessed 31 October 2014.

necessary steps to stop the repeated illegal uploading of the same film, and thus claimed that Google was liable for the infringing activities.<sup>197</sup>

The French High Court of First Instance held that, on the basis of the Dailymotion case,<sup>198</sup> as the films were uploaded by the users on Google's Video website, Google ought not to have been considered as a publisher, but rather a hosting provider.<sup>199</sup> Relying on Article 6-I-2 of the LCEN, which provides that “the hosting provider is not liable for information stored at the request of a recipient of the service, if the provider did not have actual knowledge of illegal activity or information, or if the provider, upon obtaining such knowledge, acted expeditiously to remove or to disable access to the information”, the Court found that even though Google had acted promptly to delete the infringing video from its website each time when it had received the formal letters of notice from Zadig, it could only be protected from liability under Article 6-I-2 for the first occasion when it was notified of the video and removed it, rather than for the subsequent acts of removing the reposted materials.<sup>200</sup> More specifically, the Court reasoned that after Google had been informed of the unlawful nature of the content by the first notification, it should

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<sup>197</sup> Ibid.

<sup>198</sup> , ‘Christian C., Nord Ouest Production v. Dailymotion, UGC Images, Cour de Cassation, Judgement No. 165 of February 17, 2011’.

<sup>199</sup> Jeanne Méhaud, ‘More Cases, More Confusion? The Continuing Saga of Internet Hosting Provider Liability under French Law ’ (17 December 2007) <<http://www.twobirds.com/en/news/articles/2007/continuing-saga-internet-hosting-provider-liability-france>> accessed 30 October 2014.

<sup>200</sup> Ibid.

have implemented all necessary means to prevent the same content being posted on its website again.<sup>201</sup> However, as Google failed to prove that it had implemented effective means, the court was of the view that Google could not benefit from the limitation on liability provided by Article 6-1-2 of the LCEN.<sup>202</sup>

(5) *The Pirate Bay Case*<sup>203</sup>

In this case, the four founders of The Pirate Bay operated a file-sharing service by using the so-called "BitTorrent technology" to enable users to share data files, including copyrighted materials, with each other. The District Court of Stockholm held that the defendant could be regarded as a hosting provider because it provided the server space to users for the purposes of uploading and storing torrent files.<sup>204</sup> Notwithstanding this, however, the Court ruled that the defendant could not benefit from the exemption under Article 14 of the Electronic Commerce Directive, as the defendant contributed to the users' infringing activities by providing a website with well-developed search functions, easy uploading and storing procedures as well as links between the tracker and its website.<sup>205</sup> The Court further considered that the website had actual knowledge of the infringing activities of its users. For this reason, the

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<sup>201</sup> *Zadig Productions and others v. Google Inc, Afa.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *The Pirate Bay*, District Court Stockholm, Case no. B 13301-06, Judgment of 17 April 2009.

<sup>204</sup> *Ibid.*, cited in Song 16.

<sup>205</sup> Henrik Nilsson and Jerker Edström, 'Hot Pursuit of Mere Conduits' (11 January 2010) <<http://www.twobirds.com/en/news/articles/2012/hot-pursuit-of-mere-conduits>> accessed 11 December 2014.

defendant was held liable for copyright infringement.<sup>206</sup> To this end, each of the defendants were sentenced to one year in prison. Additionally, a fine aimed at compensating the loss of sales and market damage sustained by the plaintiff was imposed.<sup>207</sup>

This decision was later confirmed by the Stockholm Court of Appeal on 26 November 2010.<sup>208</sup> Although the Court of Appeal reduced the defendants' prison sentences to between four and ten months each, it increased the amount of fines to be paid from approximately 30 million to 46 million Swedish kronor.<sup>209</sup>

## **5.4. The Liability of Internet Service Providers in China**

In this the information age, more and more Chinese people are enjoying access to various online resources offered by internet service providers. With the rapid development of the internet, however, a number of legal problems have emerged, evidenced not least by the growing number of copyright infringement disputes decided upon by Chinese courts in recent years. In order to address at least some of these problems, China has enacted relevant

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<sup>206</sup> Ibid.

<sup>207</sup> Michael Plogell and Erik Ullberg, 'Sweden: The Pirate Bay Case' <<http://merlin.obs.coe.int/iris/2009/6/article29.en.html>> accessed 11 December 2014.

<sup>208</sup> Michael Plogell and Erik Ullberg, 'Sweden: The Pirate Bay Appeal' <<http://merlin.obs.coe.int/iris/2011/2/article37.en.html>> accessed 11 December 2014.

<sup>209</sup> 'Swedish Court Reduces Sentence of Pirate Bay Founder in Hacking Case' (*CTV News*, 25 September 2013 ) <<http://www.ctvnews.ca/sci-tech/swedish-court-reduces-sentence-of-pirate-bay-founder-in-hacking-case-1.1469928>> accessed 12 December 2014.

pieces of legislation, which, while an important development, have not been a panacea. This important theme is addressed hereafter, followed by an exploration of a number of suggestions that are aimed at enhancing copyright protection in China in the digital era.

### **5.4.1. Relevant Legislation**

Several pieces of legislation attempt to protect the interests of copyright owners, as well as the interests of the information society in the digital environment. More specifically, the Copyright Law of the People's Republic of China, which was first adopted in 1990 and later amended in 2001 and 2010,<sup>210</sup> and the Implementing Regulations to the Copyright Law of the People's Republic of China, which first entered into force in 2002 and was later amended in 2011 and 2013,<sup>211</sup> set out the modalities of copyright protection in China in the digital era.

In 2005 and 2006, two key regulations were promulgated by China, which are specifically aimed at addressing increasing concerns about copyright infringement over the internet. The first is the Measures for the Administrative Protection of Internet Copyright, which was promulgated by the National Copyright Administration, the Ministry of Information Industry, in 2005,<sup>212</sup> while

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<sup>210</sup> Copyright Law of the People's Republic of China, such as the Article 10, 38, 42 and so on.

<sup>211</sup> Implementing Regulations of the Copyright Law of the People's Republic of China.

<sup>212</sup> Measures for the Administrative Protection of Internet Copyright.

the second is the Regulations for the protection of the Right of Communication through Information Network (2006 Regulations), adopted in 2006 and amended in 2013. The latter Regulations, in particular, contain a number of provisions designed to regulate copyright infringement caused by internet users or ISPs.<sup>213</sup> It is noteworthy that the limitations of liability for ISPs are addressed in details in this Regulations, which is considered as the safe harbour rules in China.<sup>214</sup> By discussing the relevant rules in the U.S. and E.U. before, China's safe harbour rules will be further analysed and discussed in the later section.

In addition, as for the ISP's liability, it is important to note that there is no theory of secondary liability in China.<sup>215</sup> In order to deal with cases which concern the liability of ISPs for infringement by their end users, the notion of "joint liability", which originated in the "General Principles of the Civil Law of the People's Republic of China" (Civil Code),<sup>216</sup> adopted in 1986 and entering into force in 1987, and the "Tort Law of the People's Republic of China" (PRC Tort Law),<sup>217</sup> adopted in 2009 and entering into force on 1 January 2010, has been utilised.

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<sup>213</sup> 2006 Regulations.

<sup>214</sup> Weixiao Wei, 'ISP Copyright Liability in China: Collision of the Knowledge Standard and the New Tort Liability Act' 33 *European Intellectual Property Review* 507 511.

<sup>215</sup> Chengsi Zheng, 'China: Internet - Liability of ISPs - Guidance from the Supreme Court' 23 *European Intellectual Property Review* 166 167.

<sup>216</sup> General Principles of the Civil Law of the People's Republic of China.

<sup>217</sup> Tort Law of the People's Republic of China.

Specifically speaking, the notion of “joint liability” first appeared in the Civil Code in 1987. Article 130 of that Code, in particular, stated that “if two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability”.<sup>218</sup> This provision was relied upon as the sole legal basis to determine the liability of ISPs in the subsequent several decades that followed, until the PRC Tort Law was implemented in 2010. The 2010 Law further defined ISPs' liability, and emphasized the notion of “joint liability”, which would apply in order to hold ISPs liable for the direct infringement of their end users. Article 9 of the 2010 Law, in particular, stipulates that “one who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.”<sup>219</sup> Additionally, Article 36 provides that

[...] where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures as deletion, blocking or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user. Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services,

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<sup>218</sup> Article 130, Civil Code.

<sup>219</sup> Article 9, PRC Tort Law.

and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.<sup>220</sup>

The Supreme Court's Interpretations and Opinions, which are legally binding in China, have further defined the notion of joint liability. More specifically, Article 3 and 4 of *The Interpretation of the Supreme People's Court Concerning Several Issues on Hearing cases in Internet Copyright Dispute* issued in 2000, and later amended in 2003 and 2006, provide that an ISP will be held jointly liable with other infringing parties in the following situations: (1) where the ISP, via the internet, attends the infringing activities held by another party; or abets or assists another person in committing a copyright infringement;<sup>221</sup> or (2) where the ISP is aware of the copyright infringement committed via the Internet by its users or has been properly warned of such infringement by the copyright owner, but does not take any measure to remove the relevant infringing contents.<sup>222</sup>

Without comprehensive legislation on the issue of indirect copyright liability,<sup>223</sup> the issues of ISP's liability have been dealt with under the joint liability regime, which is constituted by a series of laws, regulations, judicial interpretations

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<sup>220</sup> Article 36, *ibid.*

<sup>221</sup> Article 3, *The Supreme People's Court Concerning Several Issues on Hearing cases in Internet Copyright Dispute.*

<sup>222</sup> Article 4, *ibid.*

<sup>223</sup> Yeqing Li, 'The Research on the Infringement of Copyright in the Digital Era in China' 458 Xiang Chao (Second Half) 38 38-39.

and administrative measures.<sup>224</sup> However, in practice, due to some uncertainty over the language contained in existing copyright legislation, conflicting opinions have been espoused by different courts in China,<sup>225</sup> as will be further discussed below.

### **5.4.2. Problems which must be addressed**

In so far as ISP's liability is concerned, the 2006 Regulations is considered to be the most specific piece of legislation that regulates copyright-related issues that arise in the digital environment in China. A series of provisions relating to the limitations of ISP's liability were established in these Regulations.<sup>226</sup> Due to the strikingly similar language of these Regulations to the DMCA safe harbour provision, these provisions are referred to as the 'Chinese safe harbour provisions'. Notwithstanding the similar language used in these two safe harbour provisions, however, implementation has produced strikingly dissimilar results. Largely due to the different legal systems, the language of the Chinese safe harbour is at times ambiguous, and case law does not always provide specific guidance on the interpretation of these safe harbour provisions. This has necessitates the need for clarification, a theme that is explored in greater detail hereafter.

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<sup>224</sup> Xiao Ma, 'Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the United States' Approach' 4 NYU J Intell Prop & Ent L 253 255-256.

<sup>225</sup> Qian Tao, 'Knowledge Standard for the Internet Intermediary Liability in China' 20 International Journal of Law and Information Technology 1 17.

<sup>226</sup> Article 20-23, 2006 Regulations.

*(1) Knowledge and "Notice and Take Down" Procedures*

According to the DMCA, the knowledge of ISPs plays an important role in the determination of contributory infringement, and, accordingly, the application of the safe harbour provision. The 2006 Chinese Regulations takes a similar approach, to the extent that “knowledge” is taken into account in China when determining the liability of the ISPs. Notwithstanding this, however, important to note that the Chinese safe harbour provision does not contain a unified standard in respect of the terms “know”, “has reasonable grounds to know” and “should have known”. The corollary of this is that different courts, despite hearing cases raising similar material facts, have arrived at different results.

For example, in *IFPI v. Baidu*,<sup>227</sup> the International Federation of the Phonographic Industry (IFPI) sued Baidu, one of the largest web services companies in China, for copyright infringement. The defendant argued that it only provided linking service to its users and accordingly did not infringe the rights of the copyright owners. The Beijing First Intermediate Court agreed with the defendant’s argument, holding that Baidu was a linking service provider.<sup>228</sup> With regard to the notice and take down procedure, the Court further held that despite the fact that IFPI sent a notice letter to Baidu, this

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<sup>227</sup> *IFPI v. Baidu* The Beijing First Intermediate Court, 2005 No 7965.

<sup>228</sup> *Ibid* 16-17.

notice did not enclose the copyright certificates or exact links to the infringing websites. For this reason, the letter was considered to be a defective notice. More specifically, although the plaintiff argued that the defendant should have known of the existence of the infringing materials by virtue of the notice, the Court was emphatic in finding that Baidu should be protected from liability, pursuant to the Article 23 safe harbour provision.<sup>229</sup> The Beijing High Court subsequently affirmed the lower court's decision.<sup>230</sup>

A different decision was, however, arrived at in a later case. In *Universal Music Limited v. Alibaba*,<sup>231</sup> Universal Music Limited sued Alibaba, a company that ran a search engine website similar to Baidu, for direct as well as indirect copyright infringement. The facts were that, in similar vein to the Baidu case explored above, users downloaded music through the web links provided by the search engine. Although some of the information relating to the infringing materials as contained in the warning letter were not outlined in detail, including the absence of specific URL links, the court, citing Article 23, found that the defendant should know or should have known that the search results contained infringing materials based on the defective notice sent by the plaintiff.<sup>232</sup> For this reason, Alibaba was held jointly liability for copyright infringement, and could not be exempted from liability through reliance on the

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<sup>229</sup> Ibid 3.

<sup>230</sup> *IFPI v. Baidu* Beijing High Court, 2007 No 594.

<sup>231</sup> *Universal Music Limited v. Alibaba* Beijing Second Intermediate Court, 2007 No 02626.

<sup>232</sup> Ibid.

safe harbour provisions.<sup>233</sup> In view of this decision, Alibaba appealed to Beijing High Court. The decision was, however, affirmed.<sup>234</sup>

Against the backdrop of the foregoing cases, it can be argued that no clear guidance exists in legislation or case law on the question of the appropriate standard of knowledge to be ascribed in cases involving the liability of ISPs. Rather, it appears that courts retain a very wide discretion when deciding whether service providers have actual knowledge or should have known of the existence of an infringement. That said, it would appear that Chinese courts are beginning to countenance the practice of imposing an implied duty of care in respect of certain ISPs wishing to rely on the safe harbour provisions. The case of *JOY.CN Co., Ltd. v. Tudou Network Technology Co., Ltd.*<sup>235</sup> is instructive in this regard. Here, the plaintiff JOY.CN, which had obtained the exclusive right to disseminate information on several TV drama, sued Tudou, a famous video-sharing website in China, for copyright infringement. Tudou was a file hosting service provider, which allowed users to upload, view and share videos on its website; it did not, however, provide the videos itself. Tudou, however, classified its website into several channels, such as entertainment, music, film, drama and so on, and provided a search engine for users to efficiently make a link to works that they wanted to access.

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<sup>233</sup> Ibid.

<sup>234</sup> *Universal Music Limited v. Alibaba* Beijing High Court, 2007 No 1190.

<sup>235</sup> *Shanghai JOY.CN Co., Ltd. v. Shanghai Quantudou Network Technology Co., Ltd.* Shanghai First Intermediate People's Court.

The Shanghai First Intermediate People's Court held that Tudou should have known whether the material uploaded by users was illegal when they had to examine the classification of these videos. More specifically, the Court found that the website had a duty of care to monitor the materials on its website. For this reason, the Court found that, on the facts of the case, Tudou should have known about the infringements that were taking place on its server. It was accordingly liable for copyright infringement, and could not rely on the safe harbour provision.<sup>236</sup>

## *(2) The Notification Requirement*

At present, no clear guidance exists on the question of the notification requirement, as different courts have to date issued different opinions. For example, in *IFPI v. Baidu*, the Court held that the as the notice letter sent from IFPI did not contain sufficient information about the infringing materials, such as the infringing URL links, the letter had to be regarded as a defective notice, and, that, further, Baidu was not put on notice and could not therefore be held liable for copyright infringement.<sup>237</sup>

However, in *Universal Music Limited v. Alibaba*, although quite similar to the Baidu case, the Court arrived at an entirely different decision, holding that

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<sup>236</sup> Ibid.

<sup>237</sup> *IFPI v. Baidu*.

although the warning letter only contained a few URL links rather than an exhaustive list of the infringing works, the information provided was nonetheless sufficient to put the defendant on notice.<sup>238</sup> More specifically, the Court considered that Alibaba, which disabled only the infringing links included in the notice letter but not all the infringing links, was “grossly negligent”, and thus liable for copyright infringement.<sup>239</sup>

The foregoing discussion gives credence to the argument that the case law to date on the applicability and importance of the notification requirement is uncertain in nature. This arguably has the potential to seriously influence both the rights of ISPs and right holders. Against this backdrop, it is submitted that the notification requirement requires further clarified in the future.

### *(3) The Notion of “Immediately Remove” in the Notice and Take-down Provisions*

The take-down procedure, which first appeared in the DMCA, requires that the service provider acts expeditiously to remove, or disable access to, the material upon obtaining knowledge or awareness of the infringement.<sup>240</sup>

Although the Chinese safe harbour provision closely mirrors the DMCA’s safe

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<sup>238</sup> Ling Zhang, ‘Why the Safe Harbour Provision has Delegalized: a Study on the Implementation of the Safe Harbour Provision from Alibaba Case’ 10 *Legal System and Regulation* 64 64-65.

<sup>239</sup> *Universal Music Limited v. Alibaba*.

<sup>240</sup> 17 U.S.C. § 512(c)(1)(A)(iii).

harbour provision, it does not include any specific time limitation, such as the requirement to “expeditiously remove” infringing material. That said, it is important to note that Article 36 of the PRC Tort Law does, however, indicate that “if, after being notified, the network service provider fails to take necessary measures in a *timely manner*, it shall be jointly and severally liable for any additional harm with the network user.”<sup>241</sup>

The requirement to “immediately remove” infringing material is one of the important aspects of the notice and take-down procedure. That said, without a clear appreciation of the nature and scope of this requirement, it can be argued that if a service provider is required to immediately take down allegedly infringing materials, but such materials later turn out to not be infringing, the rights of users might very well be violated. Additionally, without clarity as to the nature and scope of this requirement, copyright holders might easily abuse their right, which would, in turn, be detrimental to the interests of ISPs. Furthermore, if the take-down requirement is implemented without an appropriate time limit, it can be argued that service providers may delay the removal of infringing materials, which could potentially damage the interests of right holders. To this end, it is submitted that there is a need for explicit guidance of the appropriate timeframe within which infringing materials should be taken down.

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<sup>241</sup> Article 36, PRC Tort Law.

More generally, it is also important to note that, in China, there is also no specific guidance with regard to how the notion of “immediately” should be construed. For this reason, it is arguable that judges have a wide discretion when deciding whether the timing of a “take-down” is appropriate. For example, in *Universal Music Limited v. Alibaba*, despite the fact that Alibaba removed the infringing materials and disabled access to the links one month after receiving the warning notice, the Court nevertheless held that Alibaba did not “immediately remove” the infringing material or, indeed, block the illegal links, which it considered amounted to “gross negligence” and therefore should be liable for the copyright infringement.<sup>242</sup> However, it has to be noted that the court did not give any further explanation of the time standard in the case.

In view of the current legislation and case law on this issue, a strong argument can be made that there is some ambiguity in the interpretation of the requirement to “timely remove” infringing materials. Notwithstanding this, however, given the widespread uncertainty in China on this important question, it is arguable that there is a need for greater clarity, possibly through appropriate modifications to existing legislation in future.

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<sup>242</sup> *Universal Music Limited v. Alibaba* 23-24.

### **5.4.3. Suggestions**

In view of the problems described above in relation to the existing system of copyright protection in China, an argument can be made that the unclear guidelines currently in place have led to instability and unpredictability in practice. In order to better protect copyright in the digital era in China, particularly in light of the challenges posed by emerging P2P technology, existing legislation must be improved, and coherent and clear judicial interpretations also need to be issued. In addition, there are other methods for minimizing copyright violations in the digital era, such as reforming the Copyright Collective Management System (CM) in China so as to enable China's Collective Management Organizations (CMOs) to play a greater role in ensuring the effectiveness of copyright protection. Both of these suggestions will be elaborated in the following paragraphs.

#### *1. The Perfection of legislations*

Due to the rapid development of digital technology in China, promulgation or amendment of relevant legislation on this issue has increasingly become necessary. In contrast to the limited scope of traditional copyright protection, ISP's liability should be considered as a new subject matter for copyright protection in the digital era. As the existing clauses in relation to ISP's liability are quite ambiguous in practice, as described above, by emulating relevant

legislation in western countries in view of the actual conditions in China, the law could be improved as follows:

*(i) Establishing Specific Rules regarding ISP's Liability*

As there is no specific conception of ISP's indirect liability in China's copyright legislation, secondary liability theories should be introduced, such as contributory liability, vicarious liability and inducement liability, which are prominent concepts in U.S. copyright law. Three steps need necessarily to be followed in order to introduce secondary liability for digital copyright infringement in China.

The first step involves establishing a general rule for indirect copyright liability.<sup>243</sup> This rule should require that: (a) a primary infringement be a prerequisite for secondary liability; (b) subjective fault, and, in particular, intent and knowledge; and (c) whether the ISPs in question provide the means that enable copyright infringement.<sup>244</sup> The second step is to classify secondary liability into three categories, named contributory liability, vicarious liability and inducement liability, respectively, similar to the classification system that obtains in U.S. law. The last step is to provide strict interpretation of the key

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<sup>243</sup> Ma 308.

<sup>244</sup> Ibid.

terms that touch and concern the concept secondary liability, which would simplify the process of identifying when liability in the court.

*(ii) Further Clarifying the Language used in the Safe Harbour Provision*

As pointed out in the previous section, the language used in the China's safe harbour provision is ambiguous, which has resulted in often divergent understandings of the same rules in the different courts. It is noteworthy that although China has mirrored the U.S. safe harbour provision, there are some differences between them in practice. For example, the U.S. safe harbour rules have been interpreted in a detailed and robust manner by case law emanating from the U.S. By contrast, because China is a civil law country, the judicial decisions made by previous courts have no binding effect in respect of later cases.<sup>245</sup> In light of this, it is essential that appropriate interpretations of the secondary liability theory be codified in statute in future.

*(iii) Introducing an Internet Censorship Policy*

In view of the important role played by ISPs in the digital age, it is submitted that ISPs' responsibility be carefully supervised in China. For this reason, the government may need to enhance its regulation of the internet and networks by establishing a Chinese internet censorship policy. The "Graduated

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<sup>245</sup> Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (Kluwer Law International 1997) 82.

Response” (GR) programme, as one of the popular internet censorship policy in the world today, and which exists in many countries, could be introduced to enhance the system of copyright protection in China.

The GR programme is also known as the “Three Strikes Policy”. This policy essentially means that if users receive three or more notices, but still decide not to stop their infringing activities, the service providers in question could submit their names to the relevant courts or administrative departments, which would then make a decision as to the appropriate punishment to be imposed, including disabling users’ access to the internet or fines.<sup>246</sup> The GR programme originated in France in order to deal with the issues of obligations and liabilities arising as between the government, ISPs and right owners.<sup>247</sup>

In France, the GR programme is known as the HADOPI Law, which was introduced in 2009, and later implemented in 2010. Subsequent to the official launch of the Hadopi website, hundreds and thousands of notices are sent to users each day.<sup>248</sup> The HADOPI Law, in particular, includes provisions on the GR programme, but also the dynamics associated with website blocking, as well as automatic tools to enable right holders to monitor and report infringing

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<sup>246</sup> Davor Jancic, ‘The European Political Order and Internet Piracy: Accidental or Paradigmatic Constitution-Shaping?’ (2010) 6 *European Constitutional Law Review* 430.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Rapport d’activité 2010* (2012).

activities.<sup>249</sup> According to the HADOPI Law, ISPs should provide relevant materials to HADOPI within a certain period of time, failing which they would be fined a certain amount of money. This fine can be doubled if the requirements mandated by the law are not complied with.<sup>250</sup> It therefore could be said that this law has effectively regulated and supervised the responsibility of ISPs in practice in France.

In sum, it is submitted that China should emulate this approach in order to better address the complexities associated with P2P technology in the digital age. The GR policy, in particular, appears to be a useful model, which China may want to seriously consider adopting if it wishes to effectively protect copyright.

## *2. The Reform of CM System*

With the advent of the digital age, information is being transmitted over the internet with great rapidity. This has made it more and more difficult for copyright holders to control and manage the use of their copyright works. It has also caused serious damage to the interests of copyright owners where the copyright in their works has been infringed. Another related challenge lies in the fact that with the development of the internet, the traditional route of

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<sup>249</sup> Ibid.

<sup>250</sup> HADOPI Law.

seeking copyright permission has become less and less practical, which is problematic both for ISPs and users, who would need to apply for permission on a case by case basis.

The WIPO defines CM as “the exercise of copyright and related rights by organizations acting in the interest and on behalf of the owners of rights.”<sup>251</sup>

The CM system originated in France in the 1700s,<sup>252</sup> and has since been adopted in most developed countries, including the U.S., Germany, and the U.K., among others.<sup>253</sup> In China, this system of administration was first introduced into the amended PRC Copyright Law of 2001. Article 8, in particular, provided that because CMOs are non-profit organizations, regulations related to their operation would be formulated separately by the State Council.<sup>254</sup> The State Council later issued the Regulations on Copyright Collective Administration in 2005, which addressed issues such as the establishment and rights and obligations of CMOs, as well as their power to collect and distribute copyright licensing fees.<sup>255</sup> These Regulations have, since 2005, promoted the role of CMOs in China.

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<sup>251</sup> ‘Collective Management of Copyright and Related Rights’ <<http://www.wipo.int/copyright/en/management/>> accessed 31 October 2014.

<sup>252</sup> *Collective Management of Copyright and Related Rights* (Daniel Gervais ed, Second edn, Kluwer Law International 2010) 169-170.

<sup>253</sup> *Ibid.*

<sup>254</sup> Article 8, Copyright Law of the People's Republic of China.

<sup>255</sup> Regulations of December 22, 2004, of Copyright Collective Management (promulgated by Decree No. 429 of December 28, 2004 of the State Council of the People's Republic of China).

However, the rapid development of the Chinese society and the complexities associated with copyright protection have challenged the operation of CMOs in China, which have, in turn, led to calls for reform. More specifically, Chinese CMOs are classified as administrative organizations established by the Chinese government.<sup>256</sup> As such, CMOs are operated and supported by the government. This effectively means that although copyright related disputes could be dealt with in a timely manner, there is a relative lack of independent administrative power.<sup>257</sup> An additional challenge lies in the fact that, at present, there are only three CMOs fully operational in China, that is, the Music Copyright Society of China (MCSC), China Audio-Video Copyright Association (CAVCA) and the China Written Works Copyright Society (CWWCS).<sup>258</sup> This is problematic in practice as it creates a monopoly,<sup>259</sup> since there is no competition among the CMOs. It is also problematic because the exercise of their supervisory function is admittedly poor in practice, evidenced not least by numerous lengthy delays, which have the potential to seriously affect the interests of copyright owners.<sup>260</sup>

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<sup>256</sup> Hongyan Geng and Liang Wang, 'Dui Woguo Zhuzuoquan Jiti Guanli Xianzhuang De Faxue Fenxi (The Legal Analysis of the Current Situation of the Chinese Copyright Collective Management)' [2010] Shangye Jingji 124.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Jungao Lv, 'Lun Woguo Zhuzuoquan Jiti Guanli Zhidu de Wanshan (The Discussion about the Improvement of the Chinese Collective Administration System of Copyright)' [2014] Legal System and Society 203.

<sup>260</sup> Ibid.

To improve the CM system in China, it is submitted that China should emulate the approach taken by western countries. For example, in the U.S., the activities of CMOs are viewed as commercial in nature, and are accordingly regulated by company law or competition law.<sup>261</sup> Additionally, there is a vast number of CMOs operating in the U.S., which leads to competition, and therefore improved performance. In other words, poorly run CMOs are effectively eliminated from the market;<sup>262</sup> this serves to stimulate CMOs to improve their services.

## **5.5. Conclusion**

In conclusion, this chapter has argued that, in view of the growing number of cases in which copyright infringement involving P2P technology has been alleged to date, the issue of ISP's liability in the digital era has been afforded increasingly attention in China in recent years. This chapter has accordingly examined the liability of ISPs by reference to the concepts of direct and secondary liability, and, in particular, the relevant theories that best explain secondary liability. By comparing relevant legislation on this issue with recently promulgated directives, this chapter has unearthed a number of problems inherent in China's legal framework. In view of these problems, a

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<sup>261</sup> Ibid 204.

<sup>262</sup> Ibid.

number suggestions have been provided, which, if properly implemented, are intended to improve copyright protection in China.

Apart from the issue of the liability associated with the P2P file sharing system, as examined in this chapter, the question arises as to how to strike an appropriate balance between the interests of the stakeholders in order to better protect copyright in the digital era. This issue will be critically examined in the next chapter.

# CHAPTER 6

## Striking the Right Balance Between the Interests of Key Stakeholders

### Exclusive Summary

Kenneth Crews, a copyright expert, has explained that copyright law "promotes creativity and publication, while inhibiting research and learning."<sup>1</sup> It is submitted that when one examines copyright legislation, and, in particular, provisions relating to the duration of protection and specific authors' rights, copyright law appears to strike an appropriate balance. This could be understood from two angles. On the one hand, it can be argued that, in the short term, copyright legislation place restrictions on the use of creative works, by virtue of the myriad provisions that seek to protect copyrighted works. On the other hand, however, it appears that, in the long term, copyright protection effectively promotes learning and creativity.

That said, there is a strong argument to be made that, with the continuous development of copyright protection, copyright holders' rights in works have been overprotected, not only by legislation, but also by emerging high-tech methods, such as Technological Protection Measures. Against this backdrop,

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<sup>1</sup> Dennis Dickinson, 'Copyright Dilemma: The Need for Local Policy' (1996) 16 Library Issues 1.

order to balance right holders' rights and users' rights, various theories, doctrines and relevant legislation have gradually emerged in recent years, such as the three-step test, fair use and fair dealing. These developments will be comprehensively assessed in this chapter.

## 6.1. Background Information

In order to ensure that a fair balance is achieved between right holders' interests and the interests of users,<sup>2</sup> various pieces of copyright legislation have been enacted. More specifically, several domestic laws, treaties and directives make provision concerning the interpretation, limitations and exceptions to copyright, albeit that the vast majority of legal provisions typically accrue to the benefit of authors or copyright holders. On the latter point, it is important to note that the gradual shifting of this balance in favour of copyright owners may at times serve as a detriment to society. More specifically, by maximally protecting right holders, it is arguable that the conditions associated with enforcing the requisite limitations and exceptions are increasingly becoming stricter.<sup>3</sup> It is thus submitted that if this trend

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<sup>2</sup> The user's rights are usually belonged to some of the limitations and exceptions to copyright from a certain perspective. As there is no clear definition established by the copyright experts about whether user rights are rights or simply exemptions on copyright seeking user's rights would be considered as the symbol to provide an essential balance to the rights of the copyright owners. For the more detailed discussion of user's rights, see Gillian Davies, 'Copyright and the public interest' (Ph.D.Thesis, Aberystwyth University 1997), and Lyman Ray Patterson, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press 1991).

<sup>3</sup> Christophe Geiger, 'From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-step Test' (2007) *European Intellectual Property Review* 486-491.

continues, copyright law will near-ubiquitously protect rights holders' interests, arguably at the expense of societal interests. This invariably means that exceptions and limitations to copyright will be increasingly narrowly interpreted.<sup>4</sup> For this reason, the argument can be made that users' rights may be seriously stymied.

Unfortunately, if users lose certain rights, for example, the right of private copying, the question arises as to how these persons, who will become future right holders, will be able to generate new ideas for teaching, research and other related ventures. For this reason, it is perhaps axiomatic that users' rights in respect of copyright works is essential to social development.

That said, some critics maintain that there should be little protection for users' rights because it is often difficult to differentiate between their disparate intentions, such as consumptive use and productive use. For example, if a journalist copies part of a song in order to report on a new band, it would appear that the copying is unavoidable and reasonable in terms of achieving the aim of reporting. On the other hand, however, it has been argued that if a journalist copies songs for personal enjoyment, this amounts to consumptive use, and, as such, there should be little or no protection for this type of use.

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<sup>4</sup> Thomas Riis and Jens Schovsbo, 'User's Right: Reconstructing Copyright Policy on Utilitarian Grounds' (2007) 29 European Intellectual Property Review 1-6.

The main contention, in this regard, is that if users are granted the ability to engage in consumptive use, infringement of copyright would be effectively evaded, which will, in turn, damage the interests of right holders.

In view of the underlying tension between the interests of right holders and users, as described above, the question arises as to whether there exist any reasonable approaches which could be relied upon.

## **6.2. Three-step Test**

### **6.2.1. Introduction**

Because copyright is a robust right that generally accrues in favour of right holders, there is arguably a need to ensure that, where appropriate, restrictions are imposed. This approach, which is characterised by a balance between right holders' and users' rights, has been recognised in a number of treaties and directives, including the Berne Convention, the WIPO Copyright Treaty, the Information Society Directive, the TRIPs agreement, as well as a number of other conventions discussed in chapter 2. These instruments establish what can be aptly described as a three-step test.

The three-step test appeared for the first time at the international level during

the Stockholm Revision Conference of the Berne Convention in 1967.<sup>5</sup> The aim of this conference was to formally incorporate the right to reproduce work through an amendment to the Berne Convention. Interestingly, before the Conference, the reproduction right, which is perhaps the most basic right granted to authors and a right widely recognised by national laws, had not been included in the Convention.<sup>6</sup> Suffice it to say, Article 9 of the amended Berne Convention, stated that “authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form”.<sup>7</sup> That said, a number of countries had in place a variety of exceptions and limitations to the right of reproduction in their national laws. For this reason, the second paragraph of Article 9 was added, thereby allowing signatories to make exceptions to the newly established right. Article 9(2) read, “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”.<sup>8</sup> This is, in essence, the three-step test. The intention in this regard was therefore to preserve users' right, although the signatories

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<sup>5</sup> Roger Knights, ‘Limitations and Exceptions under the “Three-step Test” and in National Legislation- Differences between the Analog and Digital Environments’ (Regional Workshop on Copyright and Related Rights in the Information Age, Montevideo, September 13 and 14, 2000).

<sup>6</sup> Martin Senftleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law* (Kluwer Law International 2004) 43-98.

<sup>7</sup> Berne Convention, Article 9.

<sup>8</sup> Ibid.

were afforded a degree of leverage to restrict the exceptions and limitations to exclusive rights under national copyright laws for the purposes of protecting the interests of right holders.

Today, the three-step test can be found in Article 13 TRIPs, Article 10 WIPO Copyright Treaty, Article 6(3) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Article 6(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and Article 5(5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Of note, in this regard, is the fact that the three-step test has not only been applied to exceptions to the reproduction right, but also to the exceptions applicable to all other exclusive rights.<sup>9</sup>

### **6.2.2. The Content of Three-step Test**

The three steps which comprise the three-step test have traditionally been applied in a cumulative fashion, in order of importance. The first step requires exceptions that be confined to “certain special cases”. The second requires that the exceptions “do not conflict with a normal exploitation of a work”. On

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<sup>9</sup> Kamiel J. Koelman, ‘Fixing the Three Step Test’ (2006) European Intellectual Property Review 407 407-412.

this point, it should be noted that the WIPO Performances and Phonograms Treaty makes it clear that the exceptions must not conflict with a normal exploitation of a performance or a phonogram. That said, the third step requires that the exceptions “do not unreasonably prejudice the legitimate interests of the author”. Within the context of the WIPO Performances and Phonograms Treaty, the exceptions must also not unreasonably prejudice the legitimate interests of the performer or phonogram producer. More generally, it is worth noting that the three steps identified above are not distinct or separate as such; rather, all three steps apply jointly to the exceptions. As such, if one of the steps is not satisfied, the exception involved will fail the test.

Although slight changes to the actual text of the three-step test have been added over the years, it must be borne in mind that the purpose of the test has not been changed. For example, in the 1994 TRIPs Agreement, the third step was changed to better protect the interests of right holders, and not the interests of the author, as was the case in previous regulations. This essentially means that protection of the author has been changed to protection of the exploiter.<sup>10</sup> Additionally, it is also of some relevance that French Intellectual Property Code was amended on 1 August 2006 to ensure

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<sup>10</sup> Geiger 486-491.

that only certain exceptions and limitations which have been enumerated in the list of rights apply to the three-step test.<sup>11</sup>

### **6.2.2.1. “Certain Special Cases”**

As intimated above, the first step requires that exceptions and limitations should be confined to certain special cases. The purpose of this step is to ensure that the exceptions and limitations in question are “finite and limited in scope”.<sup>12</sup> Since the introduction of the TRIPs agreement, the WTO panel has taken the opportunity to interpret the test,<sup>13</sup> which is the only detailed analysis to date of the meaning and scope of the test at international level. In this regard, two terms will be discussed in some detail: (1) the term “certain” and (2) the term “special”.

As regards the term “certain”, the Macmillan English Dictionary defines this as referring to something “without being specific about exactly” who they are.<sup>14</sup> Legally, a WTO panel, regarding the validity of the exceptions clause to the United States Copyright Act, found that Section 110(5)(B) conflicted with both Article 13 of the TRIPS as well as the Berne Convention. More specifically, it

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<sup>11</sup> France Intellectual Property Code, Article L122-6-1.

<sup>12</sup> Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond*, vol I, no.13.14 (2nd edn, OUP 2005) 767.

<sup>13</sup> World Trade Organization, ‘United States- Section 110(5) of the US Copyright Act’ (2000) <[www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf)> accessed 21st March.

<sup>14</sup> Macmillan Education, *Macmillan English Dictionary* (2nd edn, Macmillan Publishers Limited 2007) 233.

has been argued that the panel actually considered that the term “certain” only means “some”, and was therefore not one of the conditions of legal certainty.<sup>15</sup> In other words, "the expression 'certain special cases' can be equated with the formula 'some special cases'".<sup>16</sup>

According to the Panel, the term “special” means that “more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow both in a quantitative as well as a qualitative sense. This suggests that a narrow scope as well as an exceptional or distinctive objective [...] an exception or limitation should be the opposite of a non-special, i.e., a normal case.”<sup>17</sup> Notwithstanding this explanation, however, the question arises as to how narrow is narrow enough. Given the uncertainty in this regard, it is submitted that the specific standard for measuring the rule should be considered seriously. For this reason, it is arguable that, until further guidance is issued by the Panel, national legislation in respect of this first step should be required to clearly define and narrow its scope in an equitable manner.

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<sup>15</sup> Senftleben 134.

<sup>16</sup> Ibid

<sup>17</sup> World Trade Organization, Article 6. 109.

### **6.2.2.2. “Do not conflict with a normal exploitation of a work”**

With respect to the second step of the test, the appropriate interpretation ascribed to this requirement has been controversial in practice. Based on a literal interpretation of the second step, it could be said that exceptions and limitations would not conflict with a normal exploitation of a work whenever value could be extracted from the work in question by the right holder, or the right holder is deprived of commercial gains. In this respect, any form of exploitation which involves the possibility of creating a significant commercial value has to be seriously questioned.<sup>18</sup> In short, defining a reasonable standard so as to clarify which kinds of use are regarded as a normal exploitation of a work by the user is very necessary.

According to the Article 6.166 WTO Panel, the term “normal” in the second step could be conceived of as having two connotations, the first an empirical aspect and the second a normative aspect. The empirical aspect concerns work which has in fact been exploited, while the normative aspect relates to those situations where the work has not been exploited, but exploitation is nonetheless a real potential or desirable.<sup>19</sup> Because the term “normal” appeared in the second condition, it can be argued that “normal” exploitation

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<sup>18</sup> Jonathan Griffiths, ‘Rhetoric & the “Three-Step Test”: copyright reform in the United Kingdom’ (2010) 32 *European Intellectual Property Review* 309-312.

<sup>19</sup> World Trade Organization, Article 6. 166.

should be understood as something that amounts to less than full use of an exclusive right.

In order to find an appropriate method to implement the second step, “a normal exploitation of a work” could be interpreted to mean that the work in question should be reasonably expected to be exploited by the owner. As the Article 6.177 WTO Panel stated, “...the essential question to ask is whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption.”<sup>20</sup> As such, if the owner does not ordinarily expect to exploit the work in certain areas in which users may wish to use it, this kind of “use” will not be regarded as normal exploitation.

More generally, in order to reasonably interpret the second element of the three-step test, the level of the exploitation of the work should also be considered. As the WTO Panel pointed out, “an exception or limitation should be narrow in quantitative as well as a qualitative sense.”<sup>21</sup> In this regard, it could be said that a conflict with a normal exploitation of a work will only occur when the use covered by an exception makes very substantial incursions into an owner’s potential market,<sup>22</sup> such as significant or tangible commercial

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<sup>20</sup> Ibid, Article 6. 177.

<sup>21</sup> Ibid, Article 6. 109.

<sup>22</sup> Senftleben 226.

gains, or when the forms of use should ordinarily be considered as the “normal exploitation of a work”.<sup>23</sup> For example, private study, based on the foregoing interpretation, could be normatively thought of as an exception.

### **6.2.2.3. “Do not unreasonably prejudice the legitimate interests of the author”**

With respect to the third condition, it is worth noting that three pivotal terms have been interpreted by the WTO Panel as being of particular relevance - “interests,” “legitimate” and “unreasonable”, respectively. As for the term “interests”, the panel has made it clear that this “interests” is not only “limited to actual or potential economic advantage or detriment.”<sup>24</sup> Instead, it could be understood as encompassing an economic as well as non-economic aspect.

As regards the term “legitimate”, the Article 6.224 panel has explained that this includes two aspects, one being legal in nature, and the other normative. For example, writing a book review should not be considered as an impairment of the “legitimate” interests of the author. In such a situation, the exception which allows the user to make quotations for the purposes of criticism would not be considered to harm the author’s “legitimate” interests.<sup>25</sup>

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<sup>23</sup> Griffiths 312.

<sup>24</sup> World Trade Organization, Article 6. 223.

<sup>25</sup> Jane C. Ginsburg, ‘Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions’ (*Columbia Law School, the Center for Law and Economic Studies*, 2001)  
<<http://www.google.co.uk/url?sa=t&rct=j&q=toward%20supranational%20copyright%20law&s>

The term “unreasonably” connotes that the treaty has permitted that the copyright owner’s interests could be prejudiced to a certain level, unless the prejudice in question is “unreasonable”.<sup>26</sup> The key question, in this regard, is how to demarcate between a tolerable level and an unreasonable level. The Panel has suggested that whether the “prejudice” in question is “unreasonable” could be considered from an economic perspective.<sup>27</sup> More specifically, if an exception or limitation causes or has the potential to cause a significant loss of income to the copyright holder, this would amount to the type of prejudice that would be viewed as unreasonable.<sup>28</sup>

In short, the three-step test is an effective guideline to prevent the excessive application of limitations and exceptions to the exclusive rights of right holders, which can serve to balance the interests between the user and the right owner. However, there is currently no complementary mechanism to specifically normalize the enforcement of the test. Therefore, the question of how to understand and interpret the test has become a vexing one overtime. Notwithstanding this, however, the three steps outlined above are, at the very least, cumulative requirements, which should not be considered separately.

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source=web&cd=3&ved=0CEUQFjAC&url=http%3A%2F%2Fwww.law.columbia.edu%2Fcenter\_program%2Faw\_economics%2Fwp\_listing\_1%2Fwp\_listing%3Fexclusive%3Dfilemgr.download%26file\_id%3D64212%26rtcontentdisposition%3Dfilename%253DWP207.pdf&ei=yR2XT4GjN6St0QW9hPSiDg&usg=AFQjCNFMXg83UMFcLWIUNxu9G34Xruk4WQ> accessed 15 April.

<sup>26</sup> World Trade Organization, Article 6. 229.

<sup>27</sup> Ibid, Article 6. 227.

<sup>28</sup> Ibid, Article 6.229.

### 6.2.3. The Digital Era

Due to the rapid development of technology in the digital era, the reproduction right has been increasingly extended in the digital environment. Although there was some debate among countries as to whether the three-step test should be adopted in the digital environment, Article 1(4) of WIPO Copyright Treaty finally settled this issue by providing that the reproduction right in Article 9 of the Berne Convention can fully apply to the digital environment.<sup>29</sup> Additionally, the exceptions and limitations to the reproduction right, which are permitted under Article 9 of the Berne, were also fully adopted in the digital environment through the WIPO Copyright Treaty.<sup>30</sup>

Nevertheless, when the three-step test, with the context of the WIPO Copyright Treaty, had just started to be implemented, certain countries were worried that the incorporation of the test in the Treaty would cause a reduction in exceptions and limitations in the digital environment. This, they argued, was contrary to the purpose inherent in the Preamble to the Treaty which is to balance competing interests.<sup>31</sup> In this regard, in order to address this concern, the insertion of the three-step test in the treaty was augmented by a common declaration, expressly specifying that “the provisions of Article 10 permit

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<sup>29</sup> WCT, Article 1(4).

<sup>30</sup> *Ibid.*

<sup>31</sup> The Preamble to the WCT recognizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment”.<sup>32</sup>

#### **6.2.4. The Problems**

Because of the broad manner in which the three-step test is drafted, it has been successfully adopted following myriad rounds of negotiations. Additionally, it can also be argued that due to the open-ended expression of three-step test, it is possible that both civil law as well as common law countries can apply this test, as it contains a wide scope of application for dealing with the various problems which touch and concern the exceptions and limitations to copyright. However, although the loose language of the three-step test allows for its wide application, it can nonetheless be argued that this flexible style may also cause a series of problems. These problems are hereafter addressed.

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<sup>32</sup> T. Dreier and P. B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2006). Also, Concerning Article 10, World Intellectual Property Organization, 'Agreed Statements concerning the WIPO Copyright Treaty' (1996) <<http://www.wipo.int/treaties/en/ip/wct/statements.html>> accessed 24th March.

### 6.2.4.1. Uncertainty of Judgment

Due to the vague manner in which the test is drafted, it often proves difficult for judges to correctly interpret the test in a manner that is fair in the public's view. In practice, the wide scope of application of the three-step test creates an inexplicit definition of the test, thus making it difficult for courts to interpret the exceptions and the limitations provided for.<sup>33</sup> More specifically, for each case, judges are called to interpret the facts of said case taking into account whether the application complied with the three criteria. In this regard, it can be argued that although the language of international treaties gives flexibility to parties when introducing the test into national law, uncertainty is nonetheless created at the municipal level in so far as practical application is concerned.<sup>34</sup>

Furthermore, without a precise expression, it is difficult for judges to make a fair and reasonable interpretation in each case.<sup>35</sup> Added to this is the fact that, based on the rather precarious interpretations ascribed to the test to date by judges, the user cannot precisely predict whether the use provided by law is permitted or not.<sup>36</sup> This invariably causes users to become insecure. The vagueness of the three-step test means that users are unsure of their rights as well as what they are specifically permitted to do with works covered by

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<sup>33</sup> Koelman 411-412.

<sup>34</sup> Senftleben 134-135.

<sup>35</sup> Ibid 136.

<sup>36</sup> Geiger 486-491.

copyright. For this reason, they may take the least riskiest route in order to prevent an infringement from arising.<sup>37</sup> The vague definition of the test will discourage users from relying on the exceptions or limitations, thereby reducing the protection afforded their rights.

#### **6.2.4.2. Modes of Implementation in Different Countries**

A careful examination of the actual content of the three-step test suggests that some of the terms included in the test are quite unclear, notwithstanding the fact that some international documents have sought to flesh out the specific meanings to be ascribed to the test. The challenge, it would seem, lies in the fact that no authoritative or enforceable interpretation has been provided from at the national or the international level to specifically guide the implementation of measures taken to give effect to the three-step test. For this reason, it often proves difficult for judges to accurately evaluate the competing interests as between right holders and users in practice.<sup>38</sup>

Furthermore, because member states, to a certain extent, have some degree of discretion when implementing the three-step test, they sometimes use their own approach to interpret the terms included in the test. These national

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<sup>37</sup> Robin Wright, 'The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation' (2009) 12 *The Journal of World Intellectual Property* 600 614.

<sup>38</sup> Geiger.

interpretations may, however, be quite vague in nature. For example, in relation to the term “special cases”, some countries may make an explicit list outlining the relevant exceptions and limitations. Other countries may, however, enact broad provisions which contain the requirements concerning when and under what circumstances the copyright owner’s exclusive rights will be limited. Still, too, other countries may adopt both of these approaches, such as the United States.<sup>39</sup> In the 1976 U.S. Copyright Act, specific limitations on the copyright owner’s rights were enacted. Further, there are also provisions on “fair use” as a defence to a claim of infringement.

#### **6.2.4.3. Deviation from the Purpose of Copyright Protection**

In accordance with the three-step test, if the exceptions invoked can satisfy the first criterion, then, in respect of the second step, it must be proved that the use of the work does not conflict with a normal exploitation of the work. Unfortunately, however, the meaning of "normal exploitation" remains wholly imprecise. This begs the question as to what kinds of exploitation should be considered as normal exploitation. For example, if copies are made for private use, research or teaching purposes, could it be supposed that this kind of use would fall within the scope of exceptions, whatever the content to be exploited? Or can it be assumed that if the use of the exception would make a significant

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<sup>39</sup> UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (CUP 2005) 186-197.

dent in the right holder's market share, the owner can require exclusive control to that usage, irrespective of what public interest is served by permitting the exceptions? Some scholars have argued that, in some circumstances, if the right holder expects that he can ascertain benefits from the usage, the usage will become part of the work's "normal exploitation".<sup>40</sup> In this context, the question of whether the usage is included within the scope of "normal exploitation" is a key factor when determining whether the usage can, in fact, be exempted. In other words, the question of whether any economic value can be gained from the exploitation plays a significant role in determining whether the normal exploitation condition is satisfied in practice.<sup>41</sup>

As intimated in earlier in this chapter, the most authoritative interpretation of the three-step test, and, more particularly, the "normal exploitation" condition, has been provided by the WTO Panel. The Panel has interpreted the "normal exploitation" of a work as arising "whenever they permit uses of a work that compete economically with the ways in which a right holder normally extracts economic value from that work and thereby deprive the right holder of significant or tangible commercial gains."<sup>42</sup> This explanation suggests that if the exceptions or limitations deprive the right holder of tangible benefits, the

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<sup>40</sup> Samuel Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College 1987) 482-483.

<sup>41</sup> UNCTAD-ICTSD 186-197.

<sup>42</sup> World Trade Organization.

use will be judged to be in violation of the right holder's interest.<sup>43</sup>

On the basis of this interpretation, it can be argued that a strict definition will narrow the scope of application of the exceptions and the limitations. In other words, it can be assumed that the law-makers tried to prevent undue competition as between right holders' interests and users' interests by espousing various interpretations, which may have even been quite different from traditional approaches. Such interpretations are, however, akin to almost abolishing the exceptions altogether. To this end, it can be argued that, before long, right holders will be in a position to control any usage, through, for example, employing digital rights management systems. In this regard, if anyone wishes to use the copyrighted work, payment has to first be made. Meanwhile, because the interests of right holders are overly protected, not only users' right, but also the public interest will be stymied. This will, in essence, detract from the original aim of establishing a three-step test so as to balance the interests of right holders and the public.

Suffice it to say, if the exceptions in question pass the second step, they will finally have to satisfy the third step, which involves providing justifications for invoking the exceptions. The exceptions, in this regard, must not cause the

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<sup>43</sup> Christophe Geiger, Jonathan Griffiths and Reto M. Hilty, 'Towards a Balanced Interpretation of the "Three-step Test" in Copyright Law' (2008) 30 *European Intellectual Property Review* 489-499.

interests of right holders to be prejudiced in an “unjustified” manner. If the exceptions are held to have violated the legitimate interests of the right holder, it simply would not satisfy the third step of the test. It is noteworthy, however, that “unjustified prejudice” suggests that there are some types of “prejudice” which can be judged as being “justified”, given that the purpose of the test is to balance the interests of users and right holders.<sup>44</sup> However, by considering all the three steps of the three-step test, although the supposed purpose of the test is to balance competing interests, the reality is that the interests of right holders are implicitly considered to be superior to those of users.<sup>45</sup> This is evident from the fact that if one of the steps cannot be satisfied, the right holder, who has from the outset been granted exclusive rights, can prohibit the usage of copyrighted works by users.

The gradual evolution of the three-step test has created another problem relating to the increasingly narrow scope of the user’s right. This can be largely attributed to changes to the textual provisions of legal instruments over time. Due to these textual changes, there is increasingly a strong tendency to narrow the user’s right in order to protect the author’s right to the greatest extent possible. For example, from 1 August 2006, a short amendment was inserted into the French Intellectual Property Code, noting that, “the

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<sup>44</sup> Geiger 486-491.

<sup>45</sup> Ibid 486-491.

exceptions enumerated by the present article may neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author.” However, the right holder’s right should be limited in those circumstances involving (1) temporary acts of reproduction, which are "transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary" so long as they do not concern software or protected databases and have no independent economic significance; (2) acts of reproduction made by publicly accessible libraries, educational establishments or museums; and (3) acts of reproduction for the private use of disabled persons.<sup>46</sup> Although, at first sight, it might appear that the changes to the text of the provision are quite minimal, such changes may, in future, nonetheless modify the interpretation of exceptions and limitations. More specifically, the changes to the three-step test have the effect of freezing the scope of the exceptions, which will deprive the test of its normative value in dealing with new circumstances.<sup>47</sup> In other words, by restricting the scope of the three-step test by virtue of the list of exceptions enumerated above, there will be a reduction in flexibility when interpreting said exceptions and limitations. This will, in turn, limit the public interests as well as social development in a manner which does not sufficiently achieve the original goal

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<sup>46</sup> Article L122-6-1, France Intellectual Property Code.

<sup>47</sup> Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003) <[www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf)> accessed 21st March 63.

underlying copyright protection.

In sum, it can be argued that, in view of the foregoing, although the three-step test was easily adopted by copyright law and thereafter applied in both civil law and common law countries, its loose wording, and, therefore, vague content, has created a number of problems in practice. For this reason, it is proper guidelines must be given in order to explain how the test should be applied in future, which would greatly assist in fairly balancing the interests of right holders and users, thereby achieving the ultimate goal of copyright protection.

### **6.3. Fair Use**

The concept of "fair use" can be found in United States Copyright Law. It allows users to enjoy limited use of copyrighted material without right holders' authorization. Use of copyright works, in this regard, is governed by the "fair use" test.<sup>48</sup> The content of the "fair use" test is not the same as the three-step test, the latter being a diplomatic compromise. US courts, in particular, have applied the fair use test in practice on a number of occasions.<sup>49</sup> Four criteria must, however, be satisfied; "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit

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<sup>48</sup> Copyright Law of the United States, Section 107.

<sup>49</sup> Koelman 407-412.

educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>50</sup> The last criterion, in particular, is very similar to the second step of the three-step test, which requires the court to take the potential losses of the right holder into account. There are, however, some real differences between the three-step and fair use tests. For example, in respect of the fair use test, where the public interest competes with the interest of the right holder, allowance can be made for users to use the works without the authorisation of right holder, even if serious damage might be caused. In *Sony Corp. of American v. Universal City Studios, Inc.*, for example, the Supreme Court comprehensively considered the four factors that constitute the “fair use” test. It held that “the making of individual copies of complete television shows for purposes of time-shifting does not constitute copyright infringement, but is fair use.”<sup>51</sup> Although Universal Studios and the Walt Disney Company, as the right holders, argued that they would suffer serious losses if time-shifting were allowed, the court was nonetheless prepared to more effectively balance the interests involved, and, in particular, users' interests, which is in contradistinction to the current three-step test.<sup>52</sup> In

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<sup>50</sup> Pamela Samuelson, ‘Case Comment: The past, present and future of software copyright: interoperability rules in the European Union and United States’ (2012) 34 *European Intellectual Property Review* 233.

<sup>51</sup> *Sony Corp. of Amer. v. Universal City Studios, INC.*.

<sup>52</sup> Alexander Peukert, ‘A Bipolar Copyright System for the Digital Network Environment’ (2005) 28 *Hastings Communications and Entertainment Law Journal* 1-80.

short, therefore, it can be argued that compared to the three-step test, the “fair use” test is perhaps more reasonable in so far as striking the correct balance between protecting the right holder’s right and the user’s right. This theme is further elaborated upon in the subsequent sections, which consider the origin of fair use in US copyright law, the content of the defence, and the purposes associated therewith.

### **6.3.1. The Origin of Fair Use**

The "fair use" exception has its origins in the case *Folsom v Marsh*.<sup>53</sup> Justice Joseph Story, in examining the facts of that case, decided to expand the scope of copyright protection, but also laid the foundations for the development of the fair use exception. This was confirmed in the subsequent case of *Lawrence v Dana* case,<sup>54</sup> which cited *Folsom v. Marsh*. The fair use exception, however, only formally became part of U.S. law in the 1976 with the passage of the U.S. Copyright Act. Before this exception was adopted in 1976, the copyright law in existence hitherto did not contain a specific reference to the concept of fair use. The inclusion of the exception in the 1976 Copyright Act was, however, not automatic; for a long time, there were discussions about copyright in relation to the growing use of photographic reproduction, which led the Joint Committee on Materials for Research and

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<sup>53</sup> *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841).

<sup>54</sup> *Lawrence v Dana* 15 F Cas 26 (CCD Mass 1869).

the National Association of Book Publishers to jointly make a “Gentleman’s Agreement” in 1935, which functioned as an unofficial guideline to control the reproduction of photocopied works until the fair use exception was formally enacted in 1976 U.S. Copyright Act.<sup>55</sup>

### **6.3.2. Understanding the Content of the Fair Use Exception**

Through copyright, authors are granted limited monopoly of their works, thereby encouraging their creative enthusiasm.<sup>56</sup> However, if this “limited grant” hinder the production of new works by others, limitations and exceptions should thus be adopted to protect users’ use of copyrighted works.<sup>57</sup> In other words, users are permitted to use copyright material in certain ways even without the permission of the copyright holder.<sup>58</sup> This kind of use is called the “fair use” exception, which plays a major role in practice in terms of balancing the interests of right holders and the users in the U.S. copyright system.<sup>59</sup> The full text of the fair use exception is contained in Section 107 of the U.S. Copyright Act of 1976, which states that,

Notwithstanding the provisions of Sections 106 and 106A, the fair use

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<sup>55</sup> Leon E. Seltzer, *Exemptions and Fair Use of Copyright: The Exclusive Rights Tension in the 1976 Copyright Act* (Harvard University Press 1978) 192-193.

<sup>56</sup> L. Ray Patterson, ‘Copyright and The Exclusive Right of Authors’ (1993-1994) 1 *Journal of Intellectual Property Law* 1 28.

<sup>57</sup> *Ibid* and Christina Bohannon, ‘Copyright Harm, Foreseeability, and Fair Use’ (2007) 85 *Washington University Law Review* 969 969-970.

<sup>58</sup> Nolo, ‘What Is Fair Use?’ <<http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>> accessed 15 February 2016.

<sup>59</sup> Tony Ballard, ‘Fair Use and Fair Dealing’ (2006) 17 *Entertainment Law Review* 239 240.

of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”<sup>60</sup>

It is worth noting that there is no rule to be automatically applied in deciding whether or not the use is fair use. Accordingly, each fair use case must be determined on a case-by-case basis, by reference to all four factors.<sup>61</sup> As the court does not have a standard interpretation in the determination of each case, some interpretations are, however, particularly problematic in practice.

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<sup>60</sup> Copyright Law of the United States, Section 107.

<sup>61</sup> Ibid.

For example, if a work will be used as a commercial product, the “nature” of the work must be weighed against fair use. However, when the use is for an educational purpose, the fair use would be evaluated by reference to the “purpose” factor. In this regard, each situation must be considered in light of the specific facts of the case in question.<sup>62</sup>

### **6.3.2.1. Purpose**

The first factor which is typically examined when determining whether a use amounts to fair use is that of the purpose and character of the intended use. If a work amounts to criticism, comment, news reporting, teaching, research or scholarship, it would more than likely be considered to be a fair use, given its non-commercial basis.<sup>63</sup> Interestingly also, it would appear that the fair use exception would frequently be applied in those situations where the use is intended to create new knowledge. In short, transformative uses are given preference over commercial uses.<sup>64</sup>

#### *1. Commercial Purpose*

In the earliest copyright cases decided upon on the basis of the Copyright Act of 1976, US courts considered that the commercial use of copyrighted worked

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<sup>62</sup> The Trustees of the California State University, ‘Fair Use of Copyrighted Works: A Crucial Element in Educating America’ (*The Trustees of the California State University*, 2011) <[www.halldavidson.net/fairuse.pdf](http://www.halldavidson.net/fairuse.pdf)> accessed 17th May 7.

<sup>63</sup> Ibid 7.

<sup>64</sup> The Geometry Center, ‘Notes on Copyright & Related Issues: the Meaning of “Fair Use”’ (1996) <<http://www.geom.uiuc.edu/events/courses/1996/cmwh/Copyright/fairuse.html>> accessed 6 February 2016.

was presumptively unfair. For example, in *Sony Corp. of Amer. v. Universal City Studios, INC.*,<sup>65</sup> the “Betamax” video tape record was used, manufactured and sold by Sony Corporation of America for private time-shifting of television programs. As the copyright in the television programs belonged to Universal City Studios, Universal sued Sony for copyright infringement, alleging that users used Sony’s Betamax to record Universal’s television programs. The Court, however, decided that the use in question amounted to a fair use of copyrighted works, because time-shifting was a non-commercial home use and did not constitute copyright infringement. The court, albeit obiter, recognised that, “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright....”<sup>66</sup> This rule was, however, changed in *Campbell v. Acuff- Rose Music case*.<sup>67</sup>

In *Campbell v. Acuff- Rose Music*, the rap group "2 Live Crew" was sued for copyright infringement, after having made a parody of Roy Orbison’s song, “Oh Pretty Woman.” The court, in arriving at a conclusion that was in contrast to that arrived at in the *Sony* case, held that commercial use should not be dispositive. In this context, even if a use is commercial, it may nonetheless be a fair use; in the same vein, even if a use is educational and not for profit, it

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<sup>65</sup> *Sony Corp. of Amer. v. Universal City Studios, INC.*

<sup>66</sup> *Ibid* 451.

<sup>67</sup> *Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994) Supreme Court of United States.

might not be insulated from a finding of infringement.<sup>68</sup> To this end, it can be argued that, after *Campbell* case, the commercial use factor is no longer a presumption against fair use, although it still remains a factor which will be considered in the assessment of whether a use is fair, along with other factors, of course.

In *Harper & Row v. Nation Enterprises* case,<sup>69</sup> the rule in *Campbell* case was further refined. Here, the Nation magazine had published excerpts from an unpublished memoir, written by ex-President Gerald Ford. The publication in The Nation was made several weeks prior to the date that Ford's book was scheduled to be serialized in another magazine. For this reason, the Nation's use of the work was considered not to be a fair use. More specifically, the court held that "the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>70</sup> In this regard, it is submitted that commercial use is not about whether the purpose of the use in question is for profit or non-profit, but rather, about whether the users have commercially exploited the copyrighted works in a way that would seriously damage the right holder's market interests.

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<sup>68</sup> Ibid 584.

<sup>69</sup> *Harper & Row v. Nation Enterprises* 471 US 539 (1985) Supreme Court of United States.

<sup>70</sup> Ibid 562.

## 2. Transformative Use

A use is considered "transformative" only where a defendant changes a plaintiff's copyrighted work or uses said work in a different context such that the plaintiff's work is transformed into a new creation.<sup>71</sup> If a use is transformative or not a mere reproduction, it is more likely than not to be held as a fair use. Fair use usually applies when the copyrighted work in question is transformed, thus creating something new, such as quotations incorporated into a paper or where part of a paper was incorporated into a multimedia presentation for teaching purposes. For example, in *Campbell* case,<sup>72</sup> the Supreme Court regarded a "transformative use" as a use in a new work, which does not merely supersede the objects of the original creation, but "instead adds something new, with a further purpose or different character."<sup>73</sup> As such, the question of whether a work amounts to fair use very much depends on whether, and to what extent, the new work is "transformative" in nature.<sup>74</sup> More specifically, the court in *Campbell* held that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."<sup>75</sup> Thus, it could be argued that "the more transformative the new work is, the less will be the significance of other

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<sup>71</sup> *Wall Data v. Los Angeles County Sheriff's Dept.* 447 F3d 769 United States Court of Appeals, Ninth Circuit 778.

<sup>72</sup> *Campbell v. Acuff-Rose Music, Inc.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

factors, like commercialism, that may weigh against a finding of fair use.”<sup>76</sup>

As intimated above, *Campbell* concerned a parody, which case, which is defined as “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”<sup>77</sup> On the facts of that case, the court found that 2 Live Crew’s new version of the song in question contained the necessary critical element, which meant that new version constituted a parody. The court further maintained that parody has an “obvious claim to transformative value” and “can provide social benefit, by shedding light on an earlier work and, in the process, creating a new one” and “may claim fair use under § 107.”<sup>78</sup> Therefore, parody, as a transformative use, was held to be a fair use in this case.

### **6.3.2.2. Nature**

The second important factor in respect of fair use in copyrighted work relates to the nature of the use. At the outset, it is, however, important to note that this appears to be the vaguest of the four factors that will be considered. That said, the application of fair use could not be determined by reference to the pure artistic quality or merit of work in question, but rather other considerations,

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<sup>76</sup> Ibid.

<sup>77</sup> Sheldon W. Halpern, Craig Allen Nard and Kenneth L. Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent, Trademark* (revised edn, Kluwer Law International 2011) 132.

<sup>78</sup> *Campbell v. Acuff-Rose Music, Inc.* 579.

including the question of whether the work is fictional or non-fictional, published or unpublished.<sup>79</sup>

### *1. Fictional or Non-fictional*

By its very nature, a fictional work is more creative than that which is non-fictional. The reality, therefore, is that the more creative that work is, the more copyright protection said work would be ascribed. This, in effect, means that fair use would rarely apply as an appropriate defence to liability in respect of fictional works. By contrast, non-fictional works are usually made based on the fact, the use of which might accordingly more likely be considered as a fair use. That said, with regard to the transformative use of works, it would appear that the availability of fair use as an exception might not be wholly determined by whether the work in question is fictional or non-fictional. For example, in the *Campbell* case, the court considered that the nature of the work did “not help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”<sup>80</sup> The subsequent case of *Bill Graham Archives v. Dorling Kindersley Ltd*, also made it clear that, “the second factor may be of limited usefulness where the creative work of art is

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<sup>79</sup> Seagull Haiyan Song, ‘Reevaluating Fair Use in China - a Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Dealing Model’ (2011) 51 *Idea* 459-461.

<sup>80</sup> *Campbell v. Acuff-Rose Music, Inc.* 586.

being used for a transformative purpose.”<sup>81</sup>

## 2. *Published or Unpublished*

Whether fair use is available as an exception in appropriate cases is at times dependent on whether the work in question has been published or in unpublished.

In the 1985 case of *Harper & Row v. Nation*, the Supreme Court held that “under ordinary circumstances, the author's right to control the first public appearance of his un-disseminated expression will outweigh a claim of fair use”, since “the fact that a work is unpublished is a critical element of its ‘nature’”.<sup>82</sup> In the later case of *J.D. Salinger v. Random House, Inc.*<sup>83</sup> and *New Era Publications v. Henry Holt*,<sup>84</sup> a similar decision was arrived at, to the extent that the court held that a finding of fair use for unpublished materials is presumed to be a near impossibility. In the 1991 case of *Wright v. Warner Books, Inc.*,<sup>85</sup> however, this approach was changed to some extent, when the Second Circuit Court held that the limited use of an unpublished work comes

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<sup>81</sup> *Bill Graham Archives, Plaintiff-Appellant, v. Dorling Kindersley Limited, Dorling Kindersley Publishing, Inc. and RR Donnelley & Sons Company, Defendants-Appellees* 448 F3d 605 (2006) United States Court of Appeals, Second Circuit 612.

<sup>82</sup> *Harper & Row v. Nation Enterprises*.

<sup>83</sup> *J.D. Salinger v. Random House, Inc.* 811 F2d 90 (1987) United States Court of Appeals, Second Circuit.

<sup>84</sup> *New Era Publications Intern., ApS v. Carol Pub. Group* 884 F2d 659 (2d Cir 1989) United States Court of Appeals Second Circuit.

<sup>85</sup> *Wright v. Warner Books, Inc.* 953 F2d 731 (2d Cir 1991) United States Court of Appeals Second Circuit.

within the fair use doctrine. In subsequent cases, the Court has further emphasized that the decision as to whether fair use is applicable to individual cases involving unpublished works is to be made on a case by case, as the relevant facts of each case may differ. On 24 October 1992, Section 107 of the 1976 Copyright Act, which relates to the fair use doctrine, was finally amended to read, “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”<sup>86</sup> From 1992 onwards, the question of whether unpublished work satisfies amounts to fair use has thus become a less controversial issue.

### **6.3.2.3. Amount and Substantiality**

When assessing whether a use is fair, the court will examine both the quantity and quality of the copying from the copyrighted works.

#### *1. Quantity*

In general, the less of a work that is used, the more likely it is that the use would be considered as fair use. For instance, in the *Wright v. Warner Books Inc*, the Court considered that as the copied amount was less than 1% of Wright’s unpublished letters, added to the fact that the purpose associated therewith was informational, the fair use exception was satisfied.<sup>87</sup> In the

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<sup>86</sup> Copyright Law of the United States, Section 107.

<sup>87</sup> *Wright v. Warner Books, Inc.*

subsequent case of *Monster Communications, Inc. v. Turner Broadcasting Sys, Inc.*, the plaintiff alleged that the defendant, in producing a documentary called "Story", had infringed its copyright by including an aggregate of between 41 seconds and two minutes in clips from its "Kings" movie which was earlier released. On the facts, the Court held that "the segments in "Story" are unlikely to have any such effect. The uses in Story are too few, too short, and too small in relation to the whole."<sup>88</sup> In the other words, because the small portion of the film that was reproduced, as well as the informational nature of "Story", the use in question could be considered as fair.

More generally, it is important to note that, on the basis of the "less is more" theory, if a new work contains a large portion of copyrighted work, it is more likely that the copying will be regarded as an infringement. This does not, however, apply in parody cases. In fact, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court acknowledged that "the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim."<sup>89</sup> In other words, in order to conjure up an original work, the parodist is allowed, by law, to borrow a large amount of the copyrighted work, even though the borrowed part is the heart of the original work.

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<sup>88</sup> *Monster Communications, Inc. v. Turner Broadcasting System, Inc.* 935 FSupp 490 (1996) United States District Court, S.D. New York.

<sup>89</sup> *Campbell v. Acuff-Rose Music, Inc.* 588.

## 2. Quality

Apart from the quantitative analysis, qualitative substantiality also needs to be considered as it is an important aspect of the fair use test. In some circumstances, even if the copying at issue is only a small portion of the original work, it will not be held to be a fair use, as the used part may very well constitute the heart and core of the original copyrighted work. For example, in *Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc.*, although only 1 minute and 15 seconds were copied from a 72 minutes film, the Court was convinced that such copying did not constitute fair use. More specifically, the court held that the extracted part was substantial and part of the “heart” of the original film.<sup>90</sup> Conversely, in the *Warren Publishing Co. v. Spurlock d/b/a Vanguard Productions* case, District Court, having undertaken a qualitative analysis, found that the use in question was a transformative one, and that the copied part was not the “heart” of the protected work. As such, the use complained of was held to be a fair one.<sup>91</sup>

### 6.3.2.4. Effect

The final factor within the context of the fair exception concerns the effect of the use at issue upon the market. That is, the court will be very inclined to examine the effect which the use in question has on the income of copyright

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<sup>90</sup> *Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc.* 672 F2d 1095 (1982) United States Court of Appeals, Second Circuit.

<sup>91</sup> *Warren Publishing Company and James Warren v. J. David Spurlock d/b/a/ Vanguard Productions* 645 FSupp2d 402 (2009) United States District Court, E.D. Pennsylvania.

owner or the potential market in an effort to determine if such use is fair or not. Generally, if a use deprives the copyright owner of economic income or reduces the potential profit that he may be able to generate in future, the use would quite possibly be regarded as unfair. For example, in *Harper & Row v. Nation Enters* case,<sup>92</sup> several weeks before the publication date of Mr Ford's book which was to be serialized in another magazine, the Nation magazine had released excerpts from the unpublished work. On the facts, the court considered that, as the interest of right owner was harmed, the use in question was unfair.

In sum, then, the analysis above suggests that the fair use exception is a flexible doctrine in practice, which is applied on a case by case basis. In practice, the four factors discussed above would apply to the individual circumstances of each case so as to determine whether a particular use is fair.

### **6.3.3. Fair use under the digital era**

The rapid growth in science and technology has invariably meant that the digitization of information as well as the development of computer networks, such as the internet, are quickly becoming a challenge to copyright protection. Digital technology, in particular, has transformed the way in which work is created as well as the delivery of copyrighted works. It has also, to some

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<sup>92</sup> *Harper & Row v. Nation Enterprises*.

extent, further blurred the lines between fair and unfair use.

The question of fair use within the context of the digital environment is typically decided upon on a case by case basis.<sup>93</sup> More specifically, it would appear that the courts have been conferred with a wide discretion to judge each case by reference to its own specific circumstances. Due to the flexible nature of the fair use exception, it is also arguable that it is easy to be applied in the digital era.

A number of fair use cases relating to the internet have arisen in recent years. This is primarily because internet search engines typically use web-crawling software to cache copyrighted works, which can enable faster access; the indexing of content; the making of thumbnail images; as well as the displaying of links to original websites.<sup>94</sup> To address these cases, the courts usually apply the four-factor fair use test to come to a determination in respect of the case in question.

### *1. Kelly v. Arriba Soft Corporation*<sup>95</sup>

The plaintiff in this case, Kelly, was a professional photographer who owned

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<sup>93</sup> ...[T]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis..., *Campbell v. Acuff-Rose Music, Inc.* 577.

<sup>94</sup> Song, 'Reevaluating Fair Use in China - a Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Dealing Model' 463.

<sup>95</sup> *Kelly v. Arriba Soft Corporation* 336 F3d 811 (9th Cir 2003) United States Court of Appeals, Ninth Circuit.

the copyright in a number of images, some of which were located on either Kelly's website or other websites that were being operated with Kelly's authorization.<sup>96</sup> The defendant, Arriba Soft Corporation, operated an Internet search engine which displayed results in the form of small images, called thumbnails.<sup>97</sup> In the Arriba's database, the pictures reproduced from other websites were compiled and reduced to the "thumbnails" form, which could be sorted and indexed by Arriba's server.<sup>98</sup> If a user clicked on the selected thumbnails, the full-size images on the original websites would be displayed.<sup>99</sup> When Kelly found out that his photographs were part of Arriba's search engine database, he sued Arriba, claiming copyright infringement for both the thumbnail images and the full-size images.<sup>100</sup>

The District Court, on the facts, held that the reproduction and display constituted a non-infringing fair use under Section 107 of the Copyright Act.<sup>101</sup> Kelly, having been dissatisfied with the ruling, appealed the decision.<sup>102</sup> After further consideration, the Ninth Circuit affirmed the District Court's decision on the question of fair use in respect of thumbnail images, albeit that it reversed the earlier opinion as to the display of the full-sized images. It remitted this

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<sup>96</sup> Ibid 815.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 815-816.

<sup>101</sup> Ibid 816.

<sup>102</sup> Ibid 817.

aspect of the judgement to the District Court for further determination.<sup>103</sup>

With regard to the thumbnail aspect of the ruling, the Ninth Circuit applied the four factors test in order to arrive at a definitive conclusion on the issues at hand. In respect of the first factor, that is, the purpose and character of the use, although it can be argued that Arriba operated its website for a commercial purpose, and Kelly's images were used in Arriba's search engine database, the Court nonetheless found that Arriba's use of the images in question was dissimilar to traditional types of commercial use.<sup>104</sup> Arriba was neither selling Kelly's images for profit nor using the images to directly promote its website.<sup>105</sup> Rather, Arriba's use of the images was aimed at improving access to information on the internet, as opposed to artistic expression.<sup>106</sup> Additionally, due to certain technicalities, the thumbnails could not be enlarged to the same resolution as the original works. To this end, the Court considered that Arriba's use was unrelated to any aesthetic purpose, and that even though Arriba reproduced Kelly's images, this use was transformative.<sup>107</sup>

With regard to the second factor, that is, the nature of the work, the Court

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<sup>103</sup> Ibid 822.

<sup>104</sup> Ibid 818.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid 819.

<sup>107</sup> Ibid 820.

found that although the works used were highly creative, they were nonetheless already published on Kelly's website.<sup>108</sup> Because, in general, published works are more likely to qualify as fair use, and Kelly's images were put on the internet before Arriba used them in its search engine, therefore, the court considered that this factor only slightly favoured Kelly.<sup>109</sup>

In addressing the third factor, amount and substantiality, the court came to a neutral position on this issue.<sup>110</sup> Although Arriba copied the entire work, the copied works were just in order to "[a]llow users to recognize the image and decide whether to pursue more information about the image or the originating website."<sup>111</sup> For this reason, the Court was unable to decide upon which party should be favoured in this regard.

With respect to the final factor, the effect of the use on the potential market, the Court found that Arriba's thumbnail did not harm Kelly's potential market as the resolution of thumbnails are very low and the enlarged thumbnails had effectively lost their clarity.<sup>112</sup> More specifically, if the users were only interested in the image itself, they would still have had to access Kelly's website to see or download the full-sized quality images.<sup>113</sup> In this context, it

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<sup>108</sup> Ibid 820.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid 821.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

could not be said that Arriba diminished the plaintiff's market; rather, it could be said that the use helped users to find Kelly's works by its search engine database.<sup>114</sup> This factor, thus, weighed in favour of Arriba.<sup>115</sup>

Having balanced the relevant factors identified above, the Court ultimately found that Arriba's use of the thumbnail images amounted to a fair use.<sup>116</sup>

## *2. Righthaven, LLC v. Realty One Group, Inc.*

This case concerned an internet blog which copied several sentences of a copyrighted article. The defendant, Michael Nelson, was a licensed realtor, who operated an internet blog that was aimed at providing information on home ownership and the local housing market. One Nelson's blog posts copied eight sentences from the plaintiff's article. Righthaven thus brought a claim against Nelson for copyright infringement.

The court applied the four-factor analysis and ultimately found that Nelson's use was fair. With regard to the first factor, that is, the purpose, the court held that the purpose of Nelson's use was both commercial and educational in nature. Regarding the educational aspect, the blog relayed information about the local housing market to potential and current homeowners, while the

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<sup>114</sup> Ibid 821-822.

<sup>115</sup> Ibid 822.

<sup>116</sup> Ibid.

commercial aspect concerned Nelson acting as a realtor in Las Vegas for the specific purpose of creating business and, therefore, economic benefits for himself. In short, in regard to the purpose factor, the court found in favour of the plaintiff.

In relation to the second factor, that is, the nature of the work, the Court considered that as the copied part was primarily factual in nature, the use in question could be considered as having been fair in nature.

Regarding the amount of the work which was taken, the Court held that although Nelson copied eight sentences from the original thirty sentence article, the fact that the core of the original article - the commentary was not reproduced, the third fair use factor was satisfied.

In so far as the final factor was concerned, that is impact on the potential market, the Court considered that as Nelson's use did not contain the author's commentary, which was the core of the original article, and the reader could access the full article through Nelson's blog, the use in question was unlikely to have an effect on the market for the copyrighted article.<sup>117</sup>

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<sup>117</sup> *Righthaven LLC v. Realty One Group, Inc. et al* No 2:10-cv-LRH-PAL, 2010 WL 4115413 Nevada District Court.

After weighing up the foregoing factors, the Court found in favour of Nelson, effectively holding that the defendant was not liable for copyright infringement for his use of Righthaven's copyrighted article.<sup>118</sup>

### 3. *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>119</sup>

Perfect 10, as the plaintiff, was an adult image site, selling copyrighted images and offering subscription services. Google, a search engine site, allowed its software to be used to access, copy, cache and create thumbnail images of the plaintiff's copyrighted images by third-party websites which published Perfect 10's images on the Internet without authorization.<sup>120</sup> Perfect 10 brought an action against Google for copyright infringement.<sup>121</sup>

After applying the four-factor test, the District Court's decision was amended by the Ninth Circuit, which held that Google's use of the thumbnails in question amounted to a fair use.<sup>122</sup> Regarding the first factor, the Court considered that as Google put Perfect 10's images to a use fundamentally different than the use intended by Perfect 10, and thus created a significant benefit to the public,<sup>123</sup> the use in question was highly transformative.<sup>124</sup>

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<sup>118</sup> Ibid.

<sup>119</sup> *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F 3d 1146 United States Court of Appeals, Ninth Circuit.

<sup>120</sup> Ibid 1157.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid 1168.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid 1165.

Although Google's commercial interests, through its search engine and website, could have potentially harmed the plaintiff's market, the Court was nonetheless convinced that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case".<sup>125</sup> For this reason, the District Court's decision had to be reversed, ultimately in favour of Google.<sup>126</sup>

With regard to the second factor, the court found that "Perfect 10's images were creative, but also previously published."<sup>127</sup> Furthermore, once Perfect 10 had put its works on the Internet for paid subscribers, the enhanced protection available for an unpublished work would have been divested. In this context, the court found that this factor to only slightly weigh in favour of Perfect 10.<sup>128</sup>

In terms of the third factor, the amount of the use and substantiality of the portion used, the Court relied on the *Kelly*, discussed above, to hold that as Google's use was necessarily a transformative purpose, this factor favoured neither party.<sup>129</sup>

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<sup>125</sup> Ibid 1166.

<sup>126</sup> Ibid 1167.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid 1167-1168.

Regarding the final factor, the effect of use on the market, Perfect 10 argued that potential harm was a real issue if the defendant were to use their work for commercial gain. The Court, however, held that this presumption could not be established if the work was transformative, because “market substitution is at least less certain, and market harm may not be so readily inferred.”<sup>130</sup> As Google’s use of the thumbnails was highly transformative, as mentioned hitherto, the Court considered that harm to Perfect 10’s market could not be presumed.<sup>131</sup> Further, despite the fact that the District Court held that Google’s use of thumbnails caused potential harm to Perfect 10’s market interests, it could not conclude that the users had freely downloaded thumbnails from Google for cell phone use instead of paying for a download from Perfect 10. In doing so, the Court found that the question of potential impact was hypothetical in nature, and thus favoured neither party.<sup>132</sup>

After having balanced these four factors, the Court came to the conclusion that Google’s use of Perfect 10’s thumbnails amounted to a fair use.<sup>133</sup>

In conclusion, in view of the cases discussed above, it can be argued that all four factors need to be comprehensively considered on a case-by-case basis before any definitive conclusion can be arrived at. In the other words, because

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<sup>130</sup> *Campbell v. Acuff-Rose Music, Inc.* 591.

<sup>131</sup> *Perfect 10, Inc. v. Amazon.com, Inc.* 1168.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

no specific list is provided by the law regarding the scope of the fair use exception, in order to arrive at a fair decision, courts, in practice, apply the four-factor test discussed above.

## **6.4. Fair Dealing**

The three-step test, fair use and fair dealing are the three most widely applied limitations and exceptions to copyright infringement in different countries, They essentially limit the exclusive rights of copyright holders, thereby allowing the use of copyrighted works without the consent of right owners under certain conditions. Although the purposes of these three doctrines are nearly the same, there are still some differences between them. Suffice it to say, apart from the three-step test and fair use doctrine, the fair dealing exception also applies in appropriate circumstances, as will be discussed below.

Fair dealing arises by virtue of a right granted by copyright laws that allows users to reproduce limited portions of copyrighted works without the right owner's permission. Fair dealing, as a concept, is utilised in a number of countries, including the UK, Canada and Australia, amongst others. There is no strict definition of which kinds of use can be considered as fair dealing, but, ordinarily, it has been interpreted by the courts on a number of occasions as entailing a consideration of whether the use causes significant economic

impact on the right owner. If the economic impact is not significant, the use may be considered as fair dealing. Fair dealing is mostly applied to non-commercial research, private study, news reporting, criticism and review,<sup>134</sup> and in 2014, by virtue of the amended Copyright Act, personal copies for private use;<sup>135</sup> quotation,<sup>136</sup> caricature, parody and pastiche have also been added into the category exceptions.<sup>137</sup>

Unlike the related doctrine of fair use in the United States, fair dealing is an enumerated list of defences against an action for infringement of the owner's exclusive right. This means that fair dealing cannot be applied to occasions which do not fall into any of these established categories. For this reason, it can be argued that fair dealing, as a concept, is not as flexible as the American doctrine of fair use. That said, in order to further understand the nature of the fair dealing doctrine, this section will explore the nuances and complexities associated therewith in some detail.

### **6.4.1. The Origin of Fair Dealing**

It is generally accepted that the antecedent of the fair dealing exception

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<sup>134</sup> CDPA s29-30.

<sup>135</sup> s28B, The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014. The regulation came into force on October 1 2014.

<sup>136</sup> s30, The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. This regulation came into force on June 1 2014.

<sup>137</sup> s30A, *ibid.*

originated in the abridgment exception doctrine.<sup>138</sup> An abridgment, for the purposes of copyright law in the mid-eighteen century, was a condensation of a longer work, which normally contained the original work's form or expression.<sup>139</sup> Since 1740, with the hearing of the first abridgment case of *Gyles v. Wilcox*,<sup>140</sup> there had been an evolution in subsequent cases, culminating in the 1908 case of *Cary v. Kearsley*.<sup>141</sup> From 1911, the concept of fair dealing was written in the U.K. Copyright Act of 1911,<sup>142</sup> the concept of fair dealing was codified through the UK Copyright Act. Today, the fair dealing exceptions could still be found in s28B, s29, s30 and s30A of the Copyright, Designs and Patents Act 1988 (CDPA). According to the Act, the implementation of fair dealing is restricted to the following categories: (1) personal copies for private use; (2) research and private study; (3) criticism, review or quotation; (4) reporting of current events; and (5) caricature, parody or pastiche. For fair dealing to apply, the purposes of the dealing must fall into an enumerated category. This essentially means that if the dealing is not covered by an enumerated exception, it will not be considered as a fair dealing. Further, it is also noteworthy that although the requirements for each individual area are outlined by the Act, the statutory definition of fairness has not been provided, but rather, developed by the courts overtime.

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<sup>138</sup> Melissa deZwart, 'An historical analysis of the birth of fair dealing and fair use: lessons for the digital age' (2007) 1 Intellectual Property Quarterly 60, 75.

<sup>139</sup> Alexandra Sims, 'Appellations of Piracy: Fair Dealing's Prehistory' [2011] Intellectual Property Quarterly 3, 4.

<sup>140</sup> *Gyles v Wilcox, Barrow, and Nutt* (1740) 3 Atk 143; 26 ER 489 Court of Chancery.

<sup>141</sup> *Cary v. Kearsley* (1802) 4 Esp 168.

<sup>142</sup> Copyright Act, 1911 [1 & 2 GEO. 5. CH. 46.] s2(1)(i).

## 6.4.2. Understanding the Content of Fair Dealing

The fair dealing exception was codified in s28B, s29, s30 and s30A of the UK CDPA. Pursuant to these provisions in CDPA, if an act amounts to fair dealing for the purposes of private use,<sup>143</sup> for the purposes of research or private study,<sup>144</sup> for the purposes of criticism, review or quotation,<sup>145</sup> for the purposes of reporting current events,<sup>146</sup> or for the purposes of caricature, parody or pastiche,<sup>147</sup> he will not be liable for copyright infringement. Conversely, if the dealing in question is for a purpose not listed in the Act, it will not be regarded as a fair dealing, regardless of whether the dealing is fair.

To rely on the fair dealing exception in the U.K., the alleged infringer has to prove three elements: (1) the dealing falls into one of the fair dealing categories specified in the CDPA; (2) such dealing was fair; and (3) there must be sufficient acknowledgement of the original work where such work is made use of in different contexts.<sup>148</sup> In other words, unlike the three-step test and fair use exception, after the purpose of dealing is found to fall within an enumerated category, the fairness component of the dealing needs to be shown.

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<sup>143</sup> CDPA s28B.

<sup>144</sup> Ibid s29(1) and s29(1C).

<sup>145</sup> Ibid s30(1).

<sup>146</sup> Ibid s30(2).

<sup>147</sup> s30(A), The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

<sup>148</sup> Song, 'Reevaluating Fair Use in China - a Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Dealing Model' 469.

Regarding to the issue of fairness, there is no definition of what types of dealing is to be considered as fair in the CDPA. That said, by considering previously decided cases, it can be argued the criteria to be applied in determining fairness are: (1) the nature of the work;<sup>149</sup> (2) how the work was obtained;<sup>150</sup> (3) the quantity and quality of what has been taken from the copyrighted work;<sup>151</sup> (4) the use made of the work in question, particularly the question of whether the alleged fair dealing is commercially competing with the copyrighted work;<sup>152</sup> (5) the motives of the alleged infringer;<sup>153</sup> (6) consequences of the dealing;<sup>154</sup> and (7) the question of whether the purpose could have been achieved by different means?<sup>155</sup> In order to fully understand

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<sup>149</sup> Bently and Sherman, *Intellectual Property Law* 204. This factor mainly concerns whether the work is unpublished. If the work is unpublished, this factor will weigh against the defendant. See *Hyde Park Residence Ltd v Yelland* [2001] Ch 143 Court of Appeal 146.

<sup>150</sup> Bently and Sherman, *Intellectual Property Law*. If the work is stolen or obtained by breach of confidence, the use will be less fair. See *Beloff v Pressdram Ltd* [1973] 1 All ER 241 Ch D 264.

<sup>151</sup> Bently and Sherman, *Intellectual Property Law*. The evaluation of this factor is similar to the fair use doctrine. To wit, generally speaking, the less that it is taken, the more fair the use is. However, under a certain circumstance, it is possible that the use of entire work still could be considered as a fair dealing. See *Hubbard v Vosper* [1972] 2 QB 84 CA.

<sup>152</sup> Bently and Sherman, *Intellectual Property Law* 204-205. This factor is about purpose of the use. If the use is for the commercial purpose, it will be less fair. However, if the purpose is transformative, fair dealing is more likely. See *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [1999] EMLR 369 Ch D 380; *Hyde Park Residence Ltd v Yelland* [2001] Ch 143 Court of Appeal 170. Furthermore, according to CDPA s.29(1), if the dealing for purposes of research, the defence only applies to research for a non-commercial purpose. Therefore, it is less likely for a dealing to be fair if the use deprives the economic income of the copyright owner or reduces the potential profit the copyrighted work may create in the future. See *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2000] 4 All ER 239 Court of Appeals, Civil Division 257.

<sup>153</sup> Bently and Sherman, *Intellectual Property Law* 205. If a person acts dishonestly or for a motive that the court finds questionable, fair dealing is less likely. In contrast, if the defendant can show that they acted benevolently or were motivated by some altruistic or noble reason, it is more likely that the dealing was fair. See *Hyde Park Residence Ltd v Yelland* [2000] EMLR 363 CA 379; *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] FSR 610 CA 614; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 Ch D 263; *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2000] 4 All ER 239 Court of Appeals, Civil Division 250.

<sup>154</sup> Bently and Sherman, *Intellectual Property Law*. If the new work substitutes for the original work, the use will be less fair. See *Hubbard v Vosper*

<sup>155</sup> Bently and Sherman, *Intellectual Property Law*. It is less likely for a dealing to be fair if

how the fair dealing doctrine is applied in practice, several cases will be explored below.

1. *Hyde Park Residence Ltd v Yelland*<sup>156</sup>

The claimant provided security services to Mohammed Al Fayed and his family. Mr Al Fayed owned a house named Villa Windsor in Paris. M, the fourth defendant, which was employed in the claimant's company as a security officer, was responsible for managing a system of eight video film cameras installed in Villa Windsor. On 30 August 1997, the day before their deaths, Diana, Princess of Wales and Dodi Fayed, visited the house. M had set the video cameras to record their arrival and departure times. After the accident in which the Princess and Dodi Fayed were killed, in August 1998, M met a journalist from *The Sun newspaper*, and sold copies of the stills to him without authorisation. These stills were later published without the claimant's consent in *The Sun* on 2 September 1998 afterwards.

For this reason, the claimant commenced proceedings against *The Sun newspaper*, as well as against M for copyright infringement. The defendant sought to rely on the defences of fair dealing and public interest. The court held that *The Sun* publishing the stills was to be considered use "for the

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there are alternatives to the dealing. See *Hyde Park Residence Ltd v Yelland* [2001] Ch 143 Court of Appeal 157, 171.

<sup>156</sup> *Hyde Park Residence Ltd v Yelland*.

purpose of reporting current events”, which is falls within section 30(2) of the CDPA. The use thus was considered to be a fair dealing. With regard to the public interest defence, the court insisted that although it was not strictly necessary to decide this question, such a defence was available, albeit in principle. In short, the court ruled in favour of The Sun newspaper.<sup>157</sup> The claimant, dissatisfied with this ruling, appealed the decision.

On appeal, the Court of Appeal specifically examined the fairness of the dealing, including the nature of the work, the motives of the alleged infringer, the extent and purpose of the use and whether the use was necessary for the purpose of reporting the current events, among other things.<sup>158</sup> As for the nature of the work, because the stills were unpublished, the Court considered that this was an important indication that the use in question was not a fair dealing.<sup>159</sup> Additionally, the Court was of the view that if a fair minded and honest person had obtained these stills, he would not deal with them in the same manner as the alleged infringer did.<sup>160</sup> Further, the Court held that the extent and purpose of the use in the instance case was excessive, which accordingly prevented the use from being regarded as a fair dealing.<sup>161</sup> For

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<sup>157</sup> *Hyde Park Residence Limited v Yelland and Others* [2000] EMLR 363 Court of Appeal 364.

<sup>158</sup> *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 Court of Appeal 143.

<sup>159</sup> *Ibid* 158.

<sup>160</sup> *Ibid*.

<sup>161</sup> *Ibid*.

these reasons, the defence of fair dealing was held to have failed.<sup>162</sup>

More generally, although the Courts had an inherent jurisdiction by virtue of section 171(3) of CDPA to refuse to allow its process to be used in certain circumstances, the law did not give the court the general power to enable an infringer to use another's copyright in the public interest.<sup>163</sup> In other words, although there was no clear definition of the circumstances in which the public interest defence would be held to be satisfied, where the work in question is immoral, scandalous or contrary to family life or is injurious to public life, public health and safety or the administration of justice or incited or encouraged others to act in such a way,<sup>164</sup> it is likely that the defence would arise. On the facts of this case, however, the Court considered that it was not necessary to publish the stills in the public interest. The defendant's use was accordingly not entitled to rely on the public interest defence. In short, the Court of Appeal reversed the previous decision, holding that the defendant was liable for copyright infringement.<sup>165</sup>

## *2. Ashdown v. Telegraph Group Ltd.*<sup>166</sup>

The plaintiff, Ashdown, was a Member of Parliament and the former leader of the Liberal Democratic Party, while the defendant was the publisher of the

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<sup>162</sup> Ibid.

<sup>163</sup> Ibid 159-160.

<sup>164</sup> Ibid 143-144.

<sup>165</sup> Ibid 144.

<sup>166</sup> *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] Ch 149 Court of Appeal

newspaper, the *Sunday Telegraph*. The claimant had a meeting with the Prime Minister and three other political figures on 21 October 1997. After the meeting, Lord Ashdown, who had a habit of keeping detailed diaries and other records of his life and political career, made a minute of the meeting (the “Minute”). After stepping down from political leadership, Ashdown considered publishing his diaries, though he kept them confidential and secure.

However, on November 28 1999, the defendant, the *Sunday Telegraph*, published a number of articles which incorporated substantial sections of the Minute in the forms of both direct quotations and paraphrase without authorization. The plaintiff, in December 1999, commenced proceedings for infringement of copyright and breach of confidence, and applied for summary judgment in respect of the copyright claim.

It was not disputed that the Minute was a copyright work which belonged to the claimant, and the defendant had reproduced a substantial part of it. The defendant, however, sought to rely on the fair dealing and public interest defences.<sup>167</sup> In this context, the court had to determine whether the defendant’s action was a fair dealing. At first instance, judgment was entered in favour of the plaintiff; the Court accordingly granted an injunction against further infringement and directed disclosure of the information to enable the

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<sup>167</sup> Ibid.

plaintiff to exercise his right of election between damages and an account of profits.<sup>168</sup> The defendant subsequently appealed.

The appeal was ultimately dismissed by the Court of Appeal.<sup>169</sup> The judge held that the defendant reproduction of the claimant's work was in furtherance of commercial interests, rather than safeguarding the public interests, as argued by the defendant. It seems that the essential parts of the Minute was deliberately extracted in order to add flavour to the article, and thus attract the attention of newspaper readers.<sup>170</sup> Additionally, the unpublished nature of the work was held to be an important consideration.<sup>171</sup> Ultimately, then, the court held that the defendant's use was not a fair dealing; the appeal was accordingly dismissed.<sup>172</sup>

### 3. *Pro Sieben Media v Carlton Television*<sup>173</sup>

The defendant, a television company, made a programme using excerpts from copyrighted work owned by another television company. The plaintiff, Pro Sieben, a German television company, which owned a programme containing an exclusive interview of a woman who had some special life experiences, brought an action against the defendant, a British television company, for

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> *Hyde Park Residence Ltd v Yelland* 146.

<sup>172</sup> *Ashdown v Telegraph Group Ltd*.

<sup>173</sup> *Pro Sieben Media AG v Carlton UK Television Ltd*.

having infringed their copyright by broadcasting a theme show, “The Big Story”, as part of its criticism of “chequebook journalism”. The argument was that Carlton’s programme used a 30-second excerpt of Pro Sieben’s programme. Among other things, Pro Sieben sought punitive damages on account of the flagrancy of the defendant’s infringement.

The defendant argued that the use should be considered as a fair dealing as it was for the purposes of criticism, review or the reporting of current events. However, after a thorough analysis, the Court held that Carlton’s use was not entitled to rely upon any of the fair dealing defences.<sup>174</sup> Carlton, however, appealed this decision.

On appeal, the Court of Appeal considered that “criticism or review as a concept did not just require criticism or review of the work being copied, but could also cover the social or moral implications of the work and ideas found within it”.<sup>175</sup> As the defendant’s programme was created to criticise chequebook journalism, the claim to fair dealing was deemed to be a valid one.<sup>176</sup>

Apart from the cases discussed above, two other cases, related to private

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

copying and parody, will be briefly examined here. At the outset, however, it is important to note that the exceptions relating to personal copies for private use as well as parody, have recently been added to the UK CDPA. For this reason, there has yet to be a specific UK case involving these important issues to date. That said, two recent cases decided by the Court of Justice of the European Union (CJEU) provide a preliminary indication of the judicial approach courts are likely to take in future when dealing with these exceptions. The first is a Danish case, *Copydan Båndkopi v Nokia Danmark A/S* (Case C-463/12),<sup>177</sup> which, although mainly addressing the issue of levy compensation for copying protected works by detachable memory card in imported mobile phones, provide important guidance on the issue of private copying that could guide UK courts in future. The second is *Deckmyn v Vandersteen* (Case C-201/13),<sup>178</sup> which concerned fair dealing with regard to parody, in Belgium. Because there was no explicit definition of parody in Belgium national law, the CJEU was called upon to issue a preliminary ruling regarding the "parody exception". The detailed clarifications provided by the CJEU on this question, it is submitted, would likely facilitate the development of UK case law in this new area in future.

In sum, the foregoing discussion made it clear that under the UK CDPA, in

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<sup>177</sup> *Copydan Båndkopi v Nokia Danmark A/S* (Case C-463/12) EU:C:2015:144 Court of Justice of the European Union.

<sup>178</sup> *Deckmyn and another v Vandersteen and others* (Case C-201/13) EU:C:2014:2132 Court of Justice of the European Union.

order to rely upon the fair dealing exception, the defendant prove that his use fell within one of the enumerated categories. The case law discussed above demonstrates that, after this first step has been satisfied, the fairness of a dealing must be shown by reference to a number of factors. The relative importance attached to each of these factors very much depends on the specific circumstances of each case.<sup>179</sup>

## **6.5. Fair Use and Fair Dealing in China**

### **6.5.1. Brief Introduction**

Chinese Copyright Law has adopted the U.K.'s fair dealing model in term of the limitations and exemptions to copyright protection contained therein. More specifically, in the Article 22 of P.R.C. Copyright Law, a list of twelve exceptions to copyright has been enumerated, such as the use of the copyrighted work for the personal study, the copy of the work for the collection of library and so on.<sup>180</sup> Additionally, aside from the Article 22 exceptions, Article 6 of the Regulations for the protection of the Right of Communication through Information Network<sup>181</sup> has been adopted so as to accommodate fair use in the rapidly evolving. Through this Regulation, the scope of exceptions has been extended to the digital environment. This, as well as other related themes will be addressed hereafter, along with suggestions for addressing the

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<sup>179</sup> Bently and Sherman, *Intellectual Property Law* 203.

<sup>180</sup> Article 22, Copyright Law of the People's Republic of China.

<sup>181</sup> Article 6, 2006 Regulations.

contemporary challenges and complexities to copyright protection in China.

## **6.5.2. Analysis of the Legislation**

The regulations concerning the exceptions to copyright protection in China are very detailed. Notwithstanding this, however, it would appear that there is some ambiguity in the existing statutory language in a few areas. For example, Article 22(1) stipulates that the use of another person's published work for purposes of the user's own personal study, research or appreciation is permissible, without the need for authorisation. There is, however, no further guidance explaining appropriate standards related to the implementation of the exception in practice, such as the quantity of the copied material.<sup>182</sup> This effectively means that courts are afforded a wide discretion, which could result in the law becoming very uncertain.

Additionally, there is some uncertainty surrounding Article 22(2), which refers to an "appropriate quotation from another person's published work". The challenge, it would seem, arises from the fact that there is no clear measure as to what is "appropriate".<sup>183</sup> This vagueness is problematic because different people have different standards for understanding what is "appropriate". Notwithstanding this, however, it is submitted that, in order to correctly apply this provision in practice, the quality and quantity of a work

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<sup>182</sup> Article 22(1), Copyright Law of the People's Republic of China.

<sup>183</sup> Article 22 (2), *ibid.*

extracted from the copyrighted work should be further explained.<sup>184</sup>

More generally, it is arguable that there is some uncertainty surrounding the text of Article 22(7), which refers to "a justifiable extent", given that no clear definition has been provided as to how this should be construed in practice.<sup>185</sup> Without a specific standard, it is clear that owners' right could be seriously infringed, while users might find it difficult to know when an infringement is likely to occur. The challenge with vagueness and uncertainty is that such create a recipe for myriad disputes between users and right holders. Further, it creates difficulties for judges, who because of an overly wide discretion regarding which factors to be considered, might not strike the correct balance between disparate interests.

These challenges not only exist under the Regulations, but also under the original Chinese Copyright Law, which was adopted on 7 September 1990, and amended on 26 February 2010. Article 22, which relates to limitations and exemptions, was not, however, amended. That said, with the rapid evolution of science and technology in recent years, especially the internet and related fields, it appears that the list of limitations and exceptions provided for under Article 22 is insufficient to effectively deal with these developments. Additionally, Article 22 does not permit other kinds of use, outside of the

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<sup>184</sup> Ibid.

<sup>185</sup> Article 22(7), *ibid.*

enumerated list, which may very well be protected in other countries. For example, parody, which is a permissible use under the U.S. law, is nowhere to be found in Article 22 of Chinese Copyright Law.

Owing to the insufficiency of the existing laws on copyright as described above, it is arguable that, in practice, the determination of fair use in China has been very much dependent upon the exercise of judges' inherent discretion. However, without the clear guidance on how to correctly interpret the fair use exception, judges have adopted very different approaches to Article 22.<sup>186</sup> For example, in *Chen Yuzhong, Yang Hengshan, Sha Yulan v. Yicheng Historical Record Office*,<sup>187</sup> the judge adopted a strict interpretation of Article 22. Relying upon the U.K.'s fair dealing model, the Court began by deciding upon whether the use in question fell into a specific category. It subsequently applied a three-factor test to determine the fairness of the dealing at issue. In contrast, in *SARFT Movie Channel Production Center v. China Education TV Station*,<sup>188</sup> the court approached its analysis by making clear that Article 22 provided an open-ended list of permissible uses. More specifically, the Court applied the U.S. fair-use model. In this context, although the defendant's use was held to not have fallen into any of the enumerated categories provided by Article 22,

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<sup>186</sup> Song, 'Reevaluating Fair Use in China - a Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Dealing Model' 480.

<sup>187</sup> *Chen Yuzhong, Yang Hengshan, Sha Yulan v. Yicheng Historical Record Office* [2008] Zao Shang Zhi Chu Zi No 10 Shandong Zaozhuang Intermediate Court, China.

<sup>188</sup> *SARFT Movie Channel Production Center v. China Education TV Station* [2006] Hai Min Chu Zi No 8877 Beijing Haidian District Court, China.

the Court nonetheless examined the next step by considering the question of fairness by reference to the factors that apply in the U.S.

As intimate above, some particular elements of Article 22 can be aptly described as vague. For example, Article 22 (2) uses the ambiguous term “appropriate”.<sup>189</sup> The use of such an ambiguous term has meant that courts have had to consider what relevant factors to apply based on their own understanding. A few cases are illustrative of this disconcerting state of affairs. In *Qi, Liangzhi and other family members v. Xiling Press*,<sup>190</sup> the plaintiff Ms Qi, Liangzhi, a lawful heir of the well-known artist Qi, Baishi, sued the defendant, Xiling Press, for copyright infringement when the defendant, for profit, illegally published and sold a series of books related to the plaintiff’s works without any permission over several years.<sup>191</sup> The defendant argued that, on the basis of Article 22(2), which permits uses such as “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”, their use did not constitute copyright infringement, as some of Qi’s works in two of the books published by them were selected as samples for the purposes of assisting beginner learners who were interested in studying carving. They argued that the use Qi’s of works in their books was unavoidable, and thus their use should be

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<sup>189</sup> Article 22(2), Copyright Law of the People's Republic of China.

<sup>190</sup> *Qi, Liangzhi and other family members v. Xiling Press* [2008] Shen Zhong Min Si Chu Zi No 20 Shenyang Intermediate Court, China.

<sup>191</sup> *Ibid.*

considered as fair use.<sup>192</sup>

In determining whether the defendant's use fell into the Article 22(2) exception, the Court found that the phrase, "appropriate quotation from another person's published work in one's own work" meant that using other people's works as the basis for one's own work so as to create new work or to provide an opinion amounted to fair use.<sup>193</sup> In this case, however, the defendant's use was not to create new works or express new opinion.<sup>194</sup> Additionally, given that the proportion of the quotation had to be appropriate, the Court found that the defendant's use of around 320 pieces of copyrighted works in one book, plus another 191 pieces of works in another book, seriously exceeded the "appropriate quotation standard".<sup>195</sup> Although the Court did not go on to specify what proportion of works used would, in general, be appropriate, it nonetheless concluded that the use did not fall into the Article 22(2) exception, and the defendant was accordingly liable for copyright infringement.<sup>196</sup>

In the subsequent case, "Ye, guanlin v. Collections Magazine",<sup>197</sup> the plaintiff owned two published works named "Xinghua Chunyu Jiangnan" and "Duanyang Jiaguo". The defendant, Collections Magazine, used these two

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<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> *Ye, guanlin v. Collections Magazine* [2007] Huang Zhong Fa Min Yi Chu Zi No 15 Anhui Huangshang Intermediate Court, China.

works without the authorization of the plaintiff to discuss another printer's work, "Ni Bao An Wu". Ye, Guanlin accordingly sued Collections Magazine for copyright infringement.<sup>198</sup> The defendant, however, relied on the Article 22(2) fair use exception, which allows permissible uses such as "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".<sup>199</sup>

After having carefully examined the facts of the case, the Court found that the plaintiff's works were used as quotations in the defendant's article, whose main purpose was to discuss another printer's works. Additionally, the works used by the defendant did not constitute the main aspects of the defendant's article. Further, the defendant had made appropriate reference to the plaintiff's work in their article. For this reason, on the basis of Article 22(2), the Court held that the defendant could rely on the fair use exception. The plaintiff's petition was accordingly dismissed.<sup>200</sup>

On a balance, it can be argued that the existing fair dealing model in China originated from the U.K. and Continental Europe, and established a specific list of twelve exempted uses under Article 22 of the Copyright Law of People's

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<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

Republic of China<sup>201</sup> and Article 6 of the 2006 Regulations.<sup>202</sup> Despite the law makers intention to use these pieces of legislation to create clarity and certainty in defining and determining fair use, the language of these instruments gives rise to vagueness and uncertainty in practice. There is also a strong argument to be made that the existing enumerated categories are insufficient to deal with evolving developments in the fields of technology and industry. The cases discussed above further demonstrate that the courts have had, to occasion, exercise their discretion to determine the appropriate outcome in highly contentious fair use cases. The varying judicial outcomes do, however, make it very hard to predict what approach will be taken to the determination of fair use in China.

### **6.5.3. Suggestions**

Based on the foregoing discussion, two main problems appear to arise in the context of both relevant legislation and case law. The first relates to the fact that an enumerated list of twelve permissible uses are provided, which may, in practice, be too narrow to accommodate newer cases involving emerging technologies. The second relates to the lack of clear guideline on how to interpret and apply the concept of fairness. It is submitted that to effectively address these problems, a few suggestions should be taken into account.

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<sup>201</sup> Article 22, Copyright Law of the People's Republic of China.

<sup>202</sup> Article 6, 2006 Regulations.

*(i). Establishing a standard of fairness*

Because of the vague language used in existing copyright laws, the courts have been afforded a very wide discretion which has, in turn, created a lot of uncertainty in the judicial practice. In light of this, the U.S. fair use criteria could be examined and possibly utilised for the improvement of the China's fair use rules. More specifically, to determine the fairness of a use made by a user, four factors should have to be considered. Firstly, the use should be for non-profit educational purposes; that is, the use should not have a commercial feature. Secondly, the copyrighted works that are required to be used pursuant to the fair use exception should have been published. Thirdly, the amount and substantiality of the portion used in relation to the copyrighted work as a whole should be within a reasonable range. Fourthly, the use should not influence the potential market or the value of the copyrighted works.

This detailed approach is highly likely to strengthen the usefulness of the relevant rules in practice. Clear guideline will better guarantee the efficacy of the judiciary when it comes to adjudicating on copyright claims. In this connection, it is very likely that the copyright legal system in China will become more stable and effective, since the outcomes of cases would be more predictable. This will also ensure that users have a clear understanding of the relevant requirements before they use the copyrighted work, thereby avoiding

illegal use.

*(ii) Expanding the scope of fair use*

In view of the foregoing discussion, the enumerated list of permissible uses provided for in the current China's copyright-related laws is far too narrow to deal with the cases involving the constantly evolving technologies. For this reason, it is suggested the scope of the fair use exception be expanded, by adding more possible permissible uses in order to comport with the developmental requirements of society and technology.

Notwithstanding this, however, it must be borne in mind that with the rapid development of technology, relevant laws would always lag behind newer cases. For this reason, it is recommended that China promulgates regulations and judicial interpretations, which would serve as supplementary clauses to the current copyright legislation. These are intended to enhance the efficacy of the law in view of rapid changes in technology in modern China today.

*(iii) Adopting a new model of fair use rules in China*

The copyright laws in China have adopted the U.K. fair dealing model as a basis for the country's fair use rules. However, due to the unavoidable limitations of the UK's fair dealing model, copyright protection does not at times comport with the rapid development of technology in the digital era.

Against this backdrop, it is submitted that Taiwan's fair use rules could be carefully studied and possibly emulated, as they combine the U.K. fair dealing model and the U.S. fair use model to solve various problems.

Articles 44-63<sup>203</sup> of the Taiwanese Copyright Act, which is admittedly quite similar to the U.K.'s fair dealing model, is particularly instructive. That is, the uses included in the enumerated categories have to be considered by reference to several statutory factors.<sup>204</sup> These factors are very much the same as the U.S. fair use four factors test, as previously described.<sup>205</sup>

The Taiwanese fair use model could be considered as a feasible model for China to base its reform of the fair use rules on in future. The effect of this approach would be a great degree of flexibility arising from the operation of the UK's fair dealing provisions and the factors that emanate from U.S law in so far as fair use is concerned. It is submitted that this approach will be an improvement on the approach currently countenanced in China, and, if adopted, will result in greater certainty. Should there be concerns, however, clear guideline on the issue of fairness could be used to effectively limit the wide discretion afforded judges and thus maintain justice.

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<sup>203</sup> Article 44-63, Copyright Act.

<sup>204</sup> Article 65, *ibid.* The test of fairness includes the purpose and nature of the use, the nature of the work, the amount of the use and the influence of the use on the potential market for or value of the work.

<sup>205</sup> Copyright Law of the United States, Section 107.

However, given the rapid development of technology today, it is envisaged that new problems would arise which might be excluded from the enumerated list, and may therefore not be easily solved in accordance with the Taiwanese fair use approach. To address these potential concerns, it is suggested that China uses the four factors approach to not only examine the uses in the enumerated list, but also deal with new uses which are not included in the original enumerated categories of permissible uses. This change would expand the applicability of the law and strengthen flexibility in legal practice as well.

In short, the reform of Chinese copyright law, by reference to Taiwan's model, in light of China's actual situation, will result in an improved approach, thereby creating greater certainty and consistency in the assessment of whether a use is fair. Furthermore, the model suggested above, which is underpinned by the Taiwanese fair use model, will provide to be flexible in nature, and thus more suitable for social development in China. This will better cater for future developments in the field of industry and technology.

## **6.6. Conclusion**

With the rapid development of copyright protection, there is a growing trend of overprotecting the rights of copyright owners. In order to stymie this trend, this

chapter has argued that there is a need to better protect the public interests, by ensuring that a more appropriate balance is achieved between the owners' right and the users' right. This chapter has also considered the three most widely applied methods to copyright exemption, the three-step test, the fair use and the fair dealing doctrines, in order to determine how different countries across the globe seek to achieve this balance. This chapter has also critically examined the exemption rule in China. The discussion, in this regard, revealed that a number of problems arise in practice, which necessitate reform of Chinese copyright law in this delicate area. More specifically, the chapter has argued that China should expand the scope of the fair use exception and establish a standard of fairness that is intended to strengthen the impact of the law. By learning from the fair use approaches taken in other countries, such as the U.K's. fair dealing model, the U.S. fair use model and the Taiwanese fair use model, China is implored to adopt a more appropriate approach to the reform of its current fair use rules.

In the next chapter, an emerging technology, technological measures, which was originally employed to protect copyrighted works in the digital era, will be examined. Because technological measures have raised a number of complexities and challenges of their own, the efficacy of several pieces of legislation will be analysed.

# **CHAPTER 7**

## **Emerging Technology and the Challenge of Copyright Protection in the Digital Era**

### **Exclusive Summary**

In order to better protect the owners of copyrighted material, a growing number of technological measures have been created and utilised in recent years. However, as said technological measures could potentially prevent users from accessing or reproducing copyright works, such measures have the adverse effect of seriously damaging users' rights as well as broader public interests. This chapter will accordingly analyse the myriad issues that touch and concern technological measures, including anti-circumvention rules.

In order to effectively balance the interests of users and right owners in the digital era, various anti-circumvention rules have been established by international organizations as well as different countries. This chapter critically examines some of these anti-circumvention rules and their impact in practice. By analysing the rules, a number of problems associated with their application treated with in this chapter. Additionally, appropriate suggestions will be provided which are aimed at improving China's system of copyright protection in the digital age.

## 7.1. New Methods of Protecting Copyright in the Digital Era

The rapid development of technology, and, more particularly, digitization in the network environment, has created a number of new methods for the creation of new works, as well as their development and transmission.<sup>1</sup> At the same time, however, the reproduction and distribution of copyrighted works, without authorisation, has become easier and less and less costly.<sup>2</sup> For example, with the wide range of new high-tech devices, it is now easy to make duplicates of a work, by copying a digital file for an unlimited number of times without there being any degradation in the quality of the reproductions. Further, with the rapid increase in the use of personal computers or laptops, as well as advanced internet file sharing tools, it has become simpler and more efficient to make copies of digital copyrighted works, including copying or downloading music and films at home or even in a coffee shop. Because of the ease with which information could now be obtained, used and transmitted by anyone having access to a computer, smart phone and the internet, an increasingly large number of copyrighted works have been infringed and pirated, resulting in heavy losses to right owners.<sup>3</sup> To this end, right owners have started to adopt various technical methods aimed at placing controls on

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<sup>1</sup> Julie E. Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace' (1995-1996) 28 Connecticut Law Review 981 981.

<sup>2</sup> Wendy Pollack, 'Tuning In: The Future of Copyright Protection for Online Music in the Digital Millenium' (2000) 68 Fordham Law Review 2445 2445-2446.

<sup>3</sup> J. Carlos Fernández-Molina, 'Laws Against the Circumvention of Copyright Technological Protection' (2003) 59 Journal of Documentation 41 41.

users' ability to access or reproduce copyrighted works. These self-help measures are typically referred to as Digital Right Management (DRM) or Technological Protection Measures (TPMs).<sup>4</sup> The nature and adequacy of these measures will be critically explored and analysed in this chapter.

At the outset, it is perhaps worth noting that DRM and TPMs generally refer to access control technologies that can be used by hardware manufacturers, copyright holders, publishers, and individuals to impose limitations on the use of digital content and devices. In order to distinguish these methods, albeit theoretically, Professor Peter Yu, relying on Professor Kerr,<sup>5</sup> has explained that TPMs “focus narrowly on mechanisms used to protect copyrighted contents, such as passwords (the passwords setting on the digital works so they can only be downloaded or read by authorised users), encryption (the scrambling of copyrighted works so they can only be read by licensed users and devices), digital watermarking (the embedding of information on copyright holders, restrictions on the use of works and the identities of licensed users) and other protection techniques”, while DRM “includes a large set of

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<sup>4</sup> Pamela Samuelson, ‘Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures’ (2007) 6 *Journal on Telecommunications and High Technology Law* 41 42.

<sup>5</sup> Ian R. Kerr, ‘To Observe and Protect? How Digital Rights Management Systems Threaten Privacy and What Policy Makers Should Do About it’ in Peter Yu (ed), *Intellectual Property and Information Wealth: Copyright and Related Rights*, vol 1 (Praeger Publishers 2007) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1303203](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1303203)> Kerr explained that “While TPMs are designed to prevent copying, DRMs are designed to manage copying by using various automation and surveillance technologies to identify content and technologically enforce certain licensing conditions. More and more, DRMs will be used to manage all rights reserved by content owners/providers usually on a take-it-or-leave-it basis.”

technological tools that not only protect the content, but also can monitor the consumer behaviour and facilitate payment for content usage.”<sup>6</sup> According to Professor Yu point, DRMs, like TPMs, serve to protect copyrighted works against unauthorized use; they also protect the interests of users as well.

That said it can be argued that TPMs are, in essence, tools designed to protect the interests of right owners who may be successors, assignees, licensees, agents, or other intermediaries on behalf of the original authors, while a well-designed DRM system not only protects copyrighted works by preventing unauthorized access, but also accommodates certain interests of users.<sup>7</sup> For this reason, it must be borne in mind that certain issues, for example, devices used for circumvention and associated legislation, relate only to TPMs.

With the increasing application of TPMs by right owners, a strong argument can be made that unauthorized access to, and use of, copyrighted works has been effectively stymied. The challenge, however, lies in the fact that once a certain technology has had the effect of promoting the protection of copyright, new technologies tend to emerge which aim to circumvent otherwise effective

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<sup>6</sup> Peter K. Yu, ‘Anticircumvention and Anti-anticircumvention’ (2006) 84 Denver University Law Review 13 61-62.

<sup>7</sup> Ibid 62.

technical protection.<sup>8</sup> After hacking technologies and devices were introduced to circumvent technical measures, the DRM and TPMs have proven to be unable to protect copyrighted works as they once did. This give rise to the need to adopt anti-circumvention legislation, in accordance with the WIPO Treaties of 1996 that require states to prohibit the circumvention of technological measures in so far as copyright protection is concerned.

Notwithstanding this, however, with the enactment of anti-circumvention regulations, a series of new issues have arisen in recent years, such as exceptions and limitations to copyright and users' right in using copyrighted works, amongst others. In this context, it is submitted that because right owners might widely adopt the TPMs to overprotect their works in accordance with anti-circumvention rules, the relevant domestic and international provisions need to be further analysed, in order to determine whether the right balance has been struck between the interests of copyright owners and users.<sup>9</sup>

In this regard, this chapter will, first, introduce various provisions relating to TPMs circumvention by reference to selected international treaties and domestic legislation. It will then go on to address some of the more

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<sup>8</sup> Séverine Dusollier, 'Scoping Study on Copyright and Related Rights and the Public Domain' (Committee on Development and Intellectual Property (CDIP), Geneva, May 2 to 6, 2011) 44.

<sup>9</sup> Weibao Yao and Haijun Wang, 'The Conflict between the Digital Rights Management and Personal Fair Use' [2005] *Modern Information Journal* 103 104-105.

controversial questions relating to the application of anti-circumvention rules within the context of the United States DMCA and EU Copyright Directive. In view of the problems that arise in connection with the current anti-circumvention provisions, including the likelihood of limiting the interests of users, this chapter will proffer some suggestions. More specifically, reference will be made to the U.S. anti-circumvention rules as contained in DMCA, which have served as a legislative model for a number of countries, including Australia and Singapore, amongst others.<sup>10</sup> The chapter will argue that, even those countries which do not have bilateral or plurilateral free trade agreements with the U.S., such as China, have nonetheless been required to create DMCA-like anti-circumvention laws in order to comport with the requirements of the WIPO Internet Treaties.<sup>11</sup> The implications of this development in so far as China is concerned will also be addressed in this chapter.

In the following section, some anti-circumvention rules as contained in different pieces of legislation, such as the relevant provisions in the WIPO Internet Treaties, the differentiated anti-circumvention rules in the U.S. DMCA and in the EU Directive, will be introduced and analysed. The argument will thereafter be made that in order to better address issues of circumvention in

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<sup>10</sup> Ian Brown, 'The Evolution of Anti-circumvention Law' (2006) 20 *International Review of Law, Computers & Technology* 239 243.

<sup>11</sup> Yu, 'Anticircumvention and Anti-anticircumvention' 56.

China, it will be necessary for China to learn from the experience of other jurisdictions.

## **7.2. Relevant Treaties and Legislations at the International and Domestic Levels**

Anti-circumvention rules originated in the 1980s in the U.S. It was an attempt to prevent users from circumventing technical measures. Anti-circumvention rules, at the time, included satellite cable encryption system<sup>12</sup> and serial copyright management systems,<sup>13</sup> which prohibited copies of digital audio. In 1989, the issue of technological protection measures was mentioned by WIPO during the drafting process of its model provisions. At the conference, the committee members discussed the conditions that should be applicable to TPMs from various perspectives, including obligations concerning types of equipment, and the need to protect against uses which conflict with a normal exploitation of works.<sup>14</sup>

Subsequently, a “White Paper on Intellectual Property and the National Information Infrastructure” was published by President Clinton’s Task Force in September 1995, which called for the formulation of international standards

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<sup>12</sup> 47 U.S.C. § 605(e)(4).

<sup>13</sup> 17 U.S.C. § 1002(c).

<sup>14</sup> *WIPO document CE/MPC/I/2-II* .

on the issue.<sup>15</sup> The US National Information Infrastructure White Paper (NII) noted that

[...] content providers must be confident that the systems developed to distribute these works will be secure and that works placed on these systems will remain authentic and unaltered. If content providers cannot be assured that they will be able to realise a commercial gain from the sale and use of their products using the NII, they will have little incentive to use it.<sup>16</sup>

This document, in effect, acknowledged that the ubiquitous adoption of TPMs by copyright owners could better protect copyrighted works from serious infringement. In addition, the document appears to encourage the enactment of new laws on the prohibition of circumvention in respect of DRM and TPMs. For example, the paper considered that

The Working Group recommends that the Copyright Act be amended to include a new Chapter 12, which would include a provision to prohibit the importation, manufacture or distribution of any device, product or component incorporated into a device or product, or the provision of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without

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<sup>15</sup> Brown 241.

<sup>16</sup> Bruce A. Lehman, *Intellectual Property and the National Information Infrastructure* (1995) 177.

authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights under Section 106. The provision will not eliminate the risk that protection systems will be defeated, but it will reduce it.<sup>17</sup>

The NII anti-circumvention proposal was, however, strongly criticized by other domestic groups such as telephone companies, ISPs, computer companies, libraries and scientific organizations, when it was brought before an international conference held by the WIPO in 1996. After an outpouring of public criticism from various groups, the U.S. amended its proposed anti-circumvention rule to reflect a more neutral law, as suggested by South African representatives, thereby requiring each member country to address the circumvention of technological measures employed by the right owners to protect their rights. This proposal was later formally included in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>18</sup>

Subsequent to the passage of these treaties, the U.S. and the EU sought to implement the measures contained in said treaties, by adopting the anti-circumvention rule in their domestic laws and directives, respectively.

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<sup>17</sup> Ibid 230.

<sup>18</sup> Brown 243.

Because the language of WIPO Internet Treaties allows for flexibility, it is arguable that there is plenty of room for contracting states to experiment with designing their own anti-circumvention laws to fit their special circumstances.

### **7.2.1. WIPO Internet Treaties: WCT and WPPT**

With the support of the U.S., the WIPO sought to formulate and promulgate two treaties, the WCT and WPPT, aimed at addressing the myriad challenges that arise in the context of emerging technology in the digital era.<sup>19</sup> These challenges were specifically discussed at the WIPO's international conference in Geneva in December 1996,<sup>20</sup> which ultimately led to the adoption of the WCT and the WPPT.<sup>21</sup> Because the WIPO Internet Treaties have been already been introduced in Chapter 2, I will only selectively address the TPM-related provisions contained in these treaties in this chapter. Each of the treaties contains virtually identical language on the question of TPMs, and, in particular, require member countries to prohibit the circumvention of technological measures which are used to protect copyrighted works.<sup>22</sup>

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<sup>19</sup> Brian Bolinger, 'Comments, Focusing on Infringement: Why Limitations on Decryption Technology Are Not the Solution to Policing Copyright' (2002) 52 Case Western Reserve Law Review 1091 1092.

<sup>20</sup> YiJun Tian, 'Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions' (2005) 15 Fordham Intellectual Property, Media and Entertainment Law Journal 749 751.

<sup>21</sup> WIPO Internet Treaties.

<sup>22</sup> U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998: U.S. Copyright Office Summary* (1998) 3.

Before addressing the implementation of the anti-circumvention rule in domestic law later, there is perhaps a need to examine, at the very outset, the key provisions relating to the international identified above. Instructive, in this regard, is Article 11 of the WCT, which, in relation to TPMs, stipulates that,

[...] contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by the law.<sup>23</sup>

This provision is almost identical to Article 18 of the WPPT, albeit that performers or producers of phonograms are specifically mentioned as right owners who are empowered to use technological measures to protect their works.<sup>24</sup> Notwithstanding this, however, it is important to note that a number of challenges arise in this regard which must necessarily be explored.

The first of these challenges concerns the scope of legal protection afforded by Article 11 of the WCT, which has been an ongoing debated since the treaty came into force. As intimated above, article 11 requires that TPMs be

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<sup>23</sup> Article 11, WCT.

<sup>24</sup> Article 18, WPPT.

protected against circumvention in those circumstances where no authorisation has been given by the authors or permitted by the law.<sup>25</sup> This essentially means that not all acts amounting to circumvention have to be prohibited; rather, some acts of circumvention are allowable if they are permitted by the authors or the relevant laws.

However, it is perhaps noteworthy that the important phrase "circumvention" is not appropriately defined in the treaty, which raises some interesting questions about whether acts of circumvention only include direct violations of TPMs or also cover the creation and supply of tools used for circumvention, or/and the offering of circumvention services, which could indirectly facilitate circumvention.<sup>26</sup> Although this vexing question cannot be resolved by reference to the WCT, there is an argument that relevant approaches countenanced in other documents can assist in this regard. For example, while the WCT was being drafted, the U.S. brought an interesting proposal to the Diplomatic Conference, which was later adopted as the Basis for the Treaty Proposal, albeit at the earlier stages.<sup>27</sup> Article 13 of the U.S.' Basic Proposal specifically stated that

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<sup>25</sup> Article 11, WCT.

<sup>26</sup> Hinze 785.

<sup>27</sup> Pamela Samuelson, 'Towards More Sensible Anti-circumvention Regulations' in Yair Frankel (ed), *Financial Cryptography: 4th International Conference, FC 2000 Anguilla, British West Indies, February 20–24, 2000 Proceedings* (Springer Berlin Heidelberg 2001) <[http://link.springer.com/chapter/10.1007/3-540-45472-1\\_3](http://link.springer.com/chapter/10.1007/3-540-45472-1_3)> 34-35.

[...] contracting parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the right holder or the law.<sup>28</sup>

This proposal, while interesting, was rejected by the majority of the member states represented at the conference. In contrast, Article 11 was included in the treaty, whose language is far more flexible than the provision outlined in the Basic Proposal above.<sup>29</sup> That said, it would appear that “circumvention”, within the context of Article 11, ought not to include the creation of special circumvention devices. Similarly, it appears that if an entity/ person manufactures or distributes a device that is inherently harmful to the investment and innovation of the copyright holder because it can be used for circumventing TPMs, but has also designed the device for other purposes, such as on personal computers,<sup>30</sup> this would not be a violation of the anti-circumvention rule. In this context, it can be argued that unless the authors

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<sup>28</sup> Article 13(1), *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Litterary and Artistic Works to Be Considered by the Diplomatic Conference* (1996).

<sup>29</sup> Brown 242-243.

<sup>30</sup> Hinze 787.

could prove that circumventing the TPMs was the only or primary function of the tool or device, a manufacture or distributor of said device would not fall within the scope of “circumvention”.

Secondly, Article 11 requires that the technological measures employed by the authors should be “effective”. The challenge in this context, however, lies in the fact that the WCT does not elaborate further on the precise meaning to be ascribed to “effective”. That said, it can be argued that the notion of being “effective” can be determined by reference to whether the TPM resisted the threats that have attempted to circumvent the measure. If the answer is in the negative, the measure would not be deemed as “effective”, and thus would not be in need of legal protection.<sup>31</sup> More specifically, if the TPM in question can be circumvented by a user who only used his common skill without any professional device or technological tool, it would not be considered as effective.<sup>32</sup>

More generally, although the treaty remains silent on the definition of effective technological measures, it is important to note that the European Union

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<sup>31</sup> Jane C. Ginsburg, ‘Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience’ [2005] Columbia Public Law Research Paper No 05-93 4.

<sup>32</sup> Jerry Jie Hua, *Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer 2014) 74.

Information Society Directive provides that technological measures are effective

[...] where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.<sup>33</sup>

This essentially means that the relevant types of technological measures that are to be viewed as effective have been limited to either access control or copying of the copyrighted works. Against this backdrop, if a TPM controls neither access nor copying, no matter how well it functioned, it would not be regarded as “effective”, and could therefore not benefit from legal protection against circumvention.<sup>34</sup>

Thirdly, there is some uncertainty as precise scope of the term “authors” as used in Article 11 WCT. Because the process of creating devices typically requires considerable effort, including protecting devices used by ISPs on behalf of authors, the term “authors”, as used in the conventional provision, should not be understood as applying only to the creator who directly adopted

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<sup>33</sup> Article 6(3), European Union Information Society Directive.

<sup>34</sup> Ginsburg, ‘Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience’ 5.

technological measures to protect their works; otherwise, the author-protective goals of the WCT would not be attained in practice.<sup>35</sup> Even further, in some of the more complicated cases, “authors” might also include successors, assignees, licensees, agents, or other intermediaries on behalf of the original authors.<sup>36</sup> For example, if the case involves complete or partial copyright assignment, “authors” would refer to the original authors and successors. Aside from this, it is difficult to differentiate between whether a TPM has been adopted by the author or by the successor, which leads to uncertainty and imprecision in so far as interpretation is concerned.

Fourth, Article 11 of the WCT requires that effective technological measures are used by authors “in connection with the exercise of their rights under this treaty or the Berne Convention.” In other words, although Article 11 does not expressly demarcate which kind of TPMs the WCT protects, it limits the qualifying technological measures to those used in connection with the exercise of the author’s rights as provided for under either the WCT or the Berne Convention. For this reason, it is arguable that measures protecting against copying,<sup>37</sup> adapting,<sup>38</sup> distributing of copies, including by means of

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<sup>35</sup> Ibid.

<sup>36</sup> Hua 73.

<sup>37</sup> Article 9, Berne Convention.

<sup>38</sup> Ibid, Article 12.

rental,<sup>39</sup> publicly communicating,<sup>40</sup> as well as measures against violations of integrity and attribution rights,<sup>41</sup> would all fall within the scope of Article 11.<sup>42</sup>

Additionally, a specific TPM which regulates access to a work of authorship<sup>43</sup> is also of particular relevance. More specifically, regarding work that is in a traditional format, once said work has been purchased, unlimited access would be permitted. However, with the rapid development of technology, particularly in the digital era, work in access-controlled formats may be limited access thereto, through, for example, limiting the use of the work to a certain number of times. On a related issue, with regard to the question of whether the Berne Convention or the WCT established a right to control access to works, it must be noted that only the WCT contains a general right of “communication to the public”, including by digital delivery,<sup>44</sup> which should possibly be considered to embody the right to access works. However, because of the vagueness inherent in the language of the provision, as well as the lack of further clarification, a vexing question of whether Article 11

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<sup>39</sup> Article 6, WCT.

<sup>40</sup> Article 11, 11bis, 11ter, 14 and 14bis, Berne Convention; Article 8, WCT.

<sup>41</sup> Article 6bis, Berne Convention.

<sup>42</sup> Ginsburg, ‘Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience’ 5-6.

<sup>43</sup> Jane C. Ginsburg, ‘Copyright Legislation for the “Digital Millennium” (1999-2000) 23 137.

<sup>44</sup> Article 8, WCT. It wrote that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

includes access-control TPMs is ultimately left to member states to determine on their own volition.

On the basis of the foregoing discussion, it submitted that the treaty sought to ensure that there was no conflict between Article 11 of the WCT and the provisions of the Berne Convention,<sup>45</sup> evidenced by the fact that the treaty obligations cannot go beyond the scope of copyright,<sup>46</sup> which affords member states the liberty to apply their own domestic laws when dealing with anti-circumvention issues. For example, although the WCT provides legal remedies for the circumvention of TPMs in respect of copyrighted works, it is silent on enforcement mechanisms, thus leaving the question of enforcement to member countries.<sup>47</sup> Additionally, it is worth noting that the WCT does not designate any specific TPMs which must be incorporated into member countries' domestic laws, which effectively affords these countries the freedom to choose whether technological measures would be incorporated into their domestic laws.<sup>48</sup> Furthermore, as the WCT does not require member states to incorporate the anti-circumvention rules into their copyright

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<sup>45</sup> Jennifer Newton, 'Global Solutions to Prevent Copyright Infringement of Music Over the Internet: The Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandates' (2001-2002) 12 *Indiana International & Comparative Law Review* 125 144.

<sup>46</sup> Haimo Schack, 'Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use' [2002] *University of Illinois Journal of Law, Technology & Policy* 321 323. Schack noted that "protection of technological measures is mandated only insofar as they are intended to protect the copyright owners' exploitation rights, but not as to acts "permitted by law."

<sup>47</sup> Tian 754.

<sup>48</sup> *Ibid.*

legislation, member countries themselves could independently determine that said rules are not applicable in their respective domestic laws.<sup>49</sup>

Because of the uncertainties created by the WIPO Internet Treaties, which invariably affect the extent to which a balance can be struck between the disparate interests of right holders and users, member states have had to take the lead in terms of implementing the anti-circumvention rules in a way that comports with the standards of their respective legal systems. The U.S. DMCA and the EU Copyright Directive are perhaps the most instructive examples of effective implementation of anti-circumvention rules in this regard. The U.S. DMCA, in particular, has influenced a number of jurisdictions, including China's anti-circumvention legislation, which will be explored in the final part of this chapter. The EU Copyright Directive has established specific standards which serve as guidelines to aid in the effective implementation of anti-circumvention rules in EU countries. Because both of these important instruments contain distinctive features, it is apposite that such features be subsequently introduced and critically evaluated.

### **7.2.2. The DMCA**

Pursuant to the WIPO Internet Treaties, which established minimum standards that require member countries to create anti-circumvention laws, a

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<sup>49</sup> Hua 75.

number of countries have incorporated anti-circumvention rules into their national legislation. The U.S., for example, has signed bilateral or plurilateral free trade agreements with several countries, which contain provisions requiring those countries to adopt anti-circumvention laws mirroring the DMCA.<sup>50</sup> For this reason, the U.S. DMCA can be viewed as being representative of anti-circumvention rules in most countries, given the leading role it plays in the domestic laws of said countries.<sup>51</sup>

As intimated above, the anti-circumvention rules contained in the WIPO Internet Treaties have been incorporated into the DMCA, which was signed into law by President Clinton on 28 October 1998.<sup>52</sup> In contrast to the WIPO Internet Treaties, however, the anti-circumvention rules contained in DMCA are more specific, and grant greater protection to right holders. For example, the DMCA not only bans the direct acts of circumvention of TPMs, but also prohibits the preparatory acts in this regard, such as the manufacture, sale, distribution, offering and trafficking of tools, technologies and devices which are used to circumvent the access control associated with TPMs as well as copy controls of TPMs. In addition, the DMCA grants absolute legal protection to both access control TPMs and copy control TPMs.

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<sup>50</sup> Brown 243.

<sup>51</sup> Terri Branstetter Cohen, 'Notes: Anti-Circumvention: Has Technology's Child Turned against Its Mother' (2003) 36 *Vanderbilt Journal of Transnational Law* 961 984.

<sup>52</sup> U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998: U.S. Copyright Office Summary* (1998) 1.

The new Chapter 12 of the DMCA makes specific provision in terms of anti-circumvention rules. This, as well as section 1201(a)(1), section 1201(a)(2) and section 1201(b), which concern preventing the circumvention of technological measures that protect copyrighted works, will be examined hereafter.

### **7.2.2.1. The Anti-circumvention Rules**

When the DMCA was enacted in 1998, anti-circumvention rules were incorporated into the United States Copyright Act, which is referred to today as "Chapter 12". Chapter 12 deals with the issue of technological protection and copyright management systems in the digital era. This chapter is divided into five sections. Among them, section 1201 seeks to implement the obligation to provide legal protection against circumvention of technological measures which are used by right owners to protect their copyrighted works. Section 1202 concerns the integrity of copyright management information; section 1203 and section 1204 concern appropriate remedies, including civil remedies and criminal penalties; and section 1205 includes savings clause.<sup>53</sup> For the purposes of this thesis, section 1201 will be critically analysed hereafter.

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<sup>53</sup> Chapter 12, 17 U.S.C.

Section 1201 addresses two kinds of technological measures. The first concerns measures that prohibit the unauthorized access to copyrighted works, while the second concerns measures that prohibit the unauthorized copying of copyrighted works. More specifically, section 1201 covers two kinds of prohibited acts. The first is that of direct acts of circumventing TPMs, whereas the second addresses preparatory acts in respect of circumvention, such as manufacturing, selling or providing the devices which are used to circumvent TPMs.

There are three kinds of violations which are prohibited by section 1201: (1) section 1201(a)(1) circumvention of technological protection measures that control access to copyrighted works;<sup>54</sup> (2) section 1201(a)(2) the making, provision, or offering, etc, of devices or services, etc. that circumvent access controls;<sup>55</sup> and (3) section 1201(b) the making, provision, or offering, etc, of devices or services, etc. that circumvent a technological measure that effectively protects a right of the right owner.<sup>56</sup> It is noteworthy that these three violations are distinct from copyright infringement. Because these violations occur once the prohibited acts are found to exist, it is not necessary to prove that the manufacture and sale of circumvention devices resulted in some

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<sup>54</sup> Section 1201(a)(1), *ibid*

<sup>55</sup> Section 1201(a)(2), *ibid*.

<sup>56</sup> Section 1201(b), *ibid*.

specific infringements, or the purpose of circumventing an access control was to commit an illegal act.<sup>57</sup>

As intimated above, section 1201(a)(1) aims to prevent the direct circumvention of access control TPMs. This anti-circumvention provision protects technological measures which effectively control access to copyrighted works. However, while the DMCA requires protection of “effective technological measures”, it did not explain how this should be construed. Instead, it explains the phrase “to circumvent a technological measure” and when a technical measure could be considered to “effectively control access to a work”. More specifically, in section 1201(a)(3), these two phrases are defined as (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.<sup>58</sup>

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<sup>57</sup> Ginsburg, ‘Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience’ 12.

<sup>58</sup> section 1201(a)(3), 17 U.S.C.

In contrast to the WIPO Treaties, it appears that the question of the efficiency of technical measures in DMCA are fewer than those contained in the WIPO treaties, which effectively means that the scope of protected technical measures could extend to all measures employed in connection with a work which ordinarily implies that it is not readily accessible. However, with the development of case law, it has been held that certain TPMs are excluded from the protective scope of the DMCA. For example, in *Lexmark Intern. v. Static Control Components*,<sup>59</sup> the claimant, Lexmark International, designed a computer program, known as the “Printer Engine Program”, which sought to control various printer functions on Lexmark Printers.<sup>60</sup> One of the functions, a microchip, was to prevent Lexmark printers from functioning with toner cartridges that Lexmark had not re-filled. However, the defendant, Static Control Components (SCC), mimicked Lexmark's computer chip and sold it to companies who were interested in selling remanufactured toner cartridges.<sup>61</sup> Lexmark thus claimed that SCC's chip violated the DMCA by circumventing the technological measure designed to control access to the Printer Engine Program.<sup>62</sup> It was, however, held that, on the facts, Lexmark's technological measure was not the only method to control access to the Printer Engine Program.<sup>63</sup> Accordingly, TPMs which provided alternative means of access to

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<sup>59</sup> *Lexmark Intern. v. Static Control Components* 387 F 3d 522 Court of Appeals, 6th Circuit 2004.

<sup>60</sup> *Ibid* 528.

<sup>61</sup> *Ibid* 529.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid* 546-547.

a work could not “effectively control access to a work”, and thus would not be protected by the DMCA.<sup>64</sup>

With regard to section 1201(a)(2) and section 1201(b), it must be noted that while the former prohibits the trafficking or distribution of devices that facilitate circumvention of technological measures used to control access to the copyrighted works, the latter prohibits trafficking or distribution of devices that circumvent technological measures used to protect the exclusive rights of the copyright owners. Pursuant to the statutory explanation provided in section 1201(b)(2)(B), technological measures effectively protect the rights of copyright owners if the measures, in the ordinary course of their operation, prevent, restrict, or otherwise limit the exercise of the rights of copyright owners.<sup>65</sup> As such, section 1201(b) would apply to those situations where infringers are allowed access to the copyrighted works, and then subsequently facilitate the circumvention of copy control technological measures used in the works. In this context, some scholars have argued that section 1201(b) is essentially a “post-access control” provision.<sup>66</sup>

By contrast, because both of section 1201(a)(2) and section 1201(b) stipulate that “no person shall manufacture, import, offer to the public, provide, or

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<sup>64</sup> Ibid 547.

<sup>65</sup> Section 1201(b)(2)(B), 17 U.S.C.

<sup>66</sup> YiJun Tian, *Re-thinking Intellectual Property : the Political Economy of Copyright Protection in the Digital Era* (London: Routledge-Cavendish 2009) 221.

otherwise traffic in any technology, product, service, device, component, or part thereof, that” controls and access to or copying of a protected work, they have been aptly described as “anti-device” provisions.<sup>67</sup> In this regard, a device which is considered to be prohibited must necessarily fall within any of the following three categories: (1) it is primarily designed or produced for circumventing access or copy control technological measures; (2) it has limited commercially significant purpose or use other than circumvention use; or (3) it is marketed for use in circumvention.<sup>68</sup>

Despite the similarities between the “anti-device” provisions, however, it is important to note that there are also some differences between. These will be explored hereafter.

(1) Section 1201(a)(2)

Although both of section 1201(a)(1) and section 1201(a)(2) relate to access control technological measures, the former prohibits direct acts of circumvention of access controls, while the latter prohibits trafficking in devices which are used to circumvent access controls.<sup>69</sup> The distinction between the two is best illustrated through an example. If a person provides

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<sup>67</sup> Pamela Samuelson, ‘Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised’ (1999) 14 Berkeley Technology Law Journal 519 534.

<sup>68</sup> U.S. Copyright Office 4.

<sup>69</sup> Peter Singer, ‘Mounting a Fair Use Defense to the Anti-Circumvention Provisions of the Digital Millennium Copyright Act’ (2002-2003) 28 University of Dayton Law Review 111 116-117.

software whose sole function is to help users to access certain databases thereby avoiding entering a password or permission from the right holder, this software provider would violate section 1201(a)(2).<sup>70</sup> Additionally, users who use the software to circumvent the password requirement, without authorization of the right holder, would also be considered as being in violation of section 1201(a)(1).<sup>71</sup>

## (2) Section 1201(b)

This provision prevents the distribution of devices aimed at circumventing post-access control measures that are used by right holders to prevent unauthorized reproduction or other forms of copyright infringement. This would include technological measures “designed to permit access to a work but prevent copying of the work or some other act that infringes a copyright.”<sup>72</sup>

It is noteworthy that this provision only applies to the person who has already lawfully accessed a work, but then provides the device whose sole function is to circumvent the post-access measures installed to protect the work in question. For example, a person may search for a copyrighted work on a website which is labelled for “for viewing only”. He may then access the work, only later to find that the print function is disabled. In this circumstance, if the person finds and uses a software, whose sole function is the circumvention of

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<sup>70</sup> 1201(a)(2), 17 U.S.C.

<sup>71</sup> Section 1201(a)(1)(A), *ibid*

<sup>72</sup> Singer 118.

copying control measures, in order to disable the printing, the software provider would be considered as being in violation of section 1201(b). By contrast, the person who has used that software would not be liable under section 1201(b). However, the user in question would nevertheless be liable for the copyright infringement, which will be determined on the basis of the ordinary principles of copyright law.

A careful analysis of the U.S. anti-circumvention rule appears to suggest that the DMCA, through its anti-circumvention provisions, ascribes a tremendous amount of power to right owners. In contrast to the WIPO Internet Treaties, the anti-circumvention provisions contained in DMCA are more specific and offer more protection than these treaties do. More specifically, with regard to the anti-device provisions, right owners might be of the view that although circumvention technologies can be used for fair use or in public interests, they remain great threats to copyright protection in the digital era. They may also consider that it is more effective to reduce acts of circumvention by prohibiting the trafficking of circumvention devices, rather than having to impugn every individual act of circumvention, which is seldom possible in practice. For this reason, the anti-device provisions were enacted so as to provide effective protection against the rampant piracy caused by the hacking of technological

measures in the digital era.<sup>73</sup> Pursuant to the DMCA, it could be argued that right owners' interest have been granted stronger protection to a large extent. By contrast, users' rights have been narrowed. This is problematic in practice, as will be explained below.

Although individuals, educational and research institutions have, overtime, realised that the strong protection afforded to right owners may affect the fair use of copyrighted works, it appears that their considerable unease have not been able to contend with the adverse trend towards increasing protection.<sup>74</sup> As intimated above, however, the over-protection of right owners may adversely affect users' rights, as well as the public interests more generally. That said, it is important to also bear in mind that some exceptions and limitations exist in respect of the DMCA anti-circumvention rules. These will be discussed hereafter in some detail.

### **7.2.2.2. Limitations and Exceptions to the Anti-Circumvention Rule**

The DMCA's prohibitions on circumvention and the trafficking of circumvention devices are subject to seven specific exceptions. Three of the seven exceptions listed in section 1201(d) to (j) only apply to anti-

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<sup>73</sup> Hua 77.

<sup>74</sup> Ibid.

circumvention (section 1201(a)(1)), while the others apply to both anti-circumvention (section 1201(a)(1)) and anti-trafficking(section 1201(a)(2) and section 1201(b)).

The former three exceptions, in particular, relate to, first, non-profit libraries, archives and educational institutions (section 1201(d)). This exception allows non-profit libraries, archives and educational institutions using circumvention technologies to access copyrighted works solely for the purpose of making a good faith determination concerning whether they wish to acquire a permitted access to said copyrighted work.<sup>75</sup> Second, the protection of minors (section 1201(h)) allows users to circumvent technological preventative measure for the sole purpose of preventing access by minors to certain material on the Internet. This exception allows users to circumvent technological preventative measure for the sole purpose of preventing access by minors to certain material on the Internet. For example, parents can rely on this exception in order to prevent their children from accessing harmful content on the Internet.<sup>76</sup> Third, the personal privacy exception (section 1201(i)) allows users to circumvent access control measures when either the measures or the protected works collect or disseminate personally identifying information of internet users.<sup>77</sup>

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<sup>75</sup> Section 1201(d), 17 U.S.C.

<sup>76</sup> Section 1201(h), *ibid.*

<sup>77</sup> Section 1201(i), *ibid.*

The latter four exceptions include: (1) The governmental activities exception (section 1201(e)), which states that law enforcement, intelligence and other governmental officials are exempt if they act for the government;<sup>78</sup> (2) the reverse engineering exception (section 1201(f)), which provides that computer program developers are exempt when reverse engineering software in order to identify the elements of the software for the sole purpose of achieving interoperability of an independently created computer program with other programs;<sup>79</sup> (3) the encryption research exception (section 1201(g)), which states that encryption researchers are exempt when identifying and analysing the flaws and vulnerabilities of encryption technologies which are applied to protected works for the purposes of developing encryption technologies;<sup>80</sup> and (4) the security testing exception (section 1201(j)), which provides that circumvention is allowed when testing the security of a computer, computer system, or computer network, as long as permission has been given by the owner or operator of such computer, computer system, or computer network.<sup>81</sup>

Apart from the seven exceptions outlined above, the DMCA also contains a basic exemption for “classes of works”.<sup>82</sup> Congress, in recognition of the fact

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<sup>78</sup> Section 1201(e), *ibid.*

<sup>79</sup> Section 1201(f), *ibid.*

<sup>80</sup> Section 1201(g), *ibid.*

<sup>81</sup> Section 1201(j), *ibid.*

<sup>82</sup> Terese Foged, ‘US v EU Anti Circumvention Legislation: Preserving the Public's Privileges in the Digital Age?’ (2002) 24 *European Intellectual Property Review* 525 531.

that the narrow and rigid statutory exemptions provided for by DMCA would likely prove insufficient to prevent the anti-circumvention provision from adversely impacting the accessibility of copyrighted works, enacted sections 1201(a)(1)(B)-(E), which provides for an on-going administrative rulemaking process to evaluate the impact of the prohibition against act of circumvention by requiring the Librarian of Congress to exempt certain “classes of works” from the prohibition on access control circumvention every three years.<sup>83</sup> More specifically, users of a particular class of works, who are, or are likely to be, adversely affected in their ability to make non-infringing uses of the works by virtue of such anti-circumvention rules could be exempted from the prohibitions.<sup>84</sup> The determination of exemptions which permit the circumvention of technological measures is made every three years so that the exemptions reflect changes in the marketplace of copyrighted materials.<sup>85</sup> To date, through extensive consultations, several different classes of exceptions have been allowed on the recommendation of the Librarian of Congress.<sup>86</sup> This rulemaking process appears to be an additional safeguard in

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<sup>83</sup> Section 1201(a)(1)(B)-(E), 17 U.S.C.

<sup>84</sup> Section 1201(a)(1)(B), *ibid.*

<sup>85</sup> June M. Besek, ‘Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts’ (2003-2004) 27 *Columbia Journal of Law & the Arts* 385 417.

<sup>86</sup> For a more detailed information of the exceptions issued in each Rulemaking session please see Hua 78-79. In addition, because of the constant enactment of the new legislation, the exceptions issued in different Rulemaking sessions could be amended to keep in line with developments in the law. For an example, please see Librarian of Congress, ‘Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets’ (25 August 2014) <<http://copyright.gov/fedreg/2014/79fr50552.pdf>  
[http://www.ecfr.gov/cgi-bin/text-id?SID=cfdbf4c0bb6e5599c3c326df99d5344b&mc=true&node=se37.1.201\\_140&rgn=div8](http://www.ecfr.gov/cgi-bin/text-id?SID=cfdbf4c0bb6e5599c3c326df99d5344b&mc=true&node=se37.1.201_140&rgn=div8)> accessed 1 April 2015.

the DMCA permitting the lawful use of copyrighted works in an environment that is characterised by the widespread digital distribution of copyrighted works as well as the rapid evolution of technological measures aimed at controlling access to them.<sup>87</sup> It is expected that this rulemaking mechanism would ensure that appropriate limits are placed on the prohibition of circumvention so as to keep pace with developments in the market for copyrighted works. This will play an auxiliary role in balancing the interests of right holders and users in the digital era.<sup>88</sup>

Apart from the specific provisions relating to limitations and exceptions as explored above, there are also some general provisions limiting the scope of the anti-circumvention rules in DMCA.<sup>89</sup> Section 1201(c), for instance, states that nothing in section 1201 would “affect rights, remedies, limitations or defences to copyright infringement”, including fair use under the Copyright Act,<sup>90</sup> and “enlarge or diminish vicarious or contributory liability for copyright infringement.”<sup>91</sup> Additionally, section 1201(c) indicates that section 1201 would not oblige software and hardware manufacturers to specially design

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<sup>87</sup> Aaron Perzanowski, ‘Evolving Standards & the Future of the DMCA Anticircumvention Rulemaking’ (2007) 1 *Journal of Internet Law* 1 5.

<sup>88</sup> The Commerce Committee Report on the DMCA explained, “The primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.” See H.R. Rep., *Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998* (1998) No. 105-551, pt. 2, at 37.

<sup>89</sup> Samuelson, ‘Towards More Sensible Anti-circumvention Regulations’ 35.

<sup>90</sup> Section 1201(c)(1), 17 U.S.C.

<sup>91</sup> Section 1201(c)(2), *ibid.*

their products to respond to the particular technological measure.<sup>92</sup> Further, section 1201(k) provides that, within 18 months of enactment, all analog video cassette recorders must be designed to conform to appropriate technologies used for preventing unauthorized copying of analog video cassettes and certain analog signals.<sup>93</sup> Moreover, pursuant to section 1201(c)(4),<sup>94</sup> there is a recognition that some cases brought under the DMCA might raise First Amendment concerns. For this reason, it has been made clear that the provisions of section 1201 would not be used to enlarge or diminish any rights of free speech or the press.<sup>95</sup>

On the basis of the foregoing, it can be argued that the general approach of the DMCA anti-circumvention rules is to prohibit certain form of circumventions, albeit that specific and narrow exemptions are also provided for. However, the lack of a general fair use exception to anti-circumvention might be problematic in practice. This theme would subsequently be further explored.

### **7.2.2.3. The problems and suggestions**

Based on the exceptions discussed above, it should be noted that although there are specific exceptions to anti-circumvention rules in the DMCA, without

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<sup>92</sup> Section 1201(c)(3), *ibid.*

<sup>93</sup> Section 1201(k), *ibid.* See also U.S. Copyright Office 4.

<sup>94</sup> Section 1201(c)(4), 17 U.S.C.

<sup>95</sup> Samuelson, 'Towards More Sensible Anti-circumvention Regulations' 35.

a systematic standard to regulate these exceptions, users' rights cannot be fully guaranteed in practice. The challenges associated therewith will accordingly be analysed in detail in the subsequent section, followed by the provision of relevant suggestions.

### **7.2.2.3.1. The problems**

Although the DMCA has established a few specific exceptions which legitimize certain acts of circumvention as well as the trafficking of circumvention devices, it would appear that the existing exceptions cannot effectively resolve the negative impact which caused by anti-circumvention rules. The specific problems associated with anti-circumvention rules are addressed below.

#### *(1) Overly Specific and Narrow Exceptions*

Although copy control is one of the most popular methods of protecting against the use of copyrighted works, the anti-circumvention rule does not cover the prohibition of circumvention of copy controls. This is in an effort to leave enough space for non-infringing uses or other personal privileges.<sup>96</sup> That, even though legislation does not prevent the circumvention of copy control measures used for the purposes of fair use or other non-infringing uses, it seems that reproduction work is difficult without first being able to

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<sup>96</sup> Hua 80.

access said work. More specifically, the exceptions discussed above in relation to fair use appear only to allow users who already have lawful access to a protected work to circumvent the technological measures which are designed to protect right controls. In short, if protected works cannot be accessed, irrespective of whether copy control measures could be lawfully circumvented, users would not be able to copy the works in practice.

It is submitted that the overly specific and narrow scope of the existing exceptions, in addition to the absence of a general fair use exception in respect of anti-circumvention, may lead to a lack of access to copyrighted works, though there may very well be a legal right to use said works.<sup>97</sup> More specifically, in accordance with the “saving clause” and the specific exceptions explored above, although a use might be fair or for non-infringing purposes, the circumvention of access control measures may still not be permitted under certain circumstances. For example, if a use is for non-infringing purposes, but it was prevented from being effectuated, circumvention of the technological measures would not be ultimately allowed. As such, it could be said that the limited and overly specific statutory exceptions have excluded many potential fair or non-infringing uses which may fall outside the scope of existing exceptions. Furthermore, notwithstanding the fact that the Librarian of Congress rulemaking could be

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<sup>97</sup> Foged 531-532.

periodically updated, it is arguable that this will not likely be able to cover all possible user privileges.<sup>98</sup> On this basis, it is submitted that users' rights would not be well protected in practice by the current exception rules.

*(2) Absence of Exceptions in Relation to the Anti-trafficking Provisions*

In contrast to the anti-circumvention rules, there are very few exceptions to anti-trafficking. Almost all of these exceptions, as provided for by the DMCA, are related to the circumvention of access control measures. In this regard, if an act involves manufacturing a device or providing a service for circumvention, this would be considered as an illegal act under the anti-circumvention rule. This provides some degree of protection to copyright owners, particularly in light of the fact that the real danger to copyright in the digital era is “mass-circumvention”, which is generally executed through the dissemination of circumvention technology, rather than acts of circumvention by individuals.<sup>99</sup>

However, because of the absence of appropriate exceptions in respect of the anti-device rule, copyright owners' rights are arguably over protected, which strikes at the heart of the balance between the interests of copyright owners

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<sup>98</sup> Hua 80-81.

<sup>99</sup> Tian, 'Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions' 768.

and users.<sup>100</sup> Even further, because the device or service in question cannot be offered lawfully, the scope of a non-infringing use under the existing list of exceptions would be narrowed in practice.

### *(3) Limited Use in Practice*

Although section 1201(c)(1) explicitly states that “nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use” under the Copyright Act, this exception does not appear to work effectively in practice.<sup>101</sup> The main reason underlying this problematic state of affairs might be related to the fact that section 1201 only contains a specific and narrow list of exceptions, rather than a general exception rule that allows users to circumvent access control measures for the purpose of fair use or other non-infringing uses.<sup>102</sup> For this reason, fair uses or non-infringing uses, which would arise in respect of section 1201(c)(1), is very limited in practice. It might also be related to the fact that the exceptions in the statute are not equally applicable to the three anti-circumvention rules.<sup>103</sup>

It is submitted that the unbalanced distribution of exceptions in relation to the three anti-circumvention rules, and, in particular, the absence of exceptions to the anti-trafficking provisions, not only over protects the interests of right

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<sup>100</sup> Cohen 985 and 993.

<sup>101</sup> Dan L. Burk, ‘Anti-Circumvention Misuse’ (2003) 50 UCLA Law Review 1095 1105.

<sup>102</sup> Ibid.

<sup>103</sup> Cohen 983.

owners, but also poses serious challenges to the implementation of lawfully permitted circumvention under certain circumstances. In this context, Nimmer has argued that, in relation to section 1201,

[a]s to prohibited access, the person engaging in that conduct has violated the basic provision [section 1201 (a)(1)]; anyone assisting her through publicly offering services, products, devices, etc., to achieve the prohibited technological breach is separately culpable under the ban on trafficking [section 1201(a)(2)]. By contrast, a person who engages in prohibited usage of a work to which he has lawful access does not fall afoul of any provision of section 1201. It is only someone who assists him through publicly offering services, products, devices, etc., to achieve the prohibited technological breach who becomes culpable under the additional violations [section 1201(b)].<sup>104</sup>

Based on Nimmer's analysis, it can be argued that the scope of exceptions which could be actually applied in practice is narrower than the exceptions provided for in the statute. Thus, without the assistance of a person who has professional skills in circumvention, it will prove very difficult for users themselves to circumvent technological measures.

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<sup>104</sup> David Nimmer, 'A Riff on Fair Use in the Digital Millennium Copyright Act' (2000) 148 University of Pennsylvania Law Review 673 689-690.

More specifically, although the specific exceptions discussed above, as well as the Librarian of Congress rulemaking procedure, could permit the circumvention of access control measures under certain circumstances, users must nevertheless have adequate decryption knowledge and skills to hack through the technological measures for themselves. Otherwise, users cannot enjoy their lawful rights under the existing exceptions to the anti-circumvention rule, as acts involving manufacture or distribution of circumvention devices are prohibited, irrespective of whether the final use is unlawful or not.<sup>105</sup> For example, if a person helps a user by offering devices or services to circumvent technological measures, this act would be considered as a violation of section 1201(a)(2) or section 1201(b).<sup>106</sup> Further, even if users have enough knowledge and skills to circumvent the technological measures in question, they may still not be able to successfully engage in the permitted circumvention as most circumvention devices are not publicly available.<sup>107</sup> For this reason, it is submitted that the scope of the exceptions will be restrained in practice, particularly at the implementation stage.

In view of the problems discussed above, it can be argued that the existing exceptions cannot effectively neutralize the negative impact which is caused by anti-circumvention rules. Without fair and adequate rules relating to

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<sup>105</sup> Hua 82.

<sup>106</sup> Nimmer 689.

<sup>107</sup> Tian, 'Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions' 772.

exceptions, users' rights cannot be well guaranteed, which, in turn, shifts the balance of interests between right owners and users. Ultimately, this leads to the over-protection of the interests of right owners, which would have a detriment impact on the development of society. In order to stymie this trend, a series of suggestions will be explored in the subsequent section.

### **7.2.2.3.2. Suggestions**

In view of the problems discussed above, it could be argued that although limitations and exceptions to anti-circumvention rules exist under the DMCA, these limitations and exemptions do not sufficiently alleviate the negative impact of the rules. More specifically, the existing exceptions are overly specific and narrow, and the different types of fair use or other non-infringing uses are not completely covered by the scope of the exceptions. Additionally, although some forms of circumvention of technological measures are allowed on the basis of these exceptions, they are not effectively implemented in practice, largely due to the problematic design that characterises said limitations and exceptions, which have been explained and analysed in the previous section.

It is important to note that these problems may adversely influence the balance between the interests of copyright holders and those of users.

Moreover, because users' lawful rights cannot be guaranteed by the current

exceptions to the anti-circumvention rules, this may harm the public interests as well as ultimately hinder social development. In addition, as many countries have signed bilateral or plurilateral free trade agreements with the U.S., as intimated before, it can be argued that the anti-circumvention laws in these countries were modelled after the U.S. anti-circumvention law. This has led to an inherent imbalance of interests under the DMCA, and, by parity of reasoning, the laws of other countries. In order to prevent further adverse impact, it is submitted that it is necessary to urgently amend the current limitations and exceptions under the DMCA. This, as well as other related suggestions, are explored below.

### *(1) Legislative Design*

Copyright law should ensure that the public can easily access online materials under the certain circumstances in order to provide appropriate incentives to users to continue creating new works.<sup>108</sup> This is particularly the case in respect of anti-circumvention rules.<sup>109</sup> Of note, in this context, is the fact that overly narrow exceptions would not achieve the balance of interests identified above. For this reason, it is submitted that in order to adequately protect users' rights as well as readjust this balance, the adoption of broader exceptions to section 1201 is both necessary and appropriate.

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<sup>108</sup> Newton 127.

<sup>109</sup> Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised' 519.

More specifically, it is suggested that the DMCA's exceptions should be amended to ensure that if a use is considered as a fair use or a non-infringing use, that users in this regard are permitted to lawfully circumvent the technological measures in question, including both access control measures and post-access control measures. The logic underlying this suggestion is that if a user has the right to make fair use of an online copyrighted work, he will automatically have a right to circumvent any technological measures which would prevent him from using this work.

Meanwhile, in order to avoid the abuse of rights by users, which would be tantamount to harming the interests of copyright owners, new and specific requirements need to be incorporated into the DMCA. For example, if users wish to circumvent the technological measures in question or receive any assistance in this regard, they should be required to fill in a standard application form, and submit it to the relevant government department before the circumvention activity could be engaged in. The new rules could also require users who apply for circumventions to declare the reason(s) behind their application, the scope of the intended use and as well as other relevant information which might assist in making an appropriate decision. Should users' conduct go beyond the declaration in their application, the form could

then be used as evidence, which would make it easier to charge said users with violating the anti-circumvention law.<sup>110</sup>

Second, there is a need to examine the exceptions to circumvention which exist in other legislation, and, in particular, in other countries, in order for the U.S. to enhance the DMCA on the basis of experiences from other countries. For example, Article 6, paragraph 4 of the 2001 E.C. Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society could be adopted, as it represents a different approach from that taken by the DMCA.<sup>111</sup> This provision not only protects anti-circumvention measures, but also leaves a certain scope to allow users to legally use protected works. The two approaches adopted by the directive to achieve this balance are instructive.<sup>112</sup> The first provides that users' rights should be ensured by voluntary measures taken by copyright owners.<sup>113</sup> The second is that if no voluntary measure is taken by copyright owners, member countries must take appropriate measures to ensure that copyright owners comply with certain exceptions or limitations in the public interests.<sup>114</sup> This approach represents an acute awareness of the need to preserve the fair use and non-infringing use exception in order to protect users' rights, as well as

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<sup>110</sup> Tian, 'Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions' 786.

<sup>111</sup> European Union Information Society Directive.

<sup>112</sup> Article 6, *ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

the public interests.<sup>115</sup> The DMCA could benefit from appropriate reference to such a progressive approach.

Suffice it to say, another example of good practice in this field is the Australian Copyright Amendment (Digital Agenda) Act (CADA).<sup>116</sup> Although some technological measures have been included for protection in the CADA, such as access control measures, a strict prerequisite was simultaneously enacted for the protection of technological measures.<sup>117</sup> A TPM is defined by the Act as,

[...] a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means: (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or licensee of the copyright; (b) through a copy control mechanism [...]<sup>118</sup>

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<sup>115</sup> Schack 325-326.

<sup>116</sup> Copyright Amendment (Digital Agenda) Act.

<sup>117</sup> Ibid.

<sup>118</sup> Section 10(1), *ibid.*

On the face of it, it can be argued that the Australian anti-circumvention rule has a real potential to strike the right balance between protecting interests of copyright owners whilst at the same time ensuring that the public interests are protected.

By analysing the anti-circumvention laws from different countries, it appears that the exceptions to the anti-circumvention rules in some countries should be studied and, where appropriate, emulated by lawmakers in the U.S. in order to improve the DMCA. More specifically, it is submitted that the DMCA should be appropriately amended in order to strike a more appropriate balance between competing interests.

## *(2) Technological Design*

Apart from amending the DMCA, there is also a need to improve technological measures in order to better protect the users' rights and the public interests. More specifically, it is suggested that technological measures could incorporate certain software or procedures, which would partially allow users to circumvent TPMs, thus leaving room for fair use and as well as non-infringing uses. In this regard, once users access or copy the protected work in question, they could easily use the permitted parts of said work by circumventing any technological measures, using their own basic knowledge and skills.

A technological mechanism allowing for minimum use could be incorporated into TPMs, such as a stipulation that 10% of the copyrighted works could be used by users. Should this be the case, it is envisaged that users would only need basic knowledge to partially circumvent TPMs in order to use the permitted part of the protected work in question. That said, apart from making allowance for authorized minimum portions of works to be used, the remainder of the works would still be protected by TPMs as before.

More generally, it is worth emphasizing that the interests of copyright owners also need to be considered. More specifically, it is submitted that a properly allocated minimum authorized use would not seriously impact the market for copyrighted works in practice. However, if the non-infringing use is set too high in favour of circumvention, this would obviously damage the interests of copyright owners.

In order to find a proper proportion for fair use, there is a need to utilise appropriate software, as well as ensure that appropriate legislation guarantee a good balance between the interests of various participations. The suggested rules should include guidelines or standards that aim to help copyright owners reasonably determine the portions of works that will qualify for exemption. More generally, it will also be necessary to limit the discretion of copyright owners, thereby affording greater prospects for fair use.

In sum, then, it is submitted that, although the minimum use rule cannot completely solve all of the problems associated with exemptions to the protection of TPMs, such a rule might nevertheless play an auxiliary role in terms of ensuring that some degree of fair use is allowed. If this rule is properly implemented in practice, it is envisaged that users' rights would be better protected, whilst creators would have even greater opportunities to create new works.

### *(3) Administrative Design*

Apart from appropriate legislative and technological design, an administrative mechanism also needs to be designed so as to ensure the effective implementation of the anti-circumvention rules.

At present, a great degree of legal protection is afforded TPMs, which accrues in favour of right owners. The challenge with this, however, lies in the fact that right owners may abuse their right in practice, which would have a detrimental effect on users' rights as well as the public interests. For this reason, it is suggested that the DMCA should establish relevant rules for strengthening the control of the TPMs. For example, the conditions associated with the legal protection of TPMs should be specifically listed in the rules. Meanwhile, relevant remedies or penalties need to also be incorporated.

Moreover, in order to guarantee the implementation of TPMs-related rules, it may be necessary to appoint a governmental department to deal with all of the issues in relation to the operation of TPMs, which have been introduced in the “legislative design” section above. More specifically, works which employ TPMs by should be registered in this department by right owners. Second, the details held by this agency about TPMs should include information in relation to the purpose of TPMs and their scope, amongst others. The department should then be required to evaluate the information, and arrive at an informed decision as to whether the TPMs in question are legally allowed. Once this review is passed, a certificate should be granted to confirm the registration process.

Notwithstanding these suggestions, however, it is submitted that irrespective of how good the law is, it would only achieve its intended objectives if there is a specific department which would enforce this law. This department will play an indispensable role in terms of regulating the existing TPMs and supervising the exercise of rights of right owners. This would, in turn, facilitate the protection of TPMs, whilst ensuring that fair use is also provided for in practice.

### **7.2.3. The EU Copyright Directive**

Apart from the anti-circumvention rules described above (in the section 6.2.2.), the E.U. Copyright Directive is another piece of highly influential legislation on

this issue. In order to implement the WCT mandate, the E.U. Commission adopted the initial proposal to the Directive on 10 December 1997. After over three years of negotiations, the European Parliament and the Council eventually adopted the final version of the Directive on 22 May 2001, thereby harmonizing certain aspects of copyright and related rights in member countries.<sup>119</sup> More specifically, Article 6, as well as several recitals of the Directive, concern anti-circumvention issues.<sup>120</sup> The anti-circumvention rules included in the Directive are much more detailed than similar provisions in the WIPO Treaties, and even go further than the specific obligations imposed by the WIPO Treaties. In addition, Article 13(1) requires that member states enact domestic laws, as appropriate, to comply with the provisions of this Directive. These laws should have been brought into force before 22 December 2002.<sup>121</sup>

Given the highly influential role of the Directive in practice, the subsequent section will briefly introduce the main provisions of said instrument which directly relate to the anti-circumvention rules in the EU Copyright Directive. In addition, when one compares the anti-circumvention rules found in the EU Directive and those contained in the US DMCA, it can be argued that although

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<sup>119</sup> Foged 534.

<sup>120</sup> Richard Li-dar Wang, 'DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions' (2006) 34 *AIPLA Quarterly Journal* 217 230.

<sup>121</sup> Article 13(1), European Union Information Society Directive.

both of them have been enacted based on the WIPO Internet Treaties, there are some differences between them. For this reason, the major differences as between the approach countenanced by this Directive and the DMCA's approach will also be analysed hereafter.

### **7.2.3.1. The Anti-circumvention Rules**

In contrast to the DMCA, it can be argued that the anti-circumvention rules included in the Directive are, in a number of respects, broader than those contained in the DMCA. That said, there are some commonalities. For example, both the DMCA and the Directive prohibit the acts of circumvention and manufacture, distribution as well as the importation of circumvention tools.<sup>122</sup> However, as for the specific types of circumvention envisaged, it is important to note that, unlike the DMCA, the Directive goes further, to the extent that both access controls and copying controls are covered by the anti-circumvention rules.<sup>123</sup>

More generally, it is noteworthy that Article 6(1) of the Directive is an anti-circumvention provision which prohibits the circumvention of any effective technological measures when the circumventer either has actual knowledge of the circumvention, or has reasonable grounds to know about the

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<sup>122</sup> Article 6(2) and (3), *ibid.*

<sup>123</sup> Article 6(1) and (3), *ibid.*

circumvention.<sup>124</sup> In this context, the subject matter, knowledge, is taken into account in so far as circumvention is concerned under the Directive. If the Directive is thus applied to a circumvention-related case, the mere fact of circumventing technological measures is not enough; knowledge on the part of the circumventer also needs to be established. Against this backdrop, it can be said that, compared with the DMCA, the Directive is not as rigid or, indeed, as narrow as the DMCA in practice.<sup>125</sup>

Article 6(2) of the Directive is another anti-trafficking provision, which prohibits the trafficking of circumvention devices that fall into the following three categories: (1) where sales are promoted, advertised or marketed for the purpose of circumventing any effective technological measures; (2) where products have only a limited commercially significant purpose or use other than to circumvent any effective technological measures; or (3) where devices are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.<sup>126</sup> Identical categories of prohibitions can, quite interestingly, also be found in the DMCA. In short, although the anti-circumvention rules in the EU Directive and the US DMCA were enacted according to the general rules

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<sup>124</sup> Article 6(1), *ibid.*

<sup>125</sup> Foged 535.

<sup>126</sup> Article 6(2), European Union Information Society Directive.

contained in the WIPO Treaties, the rules in both the EU and US system have gone further in practice.

Article 6(3) of the Directive defines “technological measures” as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law [...]”<sup>127</sup> Article 6(3) then goes on to define the word “effective” when used in relation to technological measures as arising

[...] where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.<sup>128</sup>

The definitions of “technological measures” and “effectiveness” are very similar in the DMCA and the Directive. In this regard, it can be argued that unlike the WIPO Treaties that adopted a higher threshold by requiring the efficiency of technical measures, the Directive has taken an identical

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<sup>127</sup> Article 6(3), *ibid.*

<sup>128</sup> *Ibid.*

approach to the DMCA in relation to which technological measures could be protected against circumvention.<sup>129</sup>

However, in regard to the types of technological measures which would be protected, the Directive takes a different approach to the DMCA, by, for example, defining “effective” so as to prohibit trafficking of devices used for the purpose of circumventing either access control or copy control. Interestingly, although the Directive does not make any allowance for exceptions in this regard, other methods are nonetheless in place to allow for limitations and exceptions. These will be explored hereafter.

### **7.2.3.2. Limitations and Exceptions to the Anti-circumvention Rule**

Article 6(4) of the Directive concerns limitations and exceptions. Unlike the DMCA, which enumerates a list of seven specific limitations and exceptions, the Directive does not explicitly list any exceptions, although certain mechanisms have been created to accommodate a specified sub-set of the limitations and exceptions under Article 5 of the Directive. Member States are, however, allowed some degree of flexibility when incorporating these provisions into their national copyright law.<sup>130</sup>

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<sup>129</sup> Besek 426.

<sup>130</sup> Article 6(4), European Union Information Society Directive.

Article 5 of the Directive is the provision that regulates the limitations and exceptions to the reproduction right, the right of communication to the public and the right of making available works to the public.<sup>131</sup> More specifically, Article 5(2) and (3) provide an optional list, containing about 20 exceptions, whose application in national law is at the discretion of each Member State. Further, Article 6(4) extends the exceptions to the protection of technological measures; these exceptions fall into two categories.

The first category provides that,

[...] in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.<sup>132</sup>

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<sup>131</sup> Foged 536.

<sup>132</sup> Article 6(4), European Union Information Society Directive. The exceptions under Article 5 in this first category include photocopying ((2)(a)); reproduction made by publicly accessible libraries, educational establishments or museums, or by archives ((2)(c)); ephemeral recordings of works made by broadcasting organisations ((2)(d)); reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons ((2)(e)); use for the sole purpose of illustration for teaching or scientific research ((3)(a)); uses for the benefit of people with a disability ((3)(b)); and use for the purposes of public security or

The implication of this provision is that although Member States have the necessary flexibility to choose which exceptions to include in their national laws, they are nonetheless obligated to adopt at least some of these exceptions in order to ensure that users' rights are protected.

The second category concerns Member States' discretion to decide whether they would “take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by right holders to the extent necessary to benefit from the exception or limitation concerned.”<sup>133</sup> On the basis of this provision, it would appear that the exceptions would apply in relation to non-commercial reproductions made by a natural person for private use or reproductions made on condition that the right holder receives fair compensation.<sup>134</sup> In this context, irrespective of whether Member States have provided for reproduction for private use, they would still retain their discretion to choose whether to adopt Article 5(2) in order to protect the interests of private users under the second category of Article 6(4).

In addition to the exceptions identified above, the other exceptions that arise under Article 5 are not mentioned in Article 6(4). In this context, it can be

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to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings ((3)(e)).

<sup>133</sup> Article 6(4), *ibid.*

<sup>134</sup> Article 5(2)(b), *ibid.*

argued that as Member States are not allowed to create exceptions which are not mentioned in Article 6(4), the exceptions to the obligation placed on right holders and Member States to provide the means for making certain uses of copyrighted works that are protected by TPMs, are limited in nature. Moreover, it must be borne in mind that there is no relevant provision in respect of the specific measures for implementing these exceptions or, at the very least, in further explaining the “appropriate measures” that Member States should take to ensure that non-infringing uses are not prohibited. For this reason, it is arguable that it is very difficult for the beneficiaries of the exceptions to benefit in practice from the exceptions once the works in question are protected by effective TPMs.

That said, it is also important to note that Article 6(4) requires that the “beneficiary has legal access to the protected work or subject-matter concerned.” This essentially means that the exceptions could not be applied to all types of TPM-related access control devices.<sup>135</sup> In the other words, it is arguable that Article 6(4) implies that beneficiaries cannot take the initiative to circumvent technological measures, even if such circumvention could possibly fall within the scope of the fair dealing rights conferred by Article 5 of the Directive.<sup>136</sup>

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<sup>135</sup> Article 6(4), *ibid.*

<sup>136</sup> Foged 537.

Furthermore, it must be noted that the third subparagraph of Article 6(4) provides that

[...] technological measures applied voluntarily by right holders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.<sup>137</sup>

This provision appears to suggest that, in relation to the exceptions to access control in respect of TPMs, the requirements that must be fulfilled in practice are the same as, or even more stringent than, those contained in the DMCA. The effect of this lies in the fact that the users have almost no possibility of circumventing access control TPMs through reliance on the exceptions.

More generally, it is important to note that the exceptions to copy control devices as provided for by the Directive are quite different from those contained in the DMCA. In so far as the DMCA is concerned, users could circumvent relevant devices for fair use purposes. By contrast, the Directive does not allow circumvention by users, albeit that beneficiaries may exercise their optional fair dealing rights. However, it must be borne in mind that in the fourth subparagraph of Article 6(4), the exceptions contained in the first and

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<sup>137</sup> The third subparagraph in Article 6(4), European Union Information Society Directive.

second subparagraphs “shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”.<sup>138</sup> In other words, the exceptions provided contained in the first and second subparagraphs of Article 6(4) could be contractually overridden, which might result in the exceptions to copy control TPMs being narrowed and, accordingly, of limited effect.

There is no specific guidelines in the Directive regarding the measures that Member States must take to protect fair dealing rights. Of some importance, however, is Recital 48, which states that there is no obligation to design devices or services that correspond to TPMs, so long as the device or service in question does not fall under the prohibition of Article 6.<sup>139</sup> In other words, Member States are given a significant degree of flexibility to establish their own mechanism in order to implement the exceptions outlined by the Directive. In practice, four main approaches have been adopted by Member States to date. The first is that Member States have created a right of self-help that entitles beneficiaries of the exceptions to circumvent technological measures. The second is that Member States have created an avenue for the commencement of arbitration proceedings in appropriate cases. The third is

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<sup>138</sup> The fourth subparagraph in Article 6(4), *ibid.*

<sup>139</sup> Recital 48, *ibid.*

that Member States have created a direct right of action to enforce privileged exceptions in a court of law; and the fourth is that Member States have created an administrative or executive authority to regulate certain uses of TPMs.<sup>140</sup> EU Member States have to date utilised these four approaches when implementing the Directive into their national copyright laws.

In sum, then, compared with the DMCA, the limitations and exceptions introduced by the Directive are more flexible in nature, thereby catering for the different circumstances endemic to the different EU Member States. Because the relevant provisions only cover the conditions associated with the invocation of the exceptions rather than an explicit list of exceptions, and are additionally silent on the question of the specific measures that Member States are required to take, it is arguable that the Directive gives considerable discretion to Member states to create their own legislation in relation to the exceptions to the anti-circumvention rules.

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<sup>140</sup> Urs Gasser, 'Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model' Berkman Center Research Publication No 2006-04 (June 2006) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=908998](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908998)> accessed 6 May 2014. Also in Hinze 807.

## 7.3. TPMs in China

### 7.3.1. The development of TPMs in China

China is the largest internet market in the world today.<sup>141</sup> In fact, by December 2014, internet users in China amount to almost 650 million.<sup>142</sup> These astounding figures suggest that the internet has become an overly important tool in the daily lives of most Chinese people today. That said, although digitization and the growing network environment have facilitated an increasing number of new methods for the creation and transmission of works, problems have also emerged. Among other things, these problems relate to the issue of copyright protection in the digital era. More specifically, in order to safeguard their profits, right owners in China have begun to employ technical measures to protect their copyrighted works.

However, with the increasing use of technological measures, users' rights are also being increasingly threatened, which has serious implications for the public interests, as well as the development of the Chinese society. For this reason, Chinese lawmakers have begun to increasingly attach importance to addressing this problem. That said, because traditional Chinese copyright law could not adequately address the challenges and complexities of the digital

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<sup>141</sup> Internet Live Stats, 'Internet Users by Country (2014)' ([www.InternetLiveStats.com](http://www.InternetLiveStats.com), 2014) <<http://www.internetlivestats.com/internet-users-by-country/>> accessed 9 March 2015.

<sup>142</sup> China Internet Network Information Center, 'The Statistics Reporting of the Internet Development in China' ([cac.gov.cn](http://www.cac.gov.cn), 2014) <<http://www.cac.gov.cn/cnnic35fzpktjbg.htm>> accessed 5 March 2015.

environment, and China was at the time preparing to enter the WCT and WPPT,<sup>143</sup> in 2006, Regulations for the protection of the Right of Communication through Information Network (2006 Regulations) was promulgated. It was the first specific legislative instrument that expressly addressed digital copyright issues in China, and, accordingly, had the aim of harmonizing different stakeholders' interests.<sup>144</sup> Up to today, this piece of legislation still plays an important role in regulating copyright protection in the digital era in China. Given the significance of this development, the next chapter will briefly explore and discuss some of the key provisions in respect of the anti-circumvention rules. Some key suggestions aimed at further strengthening the current rules will also be proffered.

### **7.3.2. Anti-circumvention Rules in China**

Before exploring the Regulation 2006, it is important to first examine the Chinese Copyright Law of 2001 in order to get a better understanding of the anti-circumvention rules in China. The 2001 Chinese Copyright Act was the first piece of legislation in China that incorporated anti-circumvention rules. According to Article 47(6) of the 2001 Copyright Act, without the authorization of copyright owners, anyone who purposely circumvents technological measures employed by right holders for protecting their copyrighted works,

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<sup>143</sup> Huijia Xie, 'The Regulation of Anti-Circumvention in China' (2006-2007) 54 Journal, Copyright Society of the USA 545.

<sup>144</sup> 2006 Regulations.

unless otherwise provided in law or in administrative regulations, will be subject to civil, administrative or criminal liabilities, as the circumstances warrant.<sup>145</sup> However, the Act did not define the meaning of “technical measures”, and did not include provisions regarding the implementation of the anti-circumvention rule. This effectively meant that the anti-circumvention rule was hardly applied in practice.

With the rapid development of the internet, China was forced to enact more detailed anti-circumvention rules in order to regulate the problems arising from the growth of digital technology. For this reason, the 2006 Regulations was promulgated. It adopted relatively comprehensive anti-circumvention rules in order to effectively protect technological measures, whilst simultaneously balancing different stakeholders’ interests in digital copyrighted works. More specifically, Article 4 of the Regulations stipulates that in order to protect the right of communication through an information network, right owners could employ technological measures.<sup>146</sup> In this context, no organization or individual is permitted to deliberately circumvent or impair technological measures, through, for example, deliberately manufacturing, importing, or offering to the public any device or component, which is primarily designed to circumvent or impair technological measures. Even further, deliberately

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<sup>145</sup> Article 46(7), 2001 Copyright Law of the People's Republic of China.

<sup>146</sup> Article 4, 2006 Regulations.

providing technical services to other persons for the purpose of circumventing or impairing technological measures is also not permitted, unless the circumvention in question is allowed by legislation or administrative regulations.<sup>147</sup>

Article 4 of the Regulations not only prohibits acts of circumvention, but also prevents the manufacturing and trafficking of circumvention devices and associated services. Compared with the WIPO Treaties, which only require that member states prohibit acts of circumvention, the anti-circumvention rule contained in the 2006 Regulations appear to be much more rigid, to the extent that the prohibition is extended to cover anti-devices, in similar vein to the DMCA.

Because the circumvention of “technological measures” is prohibited on the basis of the foregoing provisions, it is imperative that a precise definition be ascribed to the term “technological measures” as contained in the 2006 Regulations. For this reason, Article 26(2) defines “technological measures” as “effective technologies, devices or components used to prevent or restrict browsing or appreciating a work, performance, or sound or video recording, or making available to the public through information network a work, performance, or sound or video recording without permission from the right

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<sup>147</sup> Ibid.

owner.”<sup>148</sup> This appears to suggest that “technological measures”, as they relate to the anti-circumvention rules, include all types of access control technological measures and some types of copy control technological measures. That said, the only circumvention in respect of copy control measures prohibited by the Regulations is making a work available to the public through an information network. In this regard, it can be argued that if a work is acquired by circumventing a copy control measure but this is not done through an information network, this act of circumvention would not be subject to the prohibitions contained in the Regulations. In short, it would seem that if a user lawfully accesses a work, he/she can rely on the fair use of the work in question.<sup>149</sup>

With regard to the rules in respect of the protection of technological measures, the 2006 Regulations also contains limitations and exceptions in order to cater for the public interests. These will be explored in some detail hereafter.

### **7.3.3. Limitations and Exceptions**

In order to protect their profits whilst avoiding illegal uses, copyright owners have employed a number of technological measures. On the other hand, because of the overuse of these technological measures, users’ rights, and,

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<sup>148</sup> Article 26(2), *ibid.*

<sup>149</sup> Xie 552.

by extension, the public interests, have been adversely affected. In order to balance the interests of right owners, on the one hand, and the interests of users, on the other, the 2006 Regulations introduced limitations and exceptions to the anti-circumvention rules.

China, it must be noted, took a tough position against circumvention at the time when the Regulations were being formulated against the backdrop of rampant piracy in China. In this context, the Regulations are modelled after the approach to anti-circumvention countenanced in the DMCA, to the extent that the scope of the exceptions has been narrowed.

### **7.3.3.1. Current Provisions**

There are four specific exceptions and three general exceptions contained in Article 7 to Article 9, and Article 12, respectively, of the 2006 Regulations.

At the outset, it is noteworthy that Article 12 outlines four specific exceptions, including the exception for classroom teaching and scientific research; the provision of works for blind persons; the enforcement of official governmental duties; and security testing.<sup>150</sup> These exceptions do, however, give rise to challenges in practice.

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<sup>150</sup> Article 12, 2006 Regulations.

First, in order for Article 12(1) and 12(2) to be relied upon, it must be proved that the “work is only accessible over information network”. If the works are accessible in other formats, such as on paper, rather than through an information network, the exceptions cannot be relied upon so as to allow for lawful circumvention. The challenge, however, lies in the fact that works which are only distributed over an information network happen are rarely the case in China,<sup>151</sup> which effectively means that the range of exceptions which can be relied upon in practice is very narrow and quite limited.

Secondly, Article 12 states that “in certain cases, technological measures may be circumvented, provided that technologies, devices or components used to circumvent technological measures are not made available to other persons, and that the other rights enjoyed by a right owner in accordance with law are not infringed”. In other words, although users could lawfully circumvent technical measures without permission on the basis of this provision, they would have to do so by themselves if they wish to rely on the exceptions. If, however, other persons provide the relevant technologies, devices or components to the users, the exceptions would be incapable of being relied upon. The challenge that arises in this regard lies in the fact that only few users have adequate decryption knowledge and skills to hack into technological measures by themselves. As such, most users will not be able

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<sup>151</sup> Xie 559.

to rely on the exception. Additionally, even if users have enough knowledge and skills to circumvent the relevant technological measures, the reality is that most circumvention devices are not publicly available,<sup>152</sup> which in practice means that they will be incapable of engaging in lawful circumvention. Against this backdrop, it can be argued that the scope of the exceptions is narrow in practice, which brings them closer to rhetoric than reality.

Third, when viewed in light of Article 6, which outlines relevant conditions in respect of fair use,<sup>153</sup> it appears that the exceptions to the anti-circumvention rules as contained in the 2006 Regulations are inconsistent in nature. For example, the scope of the exception to technological measures contained in Article 12 is narrower and stricter than Article 6, which essentially means that the exceptions included in the 2006 Regulations are not effective in practice.

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<sup>152</sup> Article 4, *ibid*.

<sup>153</sup> Article 6, 2006 Regulations. Article 6 stipulates that "in any of the following cases, another person's work may be made available through information network without permission from, and without payment of remuneration to, the copyright owner: (1) when a published work is appropriately quoted, for the purpose of introducing or commenting a certain work or explaining a certain point, in one's own work made available to the public; (2) when a published work is unavoidably included or quoted, for the purpose of reporting current events, in one's own work made available to the public; (3) when a small quantity of copies of a published work are made available to a small number of teachers or scientific researchers for the purpose of classroom teaching or scientific research; (4) when a published work is made available to the public by a State organ to a justifiable extent for the purpose of fulfilling its official duties; (5) when a translation of a published work of a Chinese citizen, legal entity or any other organization from Han language into a national minority language is made available to the people of the national minority in the territory of China; (6) when a published written work is made available to blind persons for a non-profit purpose in such particular way that it is perceptible to them; (7) when an article published over information network on current political or economic topics is made available to the public; or (8) when a speech delivered at a public gathering is made available to the public."

In addition to Article 12, there are three general exceptions which allow certain works to be made available through an information network under the Regulation 2006. These exceptions could also apply to the anti-circumvention rules.<sup>154</sup> They are intended to be of benefit to non-profit organizations, such as libraries, archives, memorial halls, museums and art galleries,<sup>155</sup> educational institutions under the nine-year compulsory education plan,<sup>156</sup> and residents in rural areas who need to use the works for the purpose of meeting basic standards of living.<sup>157</sup>

In practice, one case may give rise to the application of several exceptions under the 2006 Regulations. While this essentially means that the specific circumstances of each case must be comprehensively analysed, it also means that inconsistencies might arise from time to time, especially in relation to fair use as applied to the anti-circumvention rules. For example, Article 7, which applies to fair use by libraries, archives, memorial halls, museums and art galleries, stipulates that unless the parties have signed certain contracts, such institutions could collate digital works or make digital copies of said works for the purposes of display or preservation. This will only arise, however, where such works are made available to their service clients through an information network, though there is no need for authorization from, or the

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<sup>154</sup> Article 7-9, *ibid.*

<sup>155</sup> Article 7, *ibid.*

<sup>156</sup> Article 8, *ibid.*

<sup>157</sup> Article 9, *ibid.*

payment of remuneration to, right owners. An important caveat is that these institutions should not obtain any direct or indirect financial benefit from the works in question.<sup>158</sup> Additionally, Article 10(4) requires that such institutions employ technological measures on the digital works in order to prevent unlawful access by other persons; this is intended to prevent damages to right owners' profits.<sup>159</sup> That said, it is arguable that if a user is allowed to circumvent technological measures employed by libraries under the fair use exception, there is some inconsistency in practice, particularly in so far as the exceptions in Article 12 are concerned. For this reason, it is submitted that because of the narrow scope of the exceptions, an increasing number of technological measures have been employed by right owners in an effort to preclude fair use, which, in turn, adversely affects digital copyright protection in China.

In sum, the 2006 Regulations is the first systematic regulation on anti-circumvention in China, which defines the scope of prohibitions, limitations and exceptions thereto, as well as other issues related to anti-circumvention. However, in view of the problems identified above, it can be argued that China's anti-circumvention rules need urgently to be amended in order to

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<sup>158</sup> Article 7, *ibid.*

<sup>159</sup> Article 10(4), *ibid.*

better address the challenges associated with copyright protection in the digital era. To this end, some suggestions are provided below.

### **7.3.3.2. Suggestions**

In the previous section, the anti-circumvention rules in China were critically assessed. In view of the problems identified above, some relevant suggestions will be given hereafter.

As intimated above, the anti-circumvention rule contained in DMCA appears to be the legislative model which most countries, including China, have modelled their domestic laws after. For this reason, many of the problems relating to the exceptions contained in the DMCA are not unique to the U.S., but extend to China. More specifically, because of the vague and inconsistent language of the 2006 Regulations, the protection of technological measures appears to be stronger, whilst the scope of the fair use is even narrower than the anti-circumvention rules contained in the DMCA. Against this backdrop, it is arguable that improved legislative, technological and administrative mechanisms are needed in China, similar to those identified in the preceding section of this chapter in respect of the U.S.

Another important suggestion which should at the very least be given consideration to within the specific context of China is the possibility of issuing

relevant judicial interpretations. Because of the inconsistencies that arise under the 2006 Regulations, and, in an effort to ensure fairness and justice, the Chinese Supreme Court should issue judicial guidance. This guidance should be consistently updated so as to ensure that there is consistency in how domestic courts address the complexities associated with copyright protection in the digital era.

Another important suggestion is the possible introduction of a copyright levy system in China. Such a system was first mentioned in Germany's copyright law in 1965.<sup>160</sup> This system could potentially alleviate the conflicts that may arise from time between the interests of users and right owners.<sup>161</sup> With regard to digital copyright protection, it is submitted that although technological measures could effectively protect copyrighted works, the over-protective legislative model currently in operation runs the risk of prejudicing users' rights, and, by extension, the public interest. More specifically, in order to better balance stakeholders' interests in the digital era, a copyright levy system should be introduced in China.<sup>162</sup> In other words, a user who is allowed to circumvent technological measures should be charged a fee as

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<sup>160</sup> Article 53, Law on Copyright and Neighboring Rights (Germany).

<sup>161</sup> Jin Zhang, 'The Copyright Levy System in the Digital Environment' (2010) 28 *Tribune of Political Science and Law*.

<sup>162</sup> Ling Li, 'Shuzi Shidai Banquan Buchangjin Zhidu de Zhengdangxing Jiqi Yinru (The legitimacy of the Copyright Levy System and the Introduction in the Digital Era)' (2013) 14 *China Publishing Journal*.

compensation to right owners.<sup>163</sup> The implementation of this system could be managed by the Copyright Collective Management Organization (CMO),<sup>164</sup> which was explored in Chapter 5. Management by the CMO would ensure that users could conveniently use works for the purposes of generating new creations, whilst right owners gain a certain amount in compensation in this regard.

## **7.4. Conclusion**

In conclusion, this chapter has argued that with the rapid development of technology, technological measures have been created to protect right owners against the illegal use of copyrighted works in the digital era. However, with the growth of these technological measures, users' rights are being seriously threatened, which has the potential to adversely affect the public interests. In an effort to effectively balance the interests of users and right owners in the digital era, various anti-circumvention rules have been established by international organizations, as well as the different countries. This chapter has explored some of these anti-circumvention rules by reference to selected treaties as well as regional and domestic laws, such as the WIPO Internet Treaties, the EU Directive, the U.S. DMCA, and China's anti-circumvention law. By comparing the rules contained in the respective

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<sup>163</sup> Ibid.

<sup>164</sup> Zhang.

instruments, a number of problems have been identified. Suggestions have also been provided in this regard in an effort to enhance relevant laws and mechanisms for digital copyright protection, especially in China.

# **CHAPTER 8**

## **CONCLUSION**

### **Concluding Perspectives on the Development and Enhancement of Copyright Protection in the Digital Era in China**

#### **8.1. Introduction**

Over the past several decades, the internet, and, digital technology, more generally, have developed dramatically. Commensurate with the rapid development in technology are changes in people's daily lifestyles. By way of example, it is much easier now than ever before to ascertain information. In fact, people can easily download music or films from across the globe right from the comfort of their homes using peer-to-peer file sharing technology. While the increasing reliance on innovative technologies has contributed to making social life more colourful, and, indeed, more convenient, it has also created new challenges for traditional societies, such as China. It is for this reason that this thesis focuses on the complex and increasingly challenging area of copyright protection in the digital era.

This thesis has argued that the digitization of information and the development of computer networks, in particular, such as the internet, are posing new and far-reaching challenges to copyright protection across the

globe. In view of these challenges, however, this thesis has acknowledged that a series of treaties, directives and legislation, both at the international and domestic levels, have been promulgated. In addition to these instruments, a growing number of cases have been decided upon by courts across the globe on a number of increasingly complex copyright related issues. In short, by comparing and analysing the different legislative instruments and case law emanating from various jurisdictions in relation to several copyright-related issues, this thesis has not only argued that a number of challenges arise in the digital era, but has also proffered a number of solutions to these challenges, particularly in the context of China.

## **8.2. General Findings**

After a general introduction in Chapter 1, which elaborated upon the background of the research, the issues with which the thesis is concerned, the research design and structure, as well as the methodology adopted by the thesis, the thesis then explored several important issues which touch and concern copyright protection, including the development of copyright protection in China, the impact of peer-to-peer file sharing technology, the influence of history and culture on the development of copyright protection, the liability of ISPs, the balancing of interests between right holders and users, as well as technological measures and their relationship to anti-circumvention rules at both the international and national levels.

Chapter 2 introduced the history and development of copyright protection in China. By analysing the historical evolution of copyright protection in China, chapter 2 advanced the argument that although the current system of copyright protection in China was established rather late when compared to some of other countries, overtime, China acceded to all of the major international treaties on copyright protection, including the Berne Convention for the Protection of Literary and Artistic Works (1992), the Universal Copyright Convention (1992) and the TRIPS Agreement (2001), within the space of a decade, which have had a transformative impact on the protection of copyright in the country. Notwithstanding this, however, the chapter has also made it clear that the incorporation of the various standards emanating from these treaties has not resolved a number of issues in the Chinese context. In particular, it is argued that the rapid transplantation of legal norms that were alien to the Chinese society has contributed to certain misgivings in practice. In addition, the unexpected growth of the digital industry has also challenged the existing system of copyright protection in China. Accordingly, in order to better protect copyright in China, especially in the digital era, it is submitted that the overall copyright system needs to be enhanced as soon as is reasonably possible. In light of these challenges, the subsequent chapters carefully address a number of key issues, which pose serious difficulties to the current system of copyright protection in China.

In regard to Chapter 3, P2P technology, as one of the most popular technologies arising in the digital age, was selected as an example of digital copyright issue that challenges the existing status quo. In particular, chapter 3 critically discussed the challenges and complexities posed by P2P technology in the digital era, and then evaluated how other countries have addressed these concerns through an examination of relevant copyright legislation. It has argued that the development of peer-to-peer technology, while progressive, has resulted in a number of negative copyright-related externalities. By comparing the legal approaches taken in a number of jurisdictions, however, including the U.S., the U.K., Canada, Australia and China, this chapter has argued that workable, though, imperfect, solutions have increasingly been found to address the challenges associated with the development of peer-to-peer technology in the digital era.

Chapter 4 has argued that because of the strong and continuing influence of Chinese cultural dynamics, a gap exists between law and practice in so far as the protection of copyright in China is concerned. More specifically, it is argued that the distinct history and cultural context of China contributes to the relatively low level of primacy currently ascribed to copyright protection in that country. In short, this chapter has fully examined the influence of history and culture on the gradual development of copyright protection in China, and has proffered several possibilities for future reform.

Chapter 5 explored issues relating to liability under the P2P system. In light of the rapid growth of P2P file sharing technology, the main argument advanced by this chapter is that, notwithstanding myriad pieces of legislation and case law, there remains some uncertainty over the precise contours of secondary liability, particularly in relation to ISPs. Although this chapter has made it clear that there are some striking similarities between how the issue of secondary liability is addressed in the U.S.A and in Europe and how it is addressed in China, it also advances the argument that some important differences arise in practice, which account for much of the uncertainty inherent in the notion of secondary liability as applied to ISPs in China. In light of the nuanced approaches taken in other jurisdictions, this chapter has proffered a number of pragmatic suggestions aimed at ameliorating at least some of the challenges and complexities associated with the regulation of ISPs in China.

Chapter 6 argued that at present, there remains a fundamental controversy over where to strike the balance between the interests of copyright holders and users, an issue which is unlikely to be fully resolved in the immediate future. More specifically, this chapter argued that, although in theory, the overarching purpose of copyright law is to protect right holders' interests whilst also promoting creativity and innovation in the wider society,<sup>1</sup> in practice, most copyright-related instruments overemphasise the interests of right holders,

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<sup>1</sup> Patterson.

thereby marginalising the interests of users. Notwithstanding the existence of limitations and exceptions in this regard, this chapter has made it clear that there is a need to more effectively achieve a fair balance between competing interests than presently obtains. For this reason, appropriate references were made to the three-step test, the fair use and fair dealing doctrines to demonstrate how this balance has been struck in other jurisdictions, and how China can learn from the respective approaches in relation thereto. That said, this chapter remains pragmatic in nature, notably by recognising that these approaches are not a panacea, as challenges continue to arise in practice, even in those jurisdictions which adopt more liberal approaches to the balancing of competing interests.

In Chapter 7, the issue of emerging technologies that aim to protect copyright in the digital era, including technological protection measures (TPMs), has been extensively discussed. The chapter argued that these technologies raise a number of complexities and challenge of their own, which must be appropriately addressed. More specifically, this chapter has argued that, cognizant of the need to protect TPMs from circumvention, the WIPO has taken the initiative in this area by promulgating treaties prohibiting the circumvention of technological measures, which have influenced legislation in a number of jurisdictions. Notwithstanding the importance of these anti-circumvention rules, however, this chapter maintained that their application in

practice, particularly in so far as case law is concerned, raises a number of issues, which require urgent attention. While the challenges that arise in this regard are not unique to China, this chapter has, however, proffered a number of possibilities for reform that are aimed at addressing at least some of the complexities that arise in the Chinese context in so far as the application of the anti-circumvention rule is concerned.

On a balance, this thesis makes a substantial and original contribution to the existing literature as it critically assess many of the new challenges relating to copyright protection in China in the context of the digital era. By the exploration of the selected issues detailed across multiple chapters, this thesis has addressed in a fulsome manner some of key challenges inherent in China's copyright system in the digital era. However, it has to be noted that the issues discussed herein do not cover all the complexities and challenges associated with the current system of copyright protection in China. The thesis, instead, lays the foundation, so that other studies can be conducted to further advance the findings raised by this thesis.

### **8.3. Suggestions**

Throughout this thesis, various suggestions have been presented, the most important of which are summarised below:

### **8.3.1. Improving the Legislative System**

To better protect copyright in the digital era in China, constantly improving the domestic legislative system is not merely desirable, but necessary. For example, chapter 4, in particular, suggested that, in view of China's distinct history and culture, there is a need for the existing copyright legislation to be reformed. More specifically, it is submitted that merely blindly following other countries' comparatively well-established legislation on copyright-related issues, instead of promulgating an autochthonous Chinese copyright law is counterproductive. In other words, various aspects of China's copyright law should be amended to take better account of China's distinct cultural and historical characteristics.

Additionally, the thesis have explored a number of specific suggestions that are aimed at improving existing copyright legislation in China. Chapter 5, for example, argued that the incorporation of the secondary liability theory and enhancement of the current safe harbour provisions have the potential to strengthen the theory of operability and unify the understandings of the liability of ISPs in practice. In addition, the internet censorship policy, such as the GR programme, which addresses the obligations and liabilities in respect of the

government, ISPs and right owners,<sup>2</sup> should be expressly stipulated in China's copyright legislation.

More generally, chapter 6 has argued that to better achieve the delicate balance between the competing interests of right holders and users, the scope of permissible uses under the fair use exception should be expanded, and a standard of fairness should be adopted in order to keep China's copyright law in line with social developments. By emulating Taiwan's exemption rules and applying these to China's developmental interests, it is envisaged that China's fair use rules would be markedly enhanced.

Finally, chapter 7, having pointed out the problems associated with the existing legislation on the question of anti-circumvention, has argued in favour of the Chinese Supreme Court issuing judicial interpretations as temporary countermeasures aimed at guiding domestic courts.

### **8.3.2. Strengthening the Administrative System**

Apart from improving the existing legislative system, this thesis argues in favour of strengthening the administrative system that regulates the protection of copyright in China. The thesis, in particular, have argued that, among other things, a tax should be levied on the public use of copyright works. This would

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<sup>2</sup> Jancic.

apply to, for example, playing background music in a business environment to the extent that this is intended to stimulate consumption. In this regard, a certain amount of the tax collected would ensure as royalties in favour of right owners, thus better balancing the interests of right holders and users. In addition, it has to be mentioned that chapter 7 also explores this idea, but specifically in relation to the levying of a tax on circumvented copyrighted works, as compensation to copyright owners. This approach will better protect the user's right without there being a need to unnecessarily limit fair uses, which are beneficial for the further development of copyright in the digital era. Other suggestions related to improving the administrative system include establishing or enhancing the capacity and remit of various departments. For example, chapters 4 and 7 suggested that the Chinese government should establish departments that are similar to the UK's Performing Right Society (PRS). It was also argued that the existing copyright Collective Management Organization (CMO) in China could be assigned the responsibility of managing the copyright levy system in the future. Additionally, chapter 5 has argued that in order to better protect copyright in the digital era, the Copyright Collective Management System (CM) in China needs to be enhanced in ways that better protects the interests of right owners. More specifically, China's CM could greatly benefit from the modus operandi of equivalent entities that operate in other countries. These include the self-knowledge competitive approach, which is adopted in the U.S. CM system.

### **8.3.3. Improving the Technical System**

In order to strengthen copyright protection in the digital era in China, another important method of reform relates to improving the relevant technical system. Chapter 7, in particular, has argued that the technological measures currently employed in respect of digital copyrighted works need to be reformed, by, for example, allowing for the installation of some software into the technological measures that determines the appropriate proportion of fair use. This, it is submitted, would allow users to access or copy protected works, but only partially. More generally, it is arguable that reform of the technical system could leave appropriate room for fair uses as well as other non-infringing uses, thereby better protecting users' rights and, ultimately, striking the right balance between the interests of right owners and users in the digital era.

### **8.3.4. Some Other Specific Suggestions**

Apart from the suggestions provided above, the importance of education and the pricing of copyrighted works cannot be understated. Chapter 4, in particular, has argued that because of China's specific situation, its unique history and culture have had a profound impact on the manner and extent to which copyright is protected. Accordingly, in order to ensure greater protection of copyright in China, education on copyright-related issues must be enhanced, which would, in turn, improve awareness across the whole society. By utilising different educational methodologies, such as creating

extracurricular courses on intellectual property, hosting lectures and seminars as well as publishing brochures, information about copyright could be effectively communicated.

A second important factor is that of the pricing of copyrighted works. In this context, this thesis has argued that if a manageable price is required of civilians for access and use of copyright works, purchasing of said works would increase, while the piracy of original works in China would be stymied. This is an issue which, it is submitted, should be at the forefront of reform efforts in China.

## **8.4. Summary**

To conclude, this thesis has critically examined the development of copyright protection in China in light of the digital era. By analysing relevant legislation, cases, or other related factors in different jurisdictions, this thesis has argued that a number of challenges arise in practice with regard to copyright protection in the digital era in China, which require amelioration.

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