

Rethinking Copyright Reform: Should China Imitate or Innovate?

(Jerry) Jie Hua*

Deacons, Hong Kong
jerry.hua@deacons.com.hk
jerryhua@connect.hku.hk

Abstract: The revision of copyright law is influenced by the development of technologies. The emergence of personal computer and internet brings technological innovation reshaping copyright law in a continuously expansive trend. However, copyright expansion should not be unlimited when appropriate access and exploitation of copyrighted works is in danger. As a developing country where knowledge and information resources are inadequate, China would better initiate an innovative strategy in the new round of copyright reform rather than imitate legislative models of developed countries that over intensifies copyright protection. The innovative strategy should well address the issues of access, dissemination and exploitation of copyrighted works and balance the interests in rights among copyright holders, technological intermediaries and public users.

I. Introduction

There is always a close relationship between technology development and law reform. When advancement of technology brings new changes to people's social life and challenges existing legal relationships, laws will often be adjusted and reformed to adapt to the new environment and address new problems. Such interrelationship is especially reflected in the area of copyright law. The birth and development of copyright law were continuously affected by promotion in technology. The invention of printing press spurred the emergence of copyright law. The development of communication technology led to the birth of a couple of new inventions which accelerate the reproduction and distribution of works, including sound recordings, photography and motion pictures. These new communication and broadcasting technologies "triggered a second wave of expansions and adjustments to copyright".¹ The emergence of personal computer and the internet brings "a third distinct wave of technological innovation reshapes copyright law" through empowering anyone with a connection to flawless, inexpensive and instantaneous reproduction and distribution of works of authorship.²

In the fifteen century, the Gutenberg invention of the printing press resulted in the efficient and costless reproduction of literary works. The printing technology generated the early publishing industries which demanded for protection to safeguard their privileges and interests in reproducing literary works. The earliest protection was granted by the Venetian Republic as a patent right to print books in all Venetian territories for a limited period of time.³ The growth of publishing industries in a later few decades led to the recognition of the Venetian Cabinet for the exclusive rights in printing of particular books.⁴ After printing press was imported to England and London became the center of trade, England for

* Associate (Legal Assistant title) at Deacons (Hong Kong); PhD (Intellectual Property Law), The University of Hong Kong; LLM in Comparative Law, University of Florida (Gainesville FL, U.S.A.); LLB, China Foreign Affairs University (Beijing, China). This article is based on parts in the PhD thesis titled "Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era" submitted to The University of Hong Kong for partial fulfillment of the PhD degree. The author wishes to thank The University of Hong Kong for its Graduate Studentship in financial support of the research and Professor Li Yahong of the University of Hong Kong for her comments on the thesis draft.

¹ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *Intellectual Property in the New Technology Age*, 5th ed. (New York: Wolters Kluwer, 2010) at 411.

² *Ibid.*

³ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1 at 412.

⁴ *Ibid.*

the first time issued the royal decree to grant copyright protection to publishing industries. Stationers' Company was established and granted the exclusive right to control printing business for a perpetual time.⁵ The termination of such exclusive right of Stationers' Company and the fierce competition in the printing market stimulated the passing of the Statute of Anne in England in 1710.⁶ The Statute of Anne granted authors the exclusive right to control the reproduction of their works for a limited 14 years, renewable for additional 14 years. At the same period of time, the continental Europe developed a different approach for protecting authors' interests by developing a parallel system which granted authors both economic and moral rights. The first Copyright Act in the United States was passed by the Congress in 1790, following the legislative model of the Statute of Anne. Under the Copyright Act of 1790, authors had exclusive rights over books, maps, and charts created by themselves for 14 years which could be renewed by another 14 years.⁷

Copyright law has experienced numerous changes subsequently due to the emergence of new technologies. During the late nineteenth and the late twentieth century, the new communication and broadcasting technologies such as photography, sound recorder, radio, film, television and satellites enriched the category of works, increases ways of transmitting information, as well as spurred the springing-up of a series of new copyright-related industries. Expressions of literary works did not merely confine to paper-based text, but rather expanded to images, sound and motion pictures. The rapid development of music industry, film industry and broadcasting industry imposed more concerns on protection of newly emerging works. In response to these new changes, copyright law expansively covered more subject matters and exclusive rights and largely extended the term of protection. For example, the United States Copyright Act of 1909 expanded the protected literary works to "all writings" and adjusted the term of protection to an initial 28 years, renewable by an additional 28 years.⁸ The Copyright Act of 1976 further expanded "all writings" to all written works "fixed in a tangible medium of expression", including literary work, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures, sound recordings, and architectural works.⁹ The term of protection was further extended to the life of the author plus 50 years. During this period, a couple of significant international copyright conventions such as the Berne Convention for the Protection of Literary and Artistic Works were reached, under which certain minimum standards of copyright protection were established and were imposed as international obligations to member countries.

The significant inventions of computers and the internet in the late twentieth century further accelerated information dissemination and reduced expenses of reproduction and communication. The rapid development of digital network technology has generated deep influence on different aspects of people's socio-economic life, such as the style of creation, the way of expression and communication, and the operation pattern of business. The influence and challenges brought by digital network technology can be summarized as several typical features. Firstly, replication and transmission of works are simplified. The digital technology used to create and view a digital work can be used to make multiple perfect copies of that work.¹⁰ Facilitated by the internet and mobile network, works and perfect copies of these works can be quickly and cheaply distributed to almost every corner of the world where access to computers and the internet is available. Secondly, the digital network technology empowers people the capability to easily modify or adapt works in digital form.¹¹ With the aid of multimedia tools, ordinary users can manipulate the digitalized works through editing, clipping, re-recording, and making adaptation and derivation. Such remix of existing works has generated many new creations. Thirdly, the digital network technology greatly enhances the compactness of works in digital form.¹² Hundreds or thousands of copyrighted works in formats of text, images, sound, or video can be stored in one CD/DVD disk. This "feature also assists in the creation of new works or assemblages of printed and graphic materials".¹³

⁵ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1 at 413.

⁶ Yijun TIAN, *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in the Digital Era* (London and New York: Routledge-Cavendish, 2009).

⁷ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1.

⁸ *Ibid.*

⁹ The United States Copyright Act, s 102.

¹⁰ Simon STOKES, *Digital Copyright Law and Practice*, 3rd ed. (Oxford: Hart Publishing, 2009).

¹¹ *Ibid.*

¹² Simon STOKES, *supra* note 10.

¹³ Simon STOKES, *supra* note 10 at 11.

Finally, the information network endows people with strong capability to link and search. With the link to the internet and operation of search engine, people can quickly find the exact works they need.

Because the digital network technology almost changes every stage in the value chain of production of copyright works from reproduction to distribution, copyright owners and industries had more concerns on whether the traditional copyright system could well protect their interests in the digital network age. Their demand and lobbying pushed governments to promulgate new copyright laws and regulations particularly addressing the copyright protection issues under the digital network environment. For example, the United States issued the Audio Home Recording Act of 1992 for regulating the design of digital audio tape technology, the Digital Performance Right in Sound Recording Act of 1995 for compensating sound recording owners whose works are on webcasting, the No Electronic Theft Act of 1996 for enforcing criminal penalty on piracy, and the Digital Millennium Copyright Act of 1998 for setting up limitations for internet service providers' liability and prohibiting authorized circumvention of technological measures that are used by copyright owners to protect their works.¹⁴

This article addresses the continuous expansive trend of copyright protection influenced by the emergence of personal computer and the internet that brings technological innovation and argues that China, as a developing country where knowledge and information resources are inadequate, would better initiate an innovative strategy in the new round of copyright reform rather than imitate developed countries' legislative model that over intensifies copyright protection. The innovative strategy should better achieve the social justice through well resolving the issues of the access to, dissemination and exploitation of copyrighted works and balancing the interests in rights among copyright owners, technological intermediaries and public users.

2. From Balance to Imbalance: Expansion of Copyright Protection in the Digital Network Age

The establishment of copyright protection system aims to achieve two important purposes, stimulating authors' creative incentives through granting authors a bundle of exclusive rights on the one hand, and promoting progress of culture and public welfare through setting up a series of limitations to these exclusive rights so that flow of information and dissemination of knowledge will not be hindered on the other hand.

The expansion of copyright system is influenced by the development of technology. New technology induces new kinds of works based on new media and significantly decreases the cost of reproducing and disseminating works. Such technological advancement changes the interests between copyright owners and public users. Users are exposed to more opportunities brought by digital network technology to get access and exploit the copyrightable works. If copyright law does not expand its protected subject matters and categories of exclusive rights, authors cannot be adequately rewarded under the digital network environment. Copyright law can no longer function as incentive for creation, if lack of revision and appropriate expansion. When growing benefits of users outweigh the reward to authors' intellectual endeavors, certain weight shall be added on the side of authors and copyright owners in case that the balance would be broken.

However, copyright expansion should not be unlimited and should stop when appropriate access to work and future creation is in danger. Expansion of copyright protection only justifies when the access and use of works from the public threatens authors' incentive for creation and recovery of economic rewards. Over-expansion of copyright protection would again break the balance if the necessity to access to works is narrowly restricted. Over-protection of copyright will not only endanger the access to the original work, but will also impede future creation based on the original. Therefore, limitations and exceptions on copyright system should also be developed to respond to the expansion so that the ultimate goal of copyright system will not be ignored. If no place is reserved for users in the progress of copyright expansion in the digital network era, strong protection for authors and copyright owners will result in monopoly on existing works and will be harmful to advancement of knowledge and learning.

Although the change of copyright laws prior to the digital network age witnessed the unceasing expansion of copyright protection, the limitations embodied in the copyright system still function well to balance the interests between copyright protection and access to information. These limitations include

¹⁴ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1.

the idea/expression dichotomy, limited duration of protection, fair use or fair dealing, and compulsory licensing. Copyright law does not protect idea themselves. Only expressions of idea are copyrightable. The protection of authors' exclusive rights is subject to time limitation, often an author's life plus 50 years. Some jurisdictions have extended such duration to author's life plus 70 years, such as the United States and the European Union. Fair use or fair dealing doctrine permits use of copyrighted works without copyright owners' authorization and without paying remunerations to the right holders. Such design of rights restriction aims to provide leeway for teaching, research, news reporting, criticism and comments.¹⁵ With similar function as the fair use or fair dealing doctrine, the compulsory licensing scheme offers exceptions for certain situations, such as musical compositions, cable television, webcasts or fulfillment of the national compulsory education plan.¹⁶ In addition, authors' exclusive rights in the traditional copyright system only cover limited scope. Certain private uses are not prohibited by copyright laws, such as private performance and display of works.

The expansion of copyright protection both at the international and domestic level in the digital network era significantly changes the situation and breaks the balance of interest between copyright owners and public users. Due to the continuous strong lobbying from powerful copyright entrepreneur holders, copyright legislations are adjusted and reformed to strengthen protection of copyright owners' interests through increasing protected subject matters and exclusive rights, introducing protection on newly emerging copyright-protection measures such as technological measures and digital rights management information, developing the principle of indirect liability of technological intermediaries such as the internet service providers, and adding restrictions on existing copyright limitations. Although the digital network technology enhances the production and dissemination of information, expansion of copyright protection makes quite a number of unauthorized duplication and dissemination subject to infringing liability, thus, to a certain degree suffocates free flow of information and knowledge. Users can no longer enjoy privileges that were guaranteed under the traditional copyright system.

Facing the digital network challenges, the international copyright conventions and national copyright laws in many jurisdictions have expanded the subject matters to computer programs and database. Although developing countries preferred granting other types of protection such as applied art protection or *sui generis* right to computer programs, computer programs were finally approved as copyrighted works under major intellectual property or copyright conventions such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the World Intellectual Property Organization (WIPO) Copyright Treaty due to the insistence of some developed countries. Copyright protection is granted to computer programs whatever may be the mode or form of their expressions. In addition, copyright protection is extended to database, that is, compilations of data or other material in any form, as long as the selection or the arrangement constitutes creation. Thus, non-copyrightable data or materials are subject to copyright protection if they constitute parts of the database.

Similar to the expansion of subject matters, the scope of copyright owners' exclusive rights is also enlarged. Two fundamental rights, the reproduction right and the distribution right, were revised by international copyright conventions to cover more situations. Two new rights, the rental right and the right of making available, were added to the list of exclusive rights. The reproduction right was adjusted by the explanation of copyright conventions to cover temporary reproductions caused by technical or automatic acts. The distribution right was enlarged by the WIPO Internet Treaties to cover all copyrighted works instead of the cinematographic work. The rental right applies to certain categories of works, namely, cinematographic works, computer programs and phonograms. The right of making available grants copyright owners the exclusive privilege to control such a way of dissemination that members of the public may access the works from a place and at a time individually chosen by them.¹⁷ Such kind of right does not only cover simultaneous communication to the public, but also contains subsequent access to the work offered through the internet.

The WIPO Internet Treaties for the first time granted protection to technological measures which are used by copyright owners to control access and copying of protected works. Under the treaties and domestic laws of some jurisdictions which implemented the international obligations, circumvention of

¹⁵ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1.

¹⁶ Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *supra* note 1. *Also see* Copyright Law of the United States, ss 111(c), 114(d)(1)-(2), 115, and 118; Copyright Law of the People's Republic of China (2010 Amendment), Art 23.

¹⁷ WIPO Copyright Treaty, Art 8; WIPO Performances and Phonograms Treaty, Arts 10 and 14.

access-control technological measures is prohibited. In addition, prohibition also covers acts of producing and distributing technologies and devices that facilitate circumvention of both access-control and copy-control technological measures. These principles of anti-circumvention seriously narrow down users' rights which were not previously constrained for accessing to the copyrighted works. Although there are several kinds of exceptions under the anti-circumvention rule, users cannot guarantee their previous privileges such as fair use or fair dealing, because they can neither firstly access to the work with their free will nor conduct circumvention with the aid of circumvention devices to fulfill non-infringing uses. Furthermore, adoption of technological measures may impede the access to non-copyrightable material which is combined with copyrighted works.

To enforce the right of making available and control online piracy, many jurisdictions intended to look into indirect copyright infringing liability of technological intermediaries such as the internet service providers. Under the development of case law, internet service providers will be held responsible for contributory, vicarious or authorization liability for their internet subscribers' copyright infringement, if they should know or be aware of the primary infringement, have made material contribution, obtained direct financial benefit, have the right and ability to supervise or control the subscribers' activity, or authorize subscribers' activity that commits copyright infringement. Some of these factors have been imported into statutes in civil law jurisdictions such as China. In order to be immunized from those indirect infringing liability, internet service providers must follow certain statutory requirements such as the notice and takedown procedure which demands internet service providers to immediately take down the alleged infringing material on their systems upon receiving proper notifications from copyright owners. Although counter balance regime is also established to protect subscribers' interests, it cannot completely eliminate the negative effect brought by the immediate takedown requirement which denies subscribers' self-defense opportunity and places internet service providers into a dilemma between complying with the statutory procedure to be immunized from liability but losing customers and protecting customers' interests but losing the immunization opportunity under the safe harbor. In addition, release of subscribers' information to copyright owners upon request arouses the thorny problem of privacy protection.

As aforementioned, the copyright system has embodied limitations which are used to balance users' interests of accessing to information and promote the progress of culture and useful arts. The United States established the fair use doctrine based on a balancing test which provides four guiding factors, namely, the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect upon the potential market, for judges to make decisions. Whether a particular unauthorized use of the copyrighted work will be decided as fair or not depends on how these factors shall be balanced and weighed. Commonwealth jurisdictions such as the United Kingdom and Hong Kong adopted fair dealing containing a list of specific situations under which uses are deemed fair. Similar to fair dealing, Chinese copyright law also includes a list of specific exceptions, but in a much simpler way. No matter what kind of legislative models, limitations are subject to a "three-step test" in the international conventions under which limitations shall be in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.¹⁸ Such test in turn constrains the limitations to copyright owners' exclusive rights. The adoption of technological measures and anti-circumvention rule as well as the springing-up of a large number of user-generated contents and fan fictions further aroused problems regarding current copyright limitations. On the one hand, the list of specific exceptions cannot cover all possible situations in the era when digital network technologies develop quickly. On the other hand, the seemingly flexible fair use doctrine is questioned about its uncertainty, as no guidance is provided as to how these multi-factors shall be balanced and weighed. Without further interpretation, many uses fostered by digital technology and remix culture are in the grey zone where fairness and justification can be hardly determined.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, Art 9(2); WIPO Copyright Treaty, Art 10; the TRIPS Agreement, Art 13.

3. Should Developing Countries Imitate or Innovate: Digital Copyright Reform of China

Unlike the developed countries which led the digital copyright reform due to the pushing of the balancing game among different stakeholders, the developing countries followed to adjust their copyright systems mainly through legal transplant. The developing countries on the one hand face the external force to fulfill obligations of international conventions and treaties which they have joined in, and on the other hand have the internal demand to borrow advanced and effective legislations of the developed areas to accelerate the reform process as well as save costs. China is one of these developing countries which endeavored to conduct both externally-dictated transplant and internally cost-saving transplant.¹⁹

China became a member of the Berne Convention and the Universal Copyright Convention in 1992 shortly after joining the WIPO and acceded to the WTO and the TRIPS Agreement in 2001. China later joined the WIPO Internet Treaties, namely, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, in 2007. Before filing application to join these international organizations and copyright conventions, China actively undertook preparations through enacting new laws and regulations to make domestic copyright protection system comply with the international standards. The Copyright Law of China was promulgated in 1990 and entered into force in 1991 with the first amendment in 2000 and second amendment in 2010. In the process of digital copyright reform, China issued a series of regulations among which the most important one is the Regulation on the Protection of the Right to Network Dissemination of Information released in 2006 to incorporate basic concepts and norms of the WIPO Internet Treaties.

Following the international trend of copyright reform under the digital network environment, the Copyright Law of China expands copyright protection to the new subject matters, computer software and database as long as the software and the compilation of data are original and the software has already been fixed in physical objects. In addition, the Copyright Law and relevant regulations also expansively interpret existing exclusive rights and increase new categories of rights. The reproduction right was explained to cover digitalization of works or sound or video recordings. An independent rental right was added to apply to three kinds of works, namely, cinematographic works, other audiovisual works and computer software. The right of communication to the public in the WIPO Internet Treaties was renamed as the right to network dissemination of information under the Chinese Copyright Law and the Regulation on the Protection of the Right to Network Dissemination of Information. Furthermore, in the Regulation which particularly deals with the copyright issue in the digital network era, legal protection of technological measures and rights management information as well as safe harbor of internet service providers' liability have been incorporated similar to the corresponding sections in the Copyright Act of the United States. These changes and reforms reflect China's unceasing efforts of updating its copyright legal system to conform to the international norms and catching up with the socio-economically developed counterparts. However, the complete copying of the legislative model in other jurisdictions also imports the negative effects that harm the protection of users' rights, the free flow of information and the promotion of culture and useful arts.

Legal transplant is a double-edged sword. The less developed recipient countries can save both time and resources through absorbing legislative results of socioeconomically developed countries based on an appropriate and well-selected legal transplant. By introducing principles and norms of developed trading partners into the domestic legal systems, developing countries can better face the pressure imposed continuously by the economic powers to heighten intellectual property protection standards and fulfill international conventional obligations. However, hasty legal transplant lack of careful analysis and evaluation of laws in the source countries will import disadvantages of the foreign systems at the same time when beneficial factors are borrowed. Even worse, direct legal transplant without appropriate localization may make the advanced legal system inadaptable to the national socioeconomic situations of the recipient countries.

With the growth of knowledge economy and the involvement in economic globalization, developing countries such as China cannot quicken the national socioeconomic development without adopting intellectual property protection system. Lack of suitable intellectual property laws and policies, these

¹⁹ WANG Chenguang, presentation "Function of Legal Transplant in Chinese Social Transition and Legal Development" at *2011 Annual General Conference of the European China Law Studies Association* (Paris France, 28-29 September 2011).

newly emerging economic entities cannot efficiently convert intangible intellectual outputs into commercial products and encourage the rise of knowledge-economic industries. Nevertheless, experience in the developing economies has shown that unbalanced over-protection of intellectual property rights would impede introduction of technology and suffocate future innovation. In the area of copyright law, inappropriate high-protection will hinder dissemination of knowledge and culture and badly influence the future creation. It will seriously damage the cultural construction of those less-developed countries which have poor resources. Therefore, when developing countries intend to reform their legal systems through legal transplant, they should try to achieve a balance-oriented system by carefully considering what kind of laws shall be deemed as borrowing sources; how much and to what degree those foreign laws shall be borrowed; and whether there are other appropriate or supplementary options beneficial to the reform.

When updating and adjusting the copyright protection system under the digital network environment, China mainly borrowed the Digital Millennium Copyright Act (DMCA) of the United States. The lawmaking of the United States copyright legislations has always been the compromise of different stakeholders after intensive arguments. The DMCA was “the fruit of intensive lobbying by a wide range of interest groups of copyright owners, on the one hand, and, particularly, users, on the other”.²⁰ Absence of the multi-parties’ negotiation process and customs in China, it is difficult to tell how wise China incorporates a large portion of the DMCA and how effective the legislative model suits China’s national situations. Furthermore, the DMCA was enacted in late 1990s when anticipation of the development of digital network technologies was limited. Almost ten years later, China nearly completely transplanted the principal norms regarding the internet service provider liability and anti-circumvention of technological measures in the DMCA into its Regulation on the Protection of Right to Network Dissemination of Information. If borrowing of foreign laws is inevitable, China could think about modeling on other jurisdictions whose laws are more recent and reasonable, such Australia, Hong Kong, Japan or European continental countries.

The anti-circumvention rule in Chinese Regulation prohibits circumvention of both access and copy control technological measures and trafficking of devices that facilitate such circumvention. Moreover, specific exceptions to the circumvention and trafficking of devices are much narrower than relevant provisions in the DMCA. Under the anti-circumvention rule, access to information is seriously restricted. In the case of safe harbor rule for internet service provider liability, the Regulation absorbs the notice and takedown requirement as in the DMCA which demands internet service providers’ immediate removal of the alleged infringing material upon receiving copyright owners’ notifications. Copyright owners may arbitrarily send notifications without delicate investigation and may even outsource the task of sending notifications to third parties who depend on automatic process but earn benefits based on the number of notifications already sent. Following false notifications will make the internet service provider wrongfully removes subscribers’ material, thus, loses customers. By the contrast, the internet service provider cannot carefully investigate its subscribers’ activity because the knowledge of suspected infringing activity may result in the loss of safe harbor protection. Although the Regulation in China also embodies the counter-notification procedure which allows recovery of the material which has been wrongfully taken down, it cannot totally compensate the lost caused by immediate takedown. In addition, the internet service providers are more likely to be prone to copyright owners to secure their statutory immunity. Hence, correction mechanisms need to be introduced to restore the balance between copyright protection and information access and dissemination through adjusting and re-reforming current legal systems.

The next concern becomes whether appropriate options and supplementary mechanisms can be introduced to achieve the digital copyright law reform. Firstly, neither the Copyright Law nor other regulations in China expand the copyright limitations and exceptions. China does not introduce a broad fair use doctrine which contains several guiding factors for courts to make balancing tests case by case. Instead, the Copyright Law embodies a short list of exceptions ranging from private study, teaching and research, and report of current events to preservation of works in non-profit organizations and translation of works into minority languages or Braille. Although the statute attempts to include all occasions that can be anticipated so far, the short list of exemptions can hardly contain all possible uses that may be deemed fair especially in the era when ways of creation change rapidly because of the development of digital technologies. The exclusive list of exceptions ignores some emerging hot issues generated from remix culture such as the treatment of user-generated contents and fan fictions. The narrow limitations in

²⁰ Jane C. GINSBURG, “Copyright Legislation for the ‘Digital Millennium’” (1999) 23 *Columbia Journal of Law and the Arts* 137 at 137.

the Chinese copyright system can no longer balance users' interests against copyright owners' requests for strong protection, constraining many harmless and reasonable uses and leaving newly emerging issues in the grey zone. The expansion of copyright limitations by introducing flexible fair use doctrine and setting up non-exclusive detailed exceptions would broaden the scope of permissible uses, correctly treat the remix works, cultivate the creative atmosphere, and attract investment in the area of digital network technologies and industries.

Besides appropriate options in the copyright legal system, supplementary mechanisms outside the intellectual property regime should also be taken into consideration to assist public access and free flow of information. One feasible supplementary mechanism is the open access project based on more flexible licensing scheme. Examples include Open Source Software, the Creative Commons, the Open Audio and Publication License, and other open content initiatives. As one of the popular open access projects, the Creative Commons was formally launched in Mainland China in March 2006 under the lead of Renmin University of China Law School in response to the copyright reform. Under the Creative Commons licensing scheme, creators can select any of the six kinds of licenses to apply to their works, reserving part of the exclusive rights such as attribution and waiving other rights for wider distribution of the works. Users should make use of the works in compliance with the license terms. Although the Creative Commons licenses do not have sufficient enforceability, such flexible licensing scheme based on contract law would facilitate flow of information, spur creative ideas and promote the growth of small or medium creative enterprises. The introduction of such flexible licensing scheme could induce policymakers to rethink about the optional systematic design that may help restore the balance of interest between right holders and users by guaranteeing copyright protection on the one hand and broadening public access to works on the other hand. Policymakers and educational institutes in China should further consider adopting more open access initiatives based on the Creative Commons licensing scheme, such as open courseware of universities as done by the Massachusetts Institute of Technology and open digital libraries.

The legal transplant is not only a imitative process that one country follows another more developed country, but also an opportunity that the recipient country could explore its own way of development with new experiments and improvements. As Professor Peter Yu commented, the legal transplant provides a fine opportunity for the recipient society to become a donor in its turn.²¹ The developing countries can follow two ways to develop their intellectual property and copyright protection systems. One way is to stick to the time-tested solutions led by the developed counterparts with relatively greater exceptions and limitations recognized in the international legal framework.²² The other way is to embark on "a more innovative and even experimental path", addressing and resolving problems that developed countries have found difficult.²³ Although the first way may reduce the inner debate and costs of recipient countries, it will also bring problems that source countries failed to resolve. Furthermore, pure imitation without any localization and innovation will reduce the problem-solving capability and governance skills of the developing countries.²⁴ Stepping on the second path will inspire the developing countries to better adjust foreign laws adaptable to their domestic situations and initiate legal reform that can better resolve the new problems.

India is a developing country with rapidly improving digital network technologies, and has launched a new series of copyright reforms by drafting their Copyright (Amendment) Bills of 2010 and 2012 in response to digital network challenges.²⁵ The Copyright (Amendment) Act 2012 came into force on 21st June, 2012, which made amendments to the existing provisions of the Copyright Act 1957.²⁶ Correspondingly, the Copyright Rules 2013, the implementation regulations for the Copyright Act, was

²¹ Peter K. YU, "Digital Copyright Reform and Legal Transplants in Hong Kong" (2010) 48 *University of Louisville Law Review* 694.

²² Jerome H. REICHMAN, "Intellectual Property in the Twenty-first Century: Will the Developing Countries Lead or Follow?" (2009) 64 *Houston Law Review* 1115.

²³ *Ibid.*, at 1126.

²⁴ Jerome H. REICHMAN, *supra* note 22.

²⁵ Michael GEIST, "India Introduces Major Copyright Reform Bill" (22 April 2010), online: <<http://www.michaelgeist.ca/content/view/4974/196/>>. Abhai PANDEY, "Development in India IP Law: The Copyright (Amendment) Act 2012" (22 January 2013), online: <<http://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-20>>.

²⁶ "Copyright Rules 2013" (19 March 2013), online: <<http://www.lawyersclubindia.com/news/Copyright-Rules-2013-14404.asp>>.

introduced to replace the Copyright Rules 1958 on 14 March 2013.²⁷ In the lawmaking process, India has given much attention to renewing its copyright protection system to comply with the WIPO Internet Treaties on the one hand, and guarantee revisions that would be applicable to the local context, economy and culture on the other hand.²⁸ The amendments put certain endeavours on maintaining balance between proprietary control and public access to information. For example, in the case of fair dealing, the amendments were expanded to cover private and personal uses with regard to all kinds of copyrighted works.²⁹ Fair dealing is utilized to assist establishing non-commercial digital library by covering the storing of a work by electronic means by a non-commercial public library for preservation if the library already possesses a non-digital copy of the work.³⁰ The fair dealing and compulsory license were particularly reinforced to guarantee the benefit for the disabled. The new clause (zb) was inserted into Section 52 (1) to facilitate the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format for the disabled people's private or personal use, research and use for educational purpose.³¹ In cases where fair dealing does not apply, compulsory license was provided by the amendments for the access to and use of copyrighted works by the disabled. The Copyright Board should dispose the compulsory license application from people working for the benefit of the disabled within two months from the date of receipt of the application.³² If the Copyright Board approves the compulsory license after inquiry about the credentials of the applicant, the compulsory license should be granted with specification of the means and formats of publication, the period during which the compulsory license may be exercised, the number of copies that may be issued and the royalty.³³ In the case of anti-circumvention of technological measures, the updated provisions contain two main user-favored features that cannot be found in other jurisdictions. First, the trafficking of technologies, devices or services that facilitate circumvention of technological measures is not prohibited by law.³⁴ Secondly, the law protects the person who facilitates circumvention of technological measures by another person, as long as the former maintains "a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated".³⁵ These reforms make Indian copyright protection on technological measures less draconian and more balanced and fair. In addition, the amendments of India, different from other jurisdictions, clearly addressed the problem of relinquishing copyright. The copyright owners can relinquish copyright either by notifying the Registrar of Copyrights or by way of public notice.³⁶ The facilitation of relinquishment of copyright puts digital commons projects, such as the Creative Commons, on a more stable footing in India.

It is time for China to rethink and readjust its copyright system so as to restore a robust public domain where existing information and data can be used to produce future intellectual assets. The major concern of policymakers in the process of reform should be what will be the digital future of China and how such future will be shaped. This concern does not only function in China, but also benefits other jurisdictions which aim to change their existing copyright systems toward a more balanced orientation satisfying their particular social demand. Whether the system shall be adjusted to protect more interests of copyright owners or to reflect more considerations on groups of consumers and future creators depends on policymakers' social values and conceptions. Policymakers should bear the idea that the purpose of establishing copyright system does not merely focus on stimulating creative incentives by granting authors exclusive proprietary rights, but also concentrate on serving social welfare and progress by promoting access and dissemination of copyrighted works and encouraging future creations based on previous material.

The copyright reform should avoid overprotecting proprietary rights at expense of the public domain so that future creation and innovation will not be hampered and the flourish of creative and technological industries will not be restricted. By plentifully exploiting flexibilities permitted under the international

²⁷ *Ibid.*

²⁸ "The Copyright (Amendment) Act 2012 of India", online: <http://copyright.gov.in/Documents/CRACT_AMNDMNT_2012.pdf> (visited 22 April 2013).

²⁹ Michael GEIST, *supra* note 25.

³⁰ The Copyright (Amendment) Act 2012 of India, Para 32(iii), s 52(1)(n).

³¹ The Copyright (Amendment) Act 2012 of India, Para 32(vii), s 52(1)(2b).

³² The Copyright (Amendment) Act 2012 of India, Para 18, s 31B.

³³ *Ibid.*

³⁴ Spicy IP, "DRMs in the Draft Copyright Amendments" (29 March 2010), online: <<http://spicyipindia.blogspot.com/2010/03/drms-in-draft-copyright-amendments.html>>.

³⁵ The Copyright (Amendment) Act 2012 of India, Para 37, s 65A(2)(a).

³⁶ The Copyright (Amendment) Act 2012 of India, Para 11, s 21.

conventional framework, China could expand limitations and exceptions of copyright law with full consideration of information disseminators' and public users' interests in general, and with appropriate incorporation of safe harbor for internet service providers' liability and circumventors of technological measures in particular. The limitations and exceptions should be reasonably used to foster creation, research, education and cultivation of national quality. Access to knowledge and educational material should not be overridden simply by digital locks or contracts imposed by right holders. The design of copyright system requires achievement of social justice and not the mere maximization of protection on commoditization interests.

4. Concluding Remarks: Social Justice in Copyright

Social justice includes both substantive and procedural equality. It includes "not only access to, but also inclusion in, the social, cultural, and economic life of the country. Indeed, it extends beyond inclusion in social, cultural, and economic life to full participation in and ability to affect the direction of civil society in all its manifestations".³⁷ Social justice should be part of the goal that intellectual property law intends to achieve. In the spectrum of copyright, social justice is realized when people do not only have the ability to equally access and enjoy the works created by others, but also possess the equal opportunity to participate in the exploitation and creation based upon former works. The continuous subsequent creations which benefit from pre-existing works and information form a benign chain which perpetuates the production of intellectual outputs, advances cultivation of cultural atmosphere and finally promotes social progress.

The emergence and rapid development of digital network technology quickens the recreation chain, as the advancement of technology simplifies the reproduction and dissemination of works, provides mediocrity the capability to modify and adapt works, enhances the compactness of works in digital form, and strengthens people's ability of linking and searching information through the internet. These special features unprecedentedly enable ordinary users' involvement into the creation not only based on their original idea but also through making derivation and remixing of pre-existing copyrighted material. The continuous recreations may further promote the formation of creative groups such as fan fiction producers and spur the spring-up of creative industries. The realization of such continuous recreations relies on a reasonable copyright legal system which grants appropriate copyright protection to authors and guarantees adequate copyright limitations so that users can plentifully access to and exploit the copyrighted works.

Overprotection of proprietary rights in the digital network age will intensify the relationship among copyright holders, information disseminators and end users, satisfying requests of strong copyright protection from powerful copyright industries by sacrificing interests of technology developers and consumers. Facing the potential copyright infringing liability, technology intermediaries may fear to develop new technologies facilitating information dissemination and adaptation, while consumers may no longer dare to make full use of copyrighted works absent right holder's clear authorization. Interests thus become unbalanced among different stakeholders. Furthermore, overprotection will amplify the digital divide which already exists between the developed countries and the developing countries, as well as between economic-developed areas and rural areas. While residents in the more developed areas enjoy greater access to plentiful store of information, locals in less developed regions cannot obtain such benefits due to the lack of access to digital technology and the skill to effectively use the technology.³⁸ To address the interest conflicts among different stakeholders and the growing digital divide, copyright system in the digital network age should be designed to better reflect the social utility and social justice. Copyright law does not only cultivate creative incentive, but more importantly it promotes social advancement.

The Outline of the National Intellectual Property Strategy issued by Chinese government in 2008 settles the goal of developing indigenous or self-driven intellectual property,³⁹ and in the case of

³⁷ Lateef MTIMA and Steven D. JAMAR, "Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information" (2010/11) 55 *New York Law School Law Review* 77 at 83.

³⁸ *Ibid.*

³⁹ State Council of People's Republic of China, "Outline of the National Intellectual Property Strategy", online: <http://english.gov.cn/2008-06/21/content_1023471.htm> (visited 10 April 2013).

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copyright, developing national copyrighted works. The achievement of such goal is based on the law reform that well reflects the interests among creators, industries, and consumers as well as the domestic needs both at present and in the future. The development of communication technology and encouragement of public participation is important to advance national and indigenous creations. The establishment of a balance-oriented copyright system through expanding copyright limitations and exceptions, setting up safe harbor for technology developers, and adopting open access initiatives may help achieve the national strategic goal and the social function of copyright law and policies.

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