
Online Re-creation Culture in the 21st Century:

the Reconciliation between Copyright Holders,

Online Re-creators and the Public Interest

By

Khanuengnit Khaosaeng

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Abstract

In the online culture of the 21st century, people worldwide re-create and disseminate works by using existing works. Facilitated by the Internet and digital technologies, “online re-creations” have become much more common, more widespread, and more sophisticated than ever before. Online re-creations are new works created based on pre-existing copyright protected materials: they are for instance fan fiction, parody, mash-up, fanvid, machinima and virtual world. Due to the difficulties to obtain authorisation from right owners of the original works, online re-creations are potentially infringing the rights of copyright holders. Infringements are usually assumed to occur despite the uncertain legal status and the various nature of online re-creation. Nevertheless copyright and online re-creations are both essential. Re-creations and their online culture are beneficial to individuals and the society at large due to the three principles i.e. creativity, freedom of speech and the public interest. This thesis finds that copyright law that should encourage creative expressions has restrained and discouraged creative re-creations. Besides, the existing copyright exceptions are insufficient and ineffective to safeguard the rights of the re-creators and the interest of the public in accessing and reworking from copyright protected works. It is therefore vital to reconcile the conflicting interests: the exclusive rights of the copyright owners, the rights of re-creators and the interest of the public. To achieve a fair and reasonable balance between the conflicting rights and interests, this thesis proposes that everyone should have a right to use existing works in making creative re-use of such works without infringing copyright. The “right to re-create” will be granted to the person whose re-creation meets all specified criteria.

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Table of Abbreviations

Acronyms

CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EU	European Union
IPO	Intellectual Property Office
UGC	User-Generated Content
UK	United Kingdom
US	United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Journals/Publishers

Alb. L.J. Sci. & Tech.	Albany Law Journal of Science and Technology
CUP	Cambridge University Press
E.I.P.R.	European Intellectual Property Review
Ent. L. R.	Entertainment Law Review
Fla. St. U. L. Rev.	Florida State University Law Review
Ford Intell Prop Media & Ent L J	Fordham Intellectual Property, Media & Entertainment Law Journal
Harv. L. Rev.	Harvard Law Review
HRQ	Human Rights Quarterly
I.P.J.	Intellectual Property Journal
IIC	International Review of Intellectual Property and Competition Law
Intell Prop	Intellectual Property
L. J.	Law Journal
L. Rev.	Law Review

Law & Contemp. Prob.	Law and Contemporary Problems
N.C.L. Rev.	North Carolina Law Review
OUP	Oxford University Press
Stan. L. Rev.	Stanford Law Review
Theoretical Inq. L.	The Albany Law Journal of Science and Technology
U. III. L. Rev.	University of Illinois Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
UOLTJ	University of Ottawa Law and Technology Journal
Vand. J. Ent. & Tech. L.	Vanderbilt Journal of Entertainment and Technology Law

Legislations

Berne Convention Works	Berne Convention for the Protection of Literary and Artistic Works
CDPA	Copyright, Design and Patent Act
DMCA	Digital Millennium Copyright Act
ECHR	European Convention on Human Rights
E-commerce Directive	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
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
InfoSoc Directive	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
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
USC	United States Code
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty

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Introduction

“Law may function either to hold back given social changes or to accelerate them, depending on the interests that are effectively brought to bear on the legal system.”¹

Nowadays, a large number of people all over the world particularly the young generations are engaging in online activities of the 21st century by making, sharing and viewing works created based on pre-existing copyright protected materials such as books, movies, comics, anime and television series. Those activities include writing fan fictions, making fan films, parody works and mash-ups and creating virtual worlds.

This thesis studies the online phenomenon in particular regard to copyright law. Under the current law, these subsequent works can be considered copyright infringements since they incorporate some elements of copyright works without authorisation. Nevertheless, many of them involve new creativity and convey new messages different from the underlying protected work. Being a potential copyright infringement affects the re-users’ rights, particularly the human rights to freedom of expression and to participate in cultural life. It also interrupts the process of creativity and deters general people from benefiting from the online creative culture; as a result, it affects the public interest. Therefore, copyright law needs to be re-shaped to allow reasonable space for re-creation by balancing the rights of re-creators, the interests of copyright owners, and the public interest.

¹ F. James Davis, et al, *Society and the law: new meanings for an old profession* (Greenwood Press 1978) 89.

Objective and Scope of Research

This thesis studies the global culture of re-creation in the digital age particularly subsequent works involving copyright protected materials rather than the content that internet users purely generated of their own. It focuses on potential copyright infringement of online re-creators who use protected works in their re-creations without authorisation. Copyright liability of intermediaries such as online service providers or platform providers is beyond the scope of this research.

The thesis describes the nature of online re-creation and criticises its legal status and the effect of copyright law on creative re-uses of existing works from the perspectives of the law in both civil law and common law countries primarily the US, UK, Germany and Canada. It provides a critical analysis on the benefits of copyright and online re-creations and on the correlation between the conflicting rights and interests of the three parties, namely, copyright holder of original work, re-creator of subsequent work, and the general public. Ultimately, this thesis aims to propose an approach to achieve a fair and reasonable balance between the conflicting rights and interests of the stakeholders concerning copyright and the online culture of re-creations by analysing the existing pertinent copyright exceptions in the primary jurisdictions and taking into account the developing social norm. The approach forms a guidance to amend copyright law for any jurisdiction to adopt and adapt according to their national laws and policies.

Methodology and Thesis Outline

This research adopts a doctrinal methodology drawing mainly from legal literature, instruments and judicial decisions on international, regional and national copyright and human rights and from the literature in the fields of psychology, philosophy, anthropology and sociology as relevant to the research. As a support to the doctrinal analyses, the empirical research methodology was selected to discover the perspectives of the stakeholders i.e. original authors and online re-creators towards the online practice of re-creation. The research methodology of this thesis is delineated further below with the structure of the work.

The thesis is divided into 6 chapters.

The first chapter describes the phenomenon of the online culture of re-creations and the nature and definition of the term “online re-creations”. Online re-creations are also categorised and exemplified in this chapter. Chapter 2 then studies copyright issues concerning the online practice of re-creation particularly potential copyright infringements, the difficulties of obtaining permission, the uncertainties of the application of the existing copyright rules, and the effects of prompt copyright enforcements. While chapter 1 substantially involves analysing copyright literature and empirical observation of the nature of re-creations on the internet, the methodology of the research in chapter 2 mainly encompasses literature reviews, judicial decisions, and international, regional, and national copyright legislation including the Berne Convention, the TRIPS Agreement, and the EU InfoSoc Directive.

Since re-creations are potentially infringing copyright, chapter 3 aims to investigate whether and to what extent online re-creations are harmful or beneficial to the society. It also explores the correlation between copyright and online re-creations in regard to the following three principles: creativity, freedom of speech, and the public interest. The first part of this chapter discusses the nature of human creativity and the relation between copyright, creativity and online re-creation which involve a substantial research on the studies of creativity in different disciplines including sociology, psychology, anthropology, science and philosophy. The second part of chapter 3 focuses on the doctrine of freedom of speech. The primary source of research is the human rights literature, legislation and judicial decisions. The international instruments and regional conventions are the UDHR and the ICCPR, and ECHR. Relevant national instruments and constitutions such as the UK Human Rights Act 1998, the First Amendment to the US Constitution, and the French Constitution of 1958 are also studied. In the final part of chapter 3, this thesis critically analyses the correlation between creativity, freedom of speech and the general interests of the public concerning copyright and the re-creation culture specifically in the age of the internet.

Regarding the legal attempt to achieve a balance between the conflicting interests analysed in chapter 3, the thesis criticises the existing copyright exceptions which are pertinent to online re-creations in chapter 4. It refers to the copyright law in both civil and common law systems particularly the fair use doctrine of the US law, the UK fair dealing, free use doctrine in Germany, UGC exceptions of Canada and the parody exceptions in the EU and US. The relevant case law, legal provisions and important literatures are critically analysed.

To make copyright law more reasonable and well-balanced with other rights, it is important to understand the social perception concerning the online activities of re-creations. Chapter 5 therefore evaluates the perspectives of the stakeholders towards online re-creations from an original qualitative research conducted for the purpose of this thesis. This chapter analyses the empirical data collected from the interviews undertaken between 2014 and 2015. The analysis of the empirical research findings contributes to the support of the proposal in chapter 6.

The thesis is based on the law and materials available as of 26 August 2016.

CHAPTER 1 - Emergence of Online Re-creation Culture

1.1 The Change of Technology, Society and Culture

The human ability to make and remake creative works is nothing new.¹⁵ However, using existing materials to make new works is now significantly endorsed by the digital technologies. With marginal costs, people are enabled to create, disseminate, access and re-use various forms of works, ranging from written fictions, audio and/or visual art works to virtual environments; as a result, become more active writers and publishers of written stories or creators and broadcasters of music and videos without depending on printing press or recording companies. Various types of content produced and distributed by internet users are often referred to as “user-generated content” or “UGC”.

In this century, the digital technologies have enabled the making of UGC which is a highly significant part of the online world. A notable platform to investigate human behaviour in the digital age is *YouTube*¹⁶, a video-sharing website launched in May 2005.¹⁷ It has since become the dominant platform for online videos uploaded by users worldwide.¹⁸ Content on the website is extremely varied: it encompasses official trailers, music videos, amateur video clips and video blogs. In 2007, over half of *YouTube* videos were user-created.¹⁹ *YouTube* proclaims that it now has over a billion users which amount to one-third of all internet users.²⁰

¹⁵ See chapter 3.1 for an analysis on human creativity.

¹⁶ YouTube <www.youtube.com>.

¹⁷ Since 2005, non-branded video content produced by non-traditional media dominate the online content-sharing platforms. (Peggy Valcke and Marieke Lenaerts, ‘Who’s author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers’ (2010) 24 Int’l Rev. L. Computers & Tech. 119).

¹⁸ *YouTube* is ranked the most popular Web 2.0 websites with estimated unique monthly visitors of 1,000,000,000 (as of 29 June 2016) <<http://www.ebizmba.com/articles/web-2.0-websites>>.

¹⁹ According to a survey in 2007, over half the videos uploaded on *YouTube* (or 2,177 videos) were coded as user-created. Just over 60 per cent of *YouTube* video uploaders are users who were outside of the mainstream, broadcast, or established media. (Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Polity 2009)).

²⁰ YouTube, ‘Statistics’ (*YouTube*) <<https://www.youtube.com/yt/press/statistics.html>> accessed 29 June 2016; As of 2015, the number of worldwide internet users was 3.17 billion increased from 2.94 billion in the

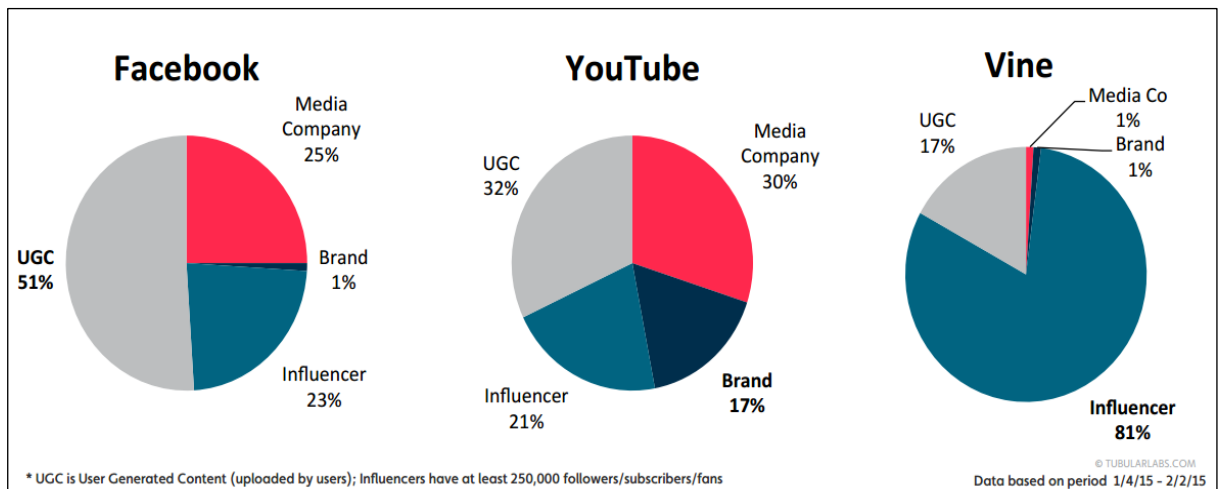


Figure 1 - Who uploaded the Top 100 videos on three platforms: *Facebook, YouTube, and Vine* (between January and February 2015)?²¹

The global trend that user-generated content proliferates and dominates Web 2.0 is continuing. The charts in Figure 1 demonstrate that, in 2015, the number of UGC²² plus videos generated by influencers (platform users who have at least 250,000 followers/subscribers/ or fans) makes up more than 50% of the top videos on *YouTube*; approximately 74% on the most popular social media platform, *Facebook*²³; and over 90% of the top 100 videos on *Vine*.

UGC including remixes has become a pervasive part of people’s lives especially young generations.²⁴ The term “remix” has been used to describe a style of mixing and mashing up prior art forms to create new ones; this can be in various forms ranging from

previous year. See also, Statista, ‘Number of internet users worldwide from 2000 to 2015 (in millions)’ <<http://www.statista.com/statistics/273018/number-of-internet-users-worldwide/>> accessed 29 June 2016.

²¹ Mark Robertson, ‘Tubular Quick Guide to YouTube, Facebook video & Vine’ (*Tubular Labs*, 20 February 2015) <<https://tubularlabs.com/thought-leadership/multi-platform-video-guide/>> accessed 29 June 2016.

²² UGC is identified by Tubular Labs as content uploaded by general users.

²³ *Facebook* is ranked the first for the ‘Top 15 Most Popular Social Networking Sites’ as of 29 June 2016 <<http://www.ebizmba.com/articles/social-networking-websites/>>.

²⁴ As of November 2014, 53.2 % of global internet users were between 15-34 years old. Among all the internet users worldwide, users between 15 and 24 years old amount to 26.5 percent. (Statista, ‘Distribution of internet users worldwide as of November 2014, by age group’ <<http://www.statista.com/statistics/272365/age-distribution-of-internet-users-worldwide/>> accessed 29 June 2016.

cut-ups of literary works or pictures (collage) to rearrangement of media.²⁵ There are plenty of online platforms which enable people to engage in social communities and cultural remixes. *YouTube*, for example, is not only a platform to create and disseminate content generated by users particularly in the form of video²⁶, it also provides a forum for people all over the world to connect, inform, discuss and inspire others. People communicate with one another simply by creating, viewing, sharing and commenting on the distributed works. The practice of remix or creative appropriation²⁷ as a way of communication and participation is not limited to audio-visual forms but encompasses all forms of creation. Fan writers compose fictions based on their favourite popular works. Online fan fictions are disseminated mainly for like-minded people as an exchange of views and expression of devotion in a fan community. *YouTube* content and written fan fiction can also be regarded as individuals' speech.²⁸

The online global culture of UGC involves peer-to-peer and collaborative production. It is a co-produced culture in two ways: first, through vertical distribution of cultural products from a centre to a number of users; and second, through horizontal and symmetrical communicative and interactive exchanges between peers virtually unlimited in time and space. Digitally networked environment of decentralised creativity and communication contributes to peer production²⁹. Such expression and interaction can be

²⁵ See, e.g., Damien O'Brien and Brian Fitzgerald, 'Mashups, Remixes and Copyright law' (2006) 9(2) *Internet Law Bulletin* 17; Lawrence Lessig, *Remix* (The Penguin Press 2008); Steven Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2009) 157 U. Pa. L. Rev. 1869; Carmit Soliman, 'Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing' (2012) 22 *Alb. L.J. Sci. & Tech.* 279.

²⁶ Aufderheide and Jaszi note that online video as creative practice in the convergence and participatory culture contributes to business opportunity and political importance. (Patricia Aufderheide and Peter Jaszi, 'Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video' (2010) 6 *Journal of Law and Policy for the Information Society* 13).

²⁷ Netanel discusses creative appropriation culture in his book, Neil Netanel, *Copyright's Paradox* (Oxford University Press 2008).

²⁸ For an analysis on free expression and digital speech, see chapter 3.2.

²⁹ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006); Steven Hetcher, 'Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production' (2009) 11 *Vand. J. Ent. & Tech. L.* 963; According to Bankler:

"Commons-based peer production, [...], relies on decentralized information gathering and exchange to reduce the uncertainty of participants. It has particular advantages as an information process for identifying and allocating human creativity available to work on information and cultural resources. It depends on very large aggregations of individuals

categorised as a form of a participatory culture³⁰ which can be described as “a culture with relatively low barriers to artistic expression and civic engagement, strong support for creating and sharing creations, and some type of informal mentorship whereby experienced participants pass along knowledge to novices.”³¹ In the modern world, people are endorsed to actively participate and interact in the online communities of their choice. Online activities and interactivities have now become a part of the digital culture.

The digital culture of this era significantly entails reworking of existing materials that are usually under copyright protection. Such practice forms the subject matter of this thesis. The relevant terms and definitions as well as the nature and categories of the subject are delineated below.

1.2 Online Re-creations

Since UGC encompasses various types of works including original works generated by users and pure copies of others’ works, this thesis will concentrate on the practice of re-using and re-mixing others’ works to make a new creation. This part therefore provides comprehensive definitions of the relevant terminologies and introduces common types of such practice.

independently scouring their information environment in search of opportunities to be creative in small or large increments.” (Yochai Benkler, ‘Coase’s Penguin, or, Linux and The Nature of the Firm’ (2002) 112 Yale L.J. 369).

³⁰ See e.g. Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Polity 2009); See also Henry Jenkins’ works: *Textual Poachers: Television Fans & Participatory Culture* (Routledge 1992); *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006); *Fans, Bloggers, and Gamers: Exploring Participatory Culture* (New York University Press 2006); *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press 2009); ‘Quentin Tarantino’s Star Wars? Digital Cinema, Media Convergence, and Participatory Culture’ in Meenakshi Gigi Durham and Douglas M. Kellner (eds), *Media and Cultural Studies* (John Wiley & Sons 2012).

³¹ Henry Jenkins, et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press 2009).

1.2.1 Definition and Nature of Re-creation

User-generated content³² (“UGC”) or user-created content³³ (“UCC”) is a term generally and broadly referred to content generated or created by consumers or users on the internet platforms known as Web 2.0 where users are not merely passive viewers but also active creators of new works. Gervais proposes a broad definition of UGC as “content that is created using tools specific to the online environment and/or disseminated using such tools.”³⁴ Its production and dissemination is among people in a network of relative equals. This type of content is referred to as ‘networked’, as opposed to ‘broadcasted’.³⁵

Gervais divides UGC into three categories: user-authored content, user-copied content and user-derived content.³⁶ User-authored content involves “neither copying nor derivation nor adaptation.” It is content created by an original author such as reviews, blog posts and original photographs and videos. Unlike the first category, user-copied content is generally illegal and illegitimate as the user merely copies pre-existing content such as uploading an unauthorised and unaltered copy of a novel, song or movie on peer-to-peer file sharing networks. The third type is user-derived content. It involves reproduction and derivation of earlier content. This type of UGC is particularly interesting as it intrigues complicated copyright discussion.³⁷ User-derived content is therefore the type of UGC

³² See e.g., Rebecca Tushnet, ‘User-Generated Discontent: Transformation in Practice’ (2007) 31 Colum. J. L. & Arts 497; Edward Lee, ‘Warming Up to User-Generated Content’ (2008) 5 U. Ill. L. Rev. 1459; Greg Lastowka, ‘User-Generated Content and Virtual Worlds’ (2008) 10(4) Vand. J. Ent. & Tech. L. 893; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008); Patrick McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011) 24 Regent U. L. Rev. 117.

³³ The OECD adopted the term ‘user-created content’ or ‘UCC’ and defined it as “i) content made publicly available over the Internet, ii) which reflects a “certain amount of creative effort”, and iii) which is created outside of professional routines and practices.” (OECD, ‘Participative Web: User-Created Content’ (Working Party on the Information Economy, 12 April 2007) 4).

³⁴ Daniel Gervais, ‘User-Generated Content and Music File-Sharing’ in Michael Geist (ed), *From Radical Extremism to Balanced Copyright* (Irwin Law 2010) 465.

³⁵ Amber Westcott-Baker, Rebekah Pure and Christopher Seaman, ‘Copyright Law and the Implications for User-Generated Content’ (2012) 3 U. Balt. J. Media L. & Ethics 171, 182.

³⁶ Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 Vand. J. Ent. & Tech. L. 841, 858-859.

³⁷ See e.g., *Ibid*; Fraser Turnbull, ‘The Morality of Mash-Ups: Moral Rights and Canada’s Non-Commercial User-Generated Content Exception’ (2014) 26 I.P.J. 217; Len Glickman and Jessica Fingerhut, ‘User-generated Content: Recent developments in Canada and the US’ (2011) 12(6) I.E.C.L.C. 49. See also chapter 2.

that forms the core discussion in this thesis. However, this thesis will adopt a more pertinent terminology to specifically refer to the subject matter for the purpose of this thesis: the broad sub-category of UGC is hereinafter termed as “online re-creation”.

This research will focus on the use of an existing work to “re-create” (meaning “to make something exist or happen again”³⁸) and the end product i.e. “re-creation”³⁹ on the internet platforms. “Online re-creation” indicates online content with an emphasis on the action of using an existing work to re-create a new work and distributing such re-creation on the internet. Particularly, online re-creations are new works created based on pre-existing copyright protected materials such as books, movies, comics, anime and television shows without authorisation of the right owners of the original works. Every minute, a large number of people all over the world especially young generations are making, sharing, and viewing “online re-creations”.⁴⁰ This phenomenon has become a part of the online culture of this century.

It is worth emphasising that re-creation is nothing new. Even in the pre-digital era, re-creations required copying. Nevertheless, in the digital world the kinds of copying involved are different, in particular, more sophisticated.⁴¹ Pre-digital re-creations such as collages, fan fiction, fan music or filk⁴², play and cosplay⁴³ fundamentally involve writing, drawing, cutting and pasting, and performing the original works. Picasso’s collages which include appropriation of preceding materials, e.g. newspaper clippings, fragments of sheet

³⁸ The word “recreate” (*verb*) means to “make something exist or happen again”. This term adopted herein is with a hyphen, i.e. “re-create”. (Cambridge Dictionary, <<http://dictionary.cambridge.org/dictionary/english/recreate>> accessed 29 June 2016).

³⁹ According to Cambridge Dictionary, the word “recreation” (*noun*) consists of two meanings i.e. “enjoyment” and “make again”. The term “re-creation” (with a hyphen) adopted in this thesis emphasises that the two words, “re” and “creation”, are joined as an indication that the word means “make again”. <<http://dictionary.cambridge.org/dictionary/english/recreation>> accessed 29 June 2016.

⁴⁰ This phenomenon is illustrated further below (chapter 1.2.2).

⁴¹ “[T]he Internet has made [fan works] much more common, more visible, and more sophisticated than ever before.” (Patrick McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011) 24 Regent U. L. Rev. 117, 128 (citation omitted)).

⁴² The definition and examples of “filk” is provided below in chapter 1.2.2.2.

⁴³ Cosplay, a contraction of the words “costume” and “play”, is an activity where fans make and wear costumes and make-up to adorn themselves as their favourite fictional characters. These cosplayers typically perform their cosplay at a popular culture convention for personal satisfaction and/or to compete for costume awards. (See e.g., Christina Evola, ‘The Next Generation of Cosplay and Conventions: Is Cosplay Copyright Infringement?’ (2010) available at SSRN <<http://ssrn.com/abstract=2200348>>).

music, photographs, cut papers and other applied objects, are by way of example.⁴⁴ Re-creations of the pre-digital age still exist in the 21st century; but as everything is (or at least, can be) digitised, these works are also distributed and even created on the digital platforms. Re-creators are now armed with advanced tools for more verbatim taking especially copying whole or part of an original work. The digital technologies have significantly changed the way people re-create by changing (enhancing) the way people borrow or copy original works to re-create.⁴⁵

1.2.2 Categories of Online Re-creations

Apart from the three categories divided by Gervais, UGC can be classified differently using different measures. The Organization for Economic Cooperation and Development (OECD) gives an overview of the common types of UGC by the formats of the content e.g. text, photo and images, music and audio, video and film, mobile content, and virtual content.⁴⁶ UGC can also be identified by the types of the purposes of works: e.g. commentary, parody and satire, pastiche or collage, personal reportage or diaries, re-interpretations, incidental use, quoting to trigger discussion, illustration or example, and

⁴⁴ Such collages created by Pablo Picasso (1881-1973) are such as *Guitar with Sheet Music and Wine Glass* (1912), *Composition with Fruit, Guitar and Glass* (1912), and *Bottle of Vieux Marc, Glass, Guitar and Newspaper* (1913).

⁴⁵ “Technology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents and individuals to become users – participants in the production of their information environment – rather than by lightly regulating concentrated commercial mass media to make them better serve individuals conceived as passive consumers.” (Yochai Benkler, ‘From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access’ (1999-2000) 52 Fed. Comm. L.J. 561, 562); “The digital technologies have put the power to copy and make other uses of works into the hands of pretty much every cyberspace users, and as a consequence a wide range of copyright-using communities has developed.” (Chris Reed, *Making Laws for Cyberspace* (OUP 2013) 124; Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”* (Irwin Law 2010) 395-397.

⁴⁶ OECD, ‘Participative Web: User-Created Content’ (Working Party on the Information Economy, 12 April 2007) 15-20.

information and knowledge sharing.⁴⁷ Online re-creations as a subset of UGC can therefore be differently categorised using different criteria.

For this thesis, online re-creations are broadly classified by two criteria: firstly, the purposes of the works; and secondly, the common types of copying the original work. It is noteworthy that it is not possible to categorise the types of online re-creations using these criteria as a work may have more than one objective (e.g. a work made by a fan devoted to a popular work may also have a parody element in it) and the levels of taking from the original works are extremely varied even in the same common type of work. Nevertheless, these two main classifications of online re-creations are beneficial for the discussion of potential copyright infringement in chapter 2 and possible copyright exceptions in chapter 4; it is also useful for an analysis of social norms concerning online re-creations in chapter 5 and for the consideration of the proposal in chapter 6.

1.2.2.1 Purposes of Re-creations

This thesis broadly divides online re-creations into two groups by reference to their objectives: parody/satire and fan works.

(i) Parody/satire

The purpose of parody and satire is to criticise, comment, mock or ridicule an object. Parody is generally a work that intentionally copies the style and expression of someone or something and makes the features or qualities of the original more noticeable in a way that is humorous or critical. A work that borrows an earlier work to criticise or ridicule the object that does not concern the borrowed work can be referred to as ‘weapon parody’ or ‘satire’. Parody and satire and the distinction between the two are discussed in

⁴⁷ Warren Chik, ‘Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law’ (2011) 11 J. Marshall Rev. Intell. Prop. L. 240, 281-287; Patricia Aufderheide and Peter Jaszi, ‘Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video’ (2010) 6 Journal of Law and Policy for the Information Society 13, 24-36.

chapter 4.4. Parody/satire can be in any format ranging from novel⁴⁸, song⁴⁹, drawing⁵⁰, and picture⁵¹ to video⁵², film⁵³, and virtual art. The nature of parody/satire is also varied. Some parody/satire indirectly borrows an underlying work (such as parody novels and songs) while some need a literal copying from an original work (such as satirical videos).

(ii) Fan works

Many fans of popular works worldwide are engaging in fan productions especially on the internet. Online fandom has become a part of the culture of the 21st century.⁵⁴ Interestingly, the numbers of people who express their loves (and likes) for certain popular works are greater than the population of many nations. For example, approximately 75.2 million people clicked ‘Like’ on the *Harry Potter*’s verified page on *Facebook*⁵⁵; the number of the likes is more than twice of the population of Canada⁵⁶. The number of *Facebook* likes for *The Simpsons*⁵⁷, an American animated sitcom, is also higher than the

⁴⁸ For example, *The Wind Done Gone*, the parody novel which criticised the original best-selling novel *Gone with the Wind*’s depiction of slavery and the Civil-War era American South. (*Suntrust v Houghton Mifflin Co*, 268 F3d 1257 (11th Cir 2001)).

⁴⁹ For example, the parody song by 2 Live Crew, a rap music group, which is composed based on *Oh, Pretty Woman*, Roy Orbison’s rock ballad, *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994)).

⁵⁰ See, e.g., *Deckmyn v Vandersteen* (C- 201/ 13) European Court of Justice (Grand Chamber) [2014] Bus. L.R. 1368; [2014] E.C.D.R. 21.

⁵¹ For instance, a parody picture of a celebrity Demi Moore while she was seven months pregnant (*Leibovitz v Paramount Pictures Corp.*, 137 F3d 109 (2d Cir 1998)).

⁵² A lot of parody videos including parody/satire of music videos can be found on video-sharing platforms such as *YouTube*.

⁵³ For example, *Scary Movie* (2000) a parody movie of the horror and mystery genres and *Fifty Shades of Black* (2016), a parody of an erotic romantic drama film, *Fifty Shades of Grey* (2015).

⁵⁴ Jenkins notes that there are significant resemblances between contemporary fan culture and traditional folk culture. (Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture* (Routledge 1992) 272-273).

⁵⁵ The data is as of 29 June 2016, *Facebook*, ‘Harry Potter’ page <https://www.facebook.com/harrypottermovie/?brand_redir=64501422481>.

⁵⁶ As of 2015, there are approximately 35.8 million people in Canada. (Statistics Canada, ‘Population by year, by province and territory (Number)’ (*Statistics Canada*, 29 September 2015) <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/demo02a-eng.htm>>) accessed 29 June 2016.

⁵⁷ As of 29 June 2016, there are approximately 67.6 million *Facebook* likes for *The Simpsons* <<https://www.facebook.com/TheSimpsons?fref=ts>>.

estimated population for the UK⁵⁸. In addition, the number of *Facebook* users who express their “Likes” for *Twilight*⁵⁹ is almost two times higher than the population of Australia⁶⁰.

A lot of re-creations are made by fans⁶¹ and can be labelled as “fan-based activities”⁶² or “fan works”⁶³. However, it is worth emphasising that many re-creations are not fan works. Fan works are based on popular cultural phenomena which are usually under copyright protection. The main objective of fan-based activities is being active “fans” or “enthusiasts”. Fan works are made as tributes to popular works, for self-satisfaction, and/or for participation in a fan community.⁶⁴ In the pre-internet age, fan activities are created offline. Nowadays, these subsequent works can be found in digitised forms. Fan works can be in any formats including literary work (i.e. fan fiction), fan-made music or filk, or fan-made videos and virtual worlds. Written fan fiction and filk music are the types of fan works which involve indirect taking of original materials. Other types of fan activities such as fan sites and fan videos typically require direct taking of original popular works. These examples of fan works are examined in detail in the next section.

⁵⁸ At 30 June 2014, the UK population is estimated to be 64.5 million. (Office for National Statistics, ‘Statistical bulletin: Annual Mid-year Population Estimates: 2014’ (*Office for National Statistics*, 25 June 2015)

<<http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/2015-06-25>>) accessed 29 June 2016.

⁵⁹ As of 29 June 2016, an official *Facebook* webpage of *Twilight* received 46.6 million likes <<https://www.facebook.com/twilight?fref=ts>>.

⁶⁰ The population of Australia as of June 2016 is projected to be 24 million. (Australian Bureau of Statistics, ‘Population Clock’ (*Australian Bureau of Statistics*, 29 June 2016) <<http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>>) accessed 29 June 2016.

⁶¹ “‘Fan’ is an abbreviated form of the word ‘fanatic’, which has its roots in the Latin word ‘fanaticus’.” (Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture* (Routledge 1992) 12).

⁶² According to Nathaniel, “[a]n activity is fanbased if it is (1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the author’s economic and creative interests.” (Noda Nathaniel, ‘Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities’, (2010) 20(1) *Seton Hall Journal of Sports & Entertainment Law* 131, 139).

⁶³ See e.g., Raizel Liebler, ‘Copyright and ownership of fan created works: fanfiction and beyond’ in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (Sage 2015).

⁶⁴ For a discussion and empirical analysis of fans’ motivations to re-create, see Chapters 3.3.3.1 and 5.2.1.

1.2.2.2 Types of Copying

Apart from the classification by the purposes of the maker, online re-creations can also be categorised by the kinds of copying and typical degrees of borrowing from the original works to re-create: (i) non-literal copying or indirect taking, and (ii) literal copying or direct taking.

(i) Non-literal⁶⁵ copying or indirect taking

The first major category of re-creations is where re-creators take inspiration from the original works but do not copy them directly. The typical types of re-creation involving non-verbatim copying are fan fiction, fan film and filk music.

Fan fiction can be defined as “any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”⁶⁶ Fan fiction authors borrow the characters, events, settings or original concept of a work (so-called “canon” or fictional universe) from the underlying work to create unique stories which reflect their own imagination and interpretation without copying the original story or image verbatim.⁶⁷ There are a number of fan-fiction sites from numerous different fandoms such as *Doctor Who*, *Star Trek*, *Star Wars*, and *Harry Potter*. The largest online fan-fiction archive and forum is probably *FanFiction.net*⁶⁸ with an extensive archive of online fan fictions; there are for example

⁶⁵ For the purpose of this thesis, “literal” and “verbatim” copying do not only mean copying exactly the same words or texts as the original literary work but also refer to reproducing exact copy of elements of other types of original works e.g. movies, pictures, drawings and music.

⁶⁶ Rebecca Tushnet, ‘Legal Fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L.A. Ent. L. Rev. 651, 655. Tushnet argues for the legality of non-commercial fan works in relation to copyright law.

⁶⁷ A number of scholars argue for the legality of non-commercial fan fiction in relation to copyright law. See e.g. Rebecca Tushnet, ‘Legal Fictions’ (1997) 17 Loy LA Ent L Rev 651; Leanne Stendell, ‘Fanfic And Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction’ (2005) 58 SMU L Rev 1551; Cory Doctorow, *Content: selected essays on technology, creativity, copyright and the future of the future* (Tachyon 2008) 89-93; Aaron Schwabach, *Fan Fiction and Copyright* (Ashgate 2011); Viva Moffat, ‘Borrowed Fiction and the Rightful Copyright Position’ (2014) 32 Cardozo Arts & Ent. L.J. 839.

⁶⁸ FanFiction <www.fanfiction.net> accessed 29 June 2016.

over 650,000 stories for *Harry Potter* books and over 397,000 fictions written about the popular anime⁶⁹ or manga⁷⁰, *Naruto*.

Fan films⁷¹ are typically produced by fans as prequels, sequels or new episodes of popular works. Fan films are the video equivalent of fan fiction and are typically either new fictional stories based on popular works or parodies of them. These fan filmmakers organise the whole production by themselves such as writing a new storyline, finding locations, providing costume, casting actors and actresses and sometimes playing the roles by themselves.

Another kind of fan works that usually involve non-literal copying is filk music. “Filk starts off at conventions.”⁷² Filk, filking or filk song⁷³ is a style of music that combines words that have a science fiction or fantasy theme such as names of places and characters from popular works into lyrics. Filks can be complete original songs (i.e. original lyrics and music)⁷⁴ as well as new lyrics combined with pre-existing music⁷⁵. Filk songs can vary from funny to heart wrenching and from silly to serious. People who write

⁶⁹ Anime is the abbreviated pronunciation of ‘animation’ in Japanese. It generally means Japanese animation.

⁷⁰ Manga is from a Japanese word meaning comics and cartooning. The term is now widely used to refer to Japanese comics.

⁷¹ See e.g., Will Brooker, *Using the Force: Creativity, Community and Star Wars Fans* (Continuum International Publishing Group 2002) 173-198.

⁷² Filk originated by groups of fans at conventions who played old folk songs and added science fiction elements into the lyrics. The quotation is from an interview with Tom Smith, a well-known filker (*cited with permission*). The interview was conducted at the World Science Fiction Convention 2015 in August 2015. See Chapter 5 for further detail of the empirical research at the Convention.

⁷³ The word “filk” was originally a typographical error for “folk” in a 1950s essay circulated among science fiction fans. The term had since been accepted and used to generally mean science-fiction folk music. (Lee Gold, ‘An Egocentric and Convolved History of Early “Filk” and Filking’ (1997) <http://www.fanac.org/Fan_Histories/filkhist.html>) accessed 29 June 2016.

⁷⁴ See, e.g., filk songs called ‘Waking Up Jedi’ and ‘Hey, it’s Can(n)on - [Hermione Granger the Pirate Queen]’ by Tom Smith (<http://www.tomsmithonline.com/freestuff/oddio/iT041_192.mp3>; <https://www.youtube.com/watch?v=k3p_Kewu7jc>); See, also, a filk music video based on *Star Wars* named ‘Wastin’ Away Again on Tatooine’ <http://www.youtube.com/watch?feature=player_embedded&v=wl_ol7_uJU> accessed 29 June 2016.

⁷⁵ See, e.g., ‘Midichlorian Rhapsody’, a filk song with the lyrics about *Star Wars* series and music from the song ‘Bohemian Rhapsody’ by Queen <<http://www.youtube.com/watch?v=hpvITVgeivU&feature=share>> accessed 29 June 2016.

or sing filk are called filksingers⁷⁶ or filkers. Although filks are traditionally to be performed at conventions, nowadays more fans post their filk songs and videos of filking performance online.

(ii) Literal copying or direct taking

There are a number of online re-creations that involve literal copying or direct taking of original works. Since there is a varying degree of direct copying, this thesis will exemplify re-creations of this category by the typical level of copying ranging from copying part of the original work to taking the entirety of the work.

Copying parts of an original work

Online re-creations involving literal copying of some portions of original works can be sub-divided into two groups of formats: (i) literary and visual works and (ii) audio and audio-visual works.

The re-creations in the forms of literary works and visual arts that usually include literal copying parts of copyright protected works are such as fanzine, fan site and doujinshi.

Fanzine is a portmanteau word of “fan” and “magazine”. A fanzine is “[a]n amateur-produced magazine written for a subculture of enthusiasts devoted to a particular interest”⁷⁷. From the original empirical research in 2015⁷⁸, the interviewed fanzine creators considered fanzines to be about science fiction and fans. They engage in the

⁷⁶ “Traditionally a filksinger is someone who comes from the Science Fiction Fannish community. They have also tended to be amateur performers and songwriters because they do this once in a while and they don’t do it to make any kind of money, they do it because it is fun.” (Three Penny Opry, ‘Filk Night’ (*Three Penny Opry*, 11 May 2006) <http://threepennyopry.blogspot.co.uk/2006_05_01_archive.html> accessed 29 June 2016).

⁷⁷ TheFreeDictionary, ‘Fanzine’, <<http://www.thefreedictionary.com/fanzine>> accessed 29 June 2016.

⁷⁸ The interviews with two fanzine creators were undertaken exclusively for the purpose of investigating the nature of fanzines. The interviews were conducted at the World Science Fiction Convention 2015 in August 2015. See chapter 5 for further detail of the empirical research at the Convention.

production of the fanzines to communicate with friends as well as exchange thoughts, experience and information on conventions and activities within the fan communities. Most of the contents are news and criticism relating to the popular works (typically science fiction genre), book reviews, and personal experiences or non-fictions. However, fanzines may contain images owned by others or art works created originally by the fan artists. Fanzines may also include other fan works such as written fan fictions, poetry, and fan drawings. Fanzines were traditionally made and circulated offline; with the digital facilities, they are now widely available on the internet.

As to fan blog, fan page or fan site⁷⁹, it is a website devoted to a particular cultural phenomenon. This fan-created website displays information about a popular subject such as history, criticism, interviews, plots, storyline, episode listings, bibliography, fan fiction, discussion boards, the latest news and links to other relevant websites. It usually embeds images, sound recordings as well as videos of the subject. The displayed items on the fan site include both copyright works owned by others and original elements made by the fan. The means of gathering these materials are varied and usually without permission of the copyright owners. The materials can be scanned from a hard copy to create the digital files and uploaded onto the fan site or can simply be copied from other websites or internet sources. The fan's creativity in a fan site can be found in the arrangement and decoration of the webpage as well as the new created contents such as news reports, statistics, Q&As, and discussion boards. Some fan sites contain a high insertion of fan creators' own creativities whereas some merely distribute or provide links for copyright infringing materials relevant to the popular work.

⁷⁹ For articles discussing the legality of fan sites, see e.g., Jessica Elliott, 'Copyright Fair Use and Private Ordering' (2011) 11 DePaul-LCA J. Art & Ent. L. 329; Jennifer C Moore, 'Comment: Copyright Protection or Fan Loyalty-Must Entertainment Companies Choose? Alternate Solutions for Addressing Internet Fan Sites' (2001) 3 N.C. J.L. & Tech. 273; Cecilia Ogbu, 'I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners' (2002) 12 S. Cal. Interdisc. LJ 279; Krissi Geary-Boehm, 'Cyber Chaos: The Clash Between Band Fansites and Intellectual Property Holders' (2005) 30 S. Ill. U. L.J. 87.

Another example of visual re-creation is doujinshi⁸⁰. Doujinshi are fan-made comics often produced by amateurs. Mehra describes doujinshi as “Japanese manga (roughly, comic books or graphic novels) written by authors using the well-known characters of another, more famous, author”.⁸¹ They are commonly created by deriving characters and backgrounds from manga, anime, and video games.

Online re-creations in the forms of audio and audio-visual arts or online videos⁸² usually involve direct copying of various parts of original works. Online re-creations of this kind are for instance mash-up, fanvid, machinima, and virtual world.

Re-creators produce “mash-ups”⁸³ by taking content from multiple original works and combining them together. They are usually in the forms of audio and audio-visual works. A music mash-up is a composition of two or more pre-recorded music or songs. It is also known as “music sampling”.⁸⁴ A prominent music mash-up is *The Grey Album* by D.J. Danger Mouse released in 2004. It mixes the vocal content of Jay-Z’s *Black Album* with samples from The Beatles’ album known as the *White Album*.⁸⁵ Another type of mash-up is in a form of video that takes content of visual and/or audio works from

⁸⁰ The term is sometimes written as Dōjinshi. See also, Mariko Foster, ‘Parody’s Precarious Place: The Need to Legally Recognize Parody as Japan’s Cultural Property’ (2013) 23(2) *Seton Hall Journal of Sports & Entertainment Law* 313; Nathaniel Noda, ‘Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities’ (2010) 20 *Seton Hall J Sports & Ent L* 131; Nathaniel Noda, ‘When Holding on Means Letting Go: Why Fair Use Should Extend to Fan-based Activities’ (2008) 5 *U. Denv. Sports & Ent. L.J.* 64.

⁸¹ Salil Mehra, ‘Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?’ (2002) 55 *Rutgers L. Rev.* 155, 156.

⁸² For an interesting discussion about online video and copyright, see Patricia Aufderheide and Peter Jaszi, ‘Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video’ (2010) 6 *Journal of Law and Policy for the Information Society* 13.

⁸³ For a legal discussion concerning mash-ups and remix see e.g., Vera Golosker, ‘The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights’ (2012) 34 *Hastings Comm. & Ent. L.J.* 381; Michael J. Hughes, ‘Dealing with Talking Girls and Dangerous Mice: An Assessment of Mashups and their Place in Copyright in Canada’ (LLM thesis, University of Toronto 2011); Rebecca Tushnet, ‘Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters’ (2010) 6 *Journal of Law and Policy for the Information Society* 1; Andrew S. Long, ‘Mashed Up Videos and Broken Down Copyright’ (2007) 60 *Okl. L. Rev.* 317; Urs Gasser and Silke Ernst, ‘From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age’ (2006) *Berkman Center Research Publication* 1; Damien O’Brien and Brian Fitzgerald, ‘Mashups, Remixes and Copyright law’ (2006) 9(2) *Internet Law Bulletin* 17.

⁸⁴ For a discussion on music sampling and copyright, see e.g. Michael B. Landau, ‘Are the Courts Singing a Different Tune When it Comes to Music?’ (2015) 5 *IP Theory* 1.

⁸⁵ Nicholas Lewis, ‘Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?’ (2005) 55 *Am. U. L. Rev.* 267.

multiple sources to create a new work. Generally, video mash-ups are used to retell the narrative of the underlying works. For example, the *YouTube* video, ‘*Buffy vs Edward: Twilight Remixed*’⁸⁶ involves selected scenes from a movie and a TV series depicting an imagined story when *Edward Cullen*, the main character who is a vampire from the series *Twilight*, meets *Buffy* from *Buffy the Vampire Slayer*.

Fan-made music videos, “fanvids”⁸⁷, or “vidding”⁸⁸ is another re-creation where “vidders” remix footage from movies, television shows, or videogames, and synchronise the clips to a soundtrack or a popular song to express different aspects of the story or the characters or to create entirely new storylines. Vidders’ creativity comes purely from selection, arrangement, and editing.⁸⁹ The popular sub-genre of fanvids is “Anime Music Videos” (“AMVs”) which are music videos based on Japanese anime and video games.⁹⁰ *AnimeMusicVideos.org* is possibly the largest online community dedicated to AMVs. As of April 2016, it had over 900,000 registered members and hosted more than 162,000 AMVs.⁹¹

Another type of online re-creations in the form of video is “machinima”. Machinima production is a new audio-visual work emerging from virtual realities; in other words, it is a film made from video games and virtual worlds. Machinima is the art of making animated movies in a real-time 3D virtual environment⁹² or the technique of taking a viewpoint on a virtual world and recording that, editing it, and displaying it as

⁸⁶ ‘Buffy vs Edward: Twilight Remixed’ is a mash-up video by Jonathan McIntosh <<https://www.youtube.com/watch?v=RZwM3GvaTRM>> accessed 30 April 2016.

⁸⁷ Rebecca Tushnet, ‘Payment in Credit: Copyright Law and Subcultural Creativity’ (2007) 70 *Law & Contemp Probs* 135; Sarah Trombley, ‘Visions and Revisions: Fanvids and Fair Use’ (2007) 25 *Cardozo Arts & Ent. L.J.* 647.

⁸⁸ Patrick McKay, ‘Culture of the Future’ (2011) 24 *Regent U L Rev* 117.

⁸⁹ For an example of fanvid, see ‘Doctor Who | Counting Stars’ <<https://www.youtube.com/watch?v=h1x-QAeG2wM>> accessed 30 April 2016.

⁹⁰ Patrick McKay, ‘Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century’ (2011) 24 *Regent U L Rev* 117, 133; See e.g., ‘Final Fantasy 7: Midgar Burning (Red - Let it Burn - Until We Have Faces) AMV’ <https://www.youtube.com/watch?v=3eiza_LXjq8> accessed 29 June 2016.

⁹¹ *AnimeMusicVideos.org*, ‘Members Main Page - Global Statistics’ <http://www.animemusicvideos.org/members/members_main.php> (*user login required*) accessed 30 April 2016.

⁹² Paul Marino, *3D Game-Based Filmmaking: the Art of Machinima* (Paraglyph Press, 2004) 2.

film⁹³. A notable example of machinima is *Tales of the Past* series which narrates a complex storyline and encompasses multiple scenes from the online role-playing game, *World of Warcraft*.⁹⁴

A similar kind of online video involves roleplaying and narrating virtual worlds and video games. As of January 2016, the *YouTube* channel, *PewDiePie*⁹⁵, created by a video game commentator was ranked as the most popular *YouTube* channel with 41.62 million subscribers.⁹⁶ The videos uploaded on the channel contain images, moving pictures, and audio works from a number of video games. Apart from *PewDiePie*, there are a lot of channels involving appropriated segments from popular games. *YouTube* channels such as *Sky Does Minecraft*⁹⁷, *stampylonghead*⁹⁸, and *TheDiamondMinecart*⁹⁹ have earned their popularity from creating videos with images, commenting, roleplaying, and narrating movies from *Minecraft*¹⁰⁰, the sandbox video game of breaking and placing blocks. Other famous video games playing channels are for example *VEGETTA777*¹⁰¹ (with over 13.5 million subscribers) and *VanossGaming*¹⁰² (with approximately 17 million subscribers) which involves many video games such as *Dragon Ball Xenoverse*, *Grand Theft Auto*, and *Garry's Mod*.

⁹³ Hugh Hancock and Johnnie Ingram, *Machinima For Dummies* (Wiley Publishing, 2007) 10.

⁹⁴ Wikia, 'Tales of the Past' <http://wowwiki.wikia.com/wiki/Tales_of_the_Past> accessed 30 April 2016.

⁹⁵ 'PewDiePie' <<https://www.youtube.com/user/PewDiePie>> accessed 30 April 2016.

⁹⁶ Statista, 'Most popular YouTube channels as of January 2016, ranked by number of subscribers (in millions)' <<http://www.statista.com/statistics/277758/most-popular-youtube-channels-ranked-by-subscribers/>>; As of 30 April 2016, *PewDiePie* channel has 43,647,281 subscribers with 11,940,087,315 total views (<<https://www.youtube.com/user/PewDiePie/about>>). The number of subscribers is more than those of official *VEVO* channels such as *OneDirectionVEVO* and *TaylorSwiftVEVO* channels.

⁹⁷ The channel has 11,927,092 subscribers with 3,193,571,235 views (as of 30 April 2016) <<https://www.youtube.com/user/SkyDoesMinecraft/about>>.

⁹⁸ The channel has 7,326,257 subscribers with 5,005,804,699 views (as of 30 April 2016) <<https://www.youtube.com/user/stampylonghead/about>>.

⁹⁹ The channel has 10,466,355 subscribers with 6,674,896,326 views (as of 30 April 2016) <<https://www.youtube.com/user/TheDiamondMinecart/about>>.

¹⁰⁰ *Minecraft* <<https://minecraft.net/>>.

¹⁰¹ The channel has 13,594,541 subscribers with 4,633,509,469 views (as of 30 April 2016) <<https://www.youtube.com/user/vegetta777/about>>.

¹⁰² The channel has 16,932,270 subscribers with 4,679,929,086 views (as of 30 April 2016) <<https://www.youtube.com/user/VanossGaming/about>>.

Another example of audio-visual re-creation is virtual world. Virtual worlds are particularly interesting as this type of re-creation is only possible because of the advanced digital technologies. Virtual worlds are venues for creation, commerce and community.¹⁰³ The term “virtual world” describes online immersive “game-like” environments where multiple users engage in socialisation, entertainment, education, and commerce simultaneously.¹⁰⁴ It can be a goal-based game such as *World of Warcraft* or the so-called “pure” environment like *Second Life*, *Minecraft* and *Garry's Mod* (worlds that are open ended, without explicit objectives).¹⁰⁵ An open world game without specific goals allows players to choose how to play the game and gives them freedom and facilities to create any virtual items which display on computer screen in sophisticated three-dimensional figures¹⁰⁶. Players can even build virtual environments (called “sims”¹⁰⁷) from their own imagination or based on works of popular culture such as *Tatooine* from *Star Wars* and *Hogwarts* from *Harry Potter*. Typically, creators of these sims would strive to create the virtual environments imitating the underlying works as close as can be. These sims undoubtedly consist of a number of reproductions of copyright works.

Copying the entirety of an original work

In making online re-creations of this kind, re-creators copy the entire original work to literally translate the original narration or text without a meaningful modification of the visual and/or audio of the original works. These works are the so-called fansub, fandub and scanlation.

¹⁰³ Melinda Schlinsog, ‘Endermen, Creepers, and Copyright: The Bogeymen of User-Generated Content in *Minecraft*’ (2013) 16 Tul. J. Tech. & Intell. Prop. 185; Greg Lastowka, *Virtual justice: The New Laws of Online Worlds* (Yale University Press 2010) 173; Matthew R Farley, ‘Making virtual copyright work’ (2010) 41 Golden Gate U L Rev 1; Todd David Marcus, ‘Fostering Creativity in Virtual Worlds’ (2008) 55 J. Copyright Soc’y U.S.A. 469; Sean Kane and Benjamin Duranske, ‘Virtual Worlds, Real World Issues’ (2008) 1 Landslide 9.

¹⁰⁴ Participants experience these virtual environments through an avatar, which is the representation of the self in a given physical medium.

¹⁰⁵ Matthew Becker, ‘Digest Comment: Re-conceptualising copyright in virtual worlds’ (2010) JOLT<<http://jolt.law.harvard.edu/digest/copyright/digest-comment-re-conceptualizing-copyright-in-virtual-worlds>>.

¹⁰⁶ Brian White, *Second Life: A Guide to Your Virtual World* (Que Publishing 2008) 177.

¹⁰⁷ “*Sim* is short for *simulator*.” *Ibid*, 6.

“Fansub”¹⁰⁸ (short for fan-subtitled) is the term referred to the production of fan-produced, translated, subtitled version of a Japanese anime episode or foreign film and television shows. A similar practice is called “fandub” (or fan-made dub) which also involves a reproduction of a whole episode of an original anime where fandubbers translate and mix the original sound with a re-recorded soundtrack in a different language. The last example for this type of re-creation is “scanlation”¹⁰⁹ (a portmanteau word of “scan” and “translation”). Scanlation is produced by scanning an original Japanese comics or manga, digitally erasing the Japanese characters and inserting a translation into another language. Typically, the appropriated original anime and manga have not been officially released or commercially licensed in that other countries that fansub, fandub and scanlation are distributed.

1.3 Conclusion

The digital technologies and the internet make it possible for anyone to easily make perfect copies of precedent works as well as freely re-create works by cutting, pasting, remixing and re-imagining existing works. They have made UGC including “online re-creations” much more common, more widespread, and more sophisticated than ever before. The rapid development of technologies leads to the change of society and culture. The nature of the online culture encompasses some prominent characteristics; the cultural phenomenon involves remixing existing materials, peer-to-peer communication, and participation and interaction in an online community. These characteristics are correlated to one another and will also be further discussed in later chapters. Since online

¹⁰⁸ Rayna Denison, ‘Anime fandom and the liminal spaces between fan creativity and piracy’ (2011) 14(5) *International Journal of Cultural Studies* 449; Hye-kyung Lee, ‘Cultural consumer and copyright: A case study of anime fansubbing’ (2010) 3 *Creative Industries Journal* 237; LaToya Rembert-Lang, ‘Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing’ (2010) 2 *Intellectual Property Brief* 21; Minako O’Hagan, ‘Evolution of User-Generated Translation: Fansubs, Translation Hacking and Crowdsourcing’ (2009) *Journal of Internationalisation and Localisation* 94; Jorge Díaz Cintas and Pablo Muñoz Sánchez, ‘Fansubs: audiovisual translation in an amateur environment’ (2006) *The Journal of Specialised Translation* 37; Jordan Hatcher, ‘Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law’ (2005) 2 *SCRIPT-ed* 544.

¹⁰⁹ Wikipedia, ‘Scanlation’ <<https://en.wikipedia.org/wiki/Scanlation>>.

re-creations involve certain degree of direct and indirect copying of copyright protected works, the questions concerning possible copyright infringement will be substantially analysed in the following chapter.

CHAPTER 2 - Copyright Problems of Online Re-creations

Copyright law has a problematic application in the age of online re-creations in which people are re-using others' works to make new creations and share them online. This chapter will analyse the correlation and conflict between copyright and online re-creations: how the current copyright law makes it difficult for online re-creations to be made lawfully.

As previously discussed in chapter 1, the technologies have significantly altered the patterns of production, reproduction and distribution of works. Unauthorised re-creations can easily be disseminated to wider audience, at the global level. From a rights owner's business perspective, the digital copy, reproduction and distribution appear as threats. The initial response to these digital threats was a more aggressive regime of copyright protection and enforcement.¹¹⁰ Copyright's target in the pre-digital era was the enforcement against professional infringers, not individual consumer and end-users.¹¹¹ The purpose of copyright seems to shift from a right to fight against professional pirates to a right targeting at individual internet users who have now become content providers, though they are mostly amateurs.¹¹²

¹¹⁰ Entertainment industries have long played a vital role in the attempt to modify copyright law for their benefits and maximum economic interest. Traditional purpose of copyright to stimulate availability of works in the public domain has become less significant than to be used by copyright holders for economic benefits. (See e.g., Neil W. Netanel, 'Why has Copyright Expanded? Analysis and Critique' in Fiona Macmillan (ed), *New Directions in Copyright Law* (Vol 6, Edward Elgar 2007)).

¹¹¹ Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 *Vand. J. Ent. & Tech. L.* 841, 847; In the traditional copyright sense, private use and public use were distinctive: professional use and amateur use were distinguished. As Gervais comments, "[a]mateur meant private (and vice versa) and non-commercial and professional meant public and commercial. The shift from one-to-many to many-to-many dissemination modes destabilized this system and amateur no longer meant private." (Daniel Gervais, 'User-Generated Content and Music File-Sharing' in Michael Geist (ed), *From Radical Extremism to Balanced Copyright* (Irwin Law 2010) 472).

¹¹² Daniel Gervais, 'The Tangled Web of UGC' (2009) 11 *Vand. J. Ent. & Tech. L.* 841, 847-849; Daniel Gervais, 'Use of Copyright Content on the Internet' in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 523 (citation omitted).

The current copyright law affects online re-creations in several ways: (i) it limits activities concerning re-creation; (ii) there are problems on obtaining permission from copyright holders; (iii) there are moral rights concerns; (iv) there are insufficient viable limitations and exceptions; and (v) there is a threat of litigation and abrupt enforcement.

2.1 Copyright Limits Activities for Re-creation

This part will specifically discuss copyright infringement of online re-creators¹¹³: the activities and elements involving in the infringement of copyright holders' exclusive rights. Copyright liability of intermediaries, such as online service providers or platform providers like *YouTube* and *Facebook*, is beyond the scope of this research.

The exclusive economic rights¹¹⁴ discussed for the purpose of this thesis are those that are most important and most relevant to online re-creations.¹¹⁵ Two main groups of rights relevant to online re-creations can be classified as the rights concerned with using or copying elements of the original work and the rights concerned with sharing the appropriated copyright materials. This part therefore analyses these two sets of rights.

2.1.1 Copying and alteration

In its production process, a re-creation involves reproducing, sampling, borrowing, quoting or remixing elements of preceding works. These activities fundamentally

¹¹³ There is no international or regional harmonisation of what amounts to copyright infringement; the question of copyright infringement is therefore greatly subject to the law of each jurisdiction. The requirements of copyright infringement discussed herein are therefore by way of an overview of the common principles of infringement.

¹¹⁴ Under international copyright treaties, there are a number of exclusive rights granted to the copyright holders under copyright law, such as the rights of reproduction, translation, public performance, broadcasting, distribution and communication to the public of work. The conferred rights are depending on various types of work and subject to domestic law implemented in each jurisdiction.

¹¹⁵ Rights such as lending and renting a work are therefore beyond the scope of this research.

constitute copy, reproduction or adaptation¹¹⁶ of the original work which are restricted acts under national copyright laws of many countries.¹¹⁷ Some jurisdictions provide the right holders with other rights related to alterations of copyright work such as the rights to translation¹¹⁸ and to prepare derivative work¹¹⁹.

Different types of re-creations involve very different ways of using the original works; thus it is worth examining each in turn.

2.1.1.1 Literal copying of the entire original work: fansubs and related activities

Fansub, as explained in chapter 1, is the term used for the production and distribution of fan-produced, translated, subtitled version of original copyright works which are typically Japanese anime episodes, television shows and films.

¹¹⁶ The right of making an adaptation of literary or artistic work is another act restricted under Article 12 of the Berne Convention. The copyright owner has the right of adaptation to control transformation of his work into other forms of presentation. Though this right can be seen as overlapping of reproduction right, it is viewed as a separate right in the Berne Convention. (J.A.L Sterling, *World Copyright Law* (Sweet & Maxwell 1999) 308).

¹¹⁷ See e.g., Articles 9 and 12 of the Berne Convention; Article 2 of the InfoSoc Directive.

¹¹⁸ See e.g., Article 8 of the Berne Convention.

¹¹⁹ Under the US Copyright Act Section 106(2), the owner of copyright has the right to prepare derivative works based on his copyrighted work. The definition of a “derivative work” can be found in Section 101 of the US Copyright Act:

“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work” (emphasis added).

Online re-creations establish a derivative work of the copyright work since they are produced based on segments of the original work and usually recast, transform, or adapt the original work. The right to prepare derivative works “provides the basis for copyright-holding authors to use a copyright infringement action as a means of objecting to subsequent writers' fan fiction.” (Michelle Chatelain, ‘Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine’ (2012) 15 Tul. J. Tech. & Intell. Prop. 199, 203) McKay also viewed that fan-made media of various forms including written fan fictions, fan films, fan arts and virtual worlds are derivative works: because they are created based on works of popular culture. (Patrick McKay, ‘Culture of the Future’ (2011) 24 Regent U. L. Rev. 117).

There is usually a group of people involved in the fansubbing process; though all phases can also be conducted by one person. These fansubbers are responsible for each stage of fansubbing: raw acquisition, translation, timing, editing, typesetting, quality control and encoding.¹²⁰ The activities of these fansubbers involve direct copying of original copyright protected works. The very first stage is acquiring an entire anime episode by copying it from a TV source or a DVD. TV and DVD rips are verbatim copy of the anime. The translators then translate the anime from the original soundtrack language or sometimes from English subtitles into other languages. The timers then set the in and out times of each subtitle. Typesetters will next be responsible for defining the font style of the subtitles. Editor or proof-readers control the coherence and natural sound of the target language. They then use an encoding program to produce the subtitled version of the anime episode.

Fansubbers directly copy the whole episode or the whole movie or anime. It therefore infringes the exclusive rights of the copyright holder significantly the right to reproduction. Article 9 of the Berne Convention recognises that “[a]uthors 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”. This clearly covers reproduction in computer storage, cloud storage and any other online medium.¹²¹ Thus copying the

¹²⁰ Jorge Díaz Cintas and Pablo Muñoz Sánchez, ‘Fansubs: audiovisual translation in an amateur environment’ (2006) *The Journal of Specialised Translation* 37, 38-39.

¹²¹ The provision is also implemented in national laws. For example, under section 17(2) the UK CDPA 1988, copying a work, in relation to literary, dramatic, musical or artistic works, means “reproducing the work in any material form” which includes “storing the work in any medium by electronic means.” Besides, according to the CDPA 1988, section 17(3), copying an artistic work includes converting a three-dimensional work into two dimensions, and vice versa. This may also extend to other changes of form. The relevant cases are, for example, *King Features Syndicate v O and M Kleeman* [1941] AC 417 (“Popeye”); *LB (Plastics) v Swish Products* [1979] FSR 145; *Autospin (Oils Seals) Ltd v Beehive Spinning* [1995] RPC 683 and *British Leyland Motor v Armstrong Patents* [1986] AC 577 (making a functional three dimensional article as clearly depicted in a copyright drawing). Similarly, concerning the reproduction right under § 106(1) of the US Copyright Act, reproducing a copyright protected character by changing the pose or medium of the character does not avoid copyright infringement. For instance, in some cases where cartoon characters were reproduced as three-dimensional dolls or figures based almost exactly on a two-dimensional cartoon drawing, copyright infringement was found without any regard to the issue of the medium difference. (See, e.g., *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir.1924) (“Sparky”); *Fleischer Studios, Inc. v. Ralph A. Freundlich* 73 F.2d 276 (1934) (“Betty Boop”); *Geisel v. Poynter Prods. Inc.*, 295 F.Supp. 331 (S.D.N.Y.1968) (“Dr. Seuss”); *United Features Syndicate v. Sunrise Mold. Co.*, 569 F.Supp 1475 (S.D. Fla. 1983) (“Peanuts”).

anime by ripping off DVD or TV and storing it by electronic means fall within the scope of this right.

This restricted act also covers reproduction or re-creation of virtual worlds in which the re-creators turn a fictional character in a story or in two dimensions into a virtual three-dimensional artistic work, and copying a picture by drawing or painting such as fan drawings or comics.¹²²

Fansubbers do not alter the content of the original work but reproduce and disseminate the whole of the original audio-visual works with subtitles. The only creative contributions to the fansub are the translation and the effort to make the subtitles. Some fansubbers do their own translation while some fansubbers use software which automatically recognises the voice of the original video and transforms it into written words.

Apart from fansubbing of audio-visual works e.g. movies and animes, a related type of re-creation is scanlation. Scanlation is usually produced by using an automated program which scans various manga or Japanese comic books, digitally erases the Japanese characters, and inserts English translations. Adding subtitles to a video and replacing textual translations mean that the original works are edited in the way that can be considered an adaptation¹²³ or derivative of the original copyright work. The subtitling and translation activities therefore potentially infringe the owner's rights of adaptation and preparing a derivative work.

¹²² "There is widespread potential for copyright infringement in virtual worlds and, indeed, there is widespread infringement of copyrights." (Sean Kane and Benjamin Duranske, 'Virtual Worlds, Real World Issues' (2008) 1 *Landslide* 9, 13).

¹²³ Adaptation of a work includes translation of a literary work and adapting a novel into a film, or vice versa. Therefore, fans who transform the original literary work such as a science fiction like *Star Wars* or a novel like *Harry Potter* into a play or fan film are possibly infringing the right of making an adaptation of the work.

2.1.1.2 Literal copying of part of original work: vidding, mashups and related activities

Fanvids and mashups take and re-arrange audio and/or visual segments from original anime, films or television series; therefore, these types of re-creations definitely constitute an act of direct copying of the copyright works. Some fanvids merely reiterate the original concept of the underlying work while some demonstrate different aspects of the original stories or unique storylines. Creative contributions of fanvids and mashups therefore vary widely in the story being told and in discretion on selection, arrangement and editing of video segments.

One general element of copyright infringement not explicitly stated in the international legislations but adopted in many jurisdictions is the concept of ‘substantiality’. Under this concept of law, to establish an infringement, copyright law does not require that the entirety of the copyright work be copied. Copying a substantial amount of the original expression will be sufficiently actionable. ‘Substantiality’ is an elusive copyright concept and is differently developed in each national copyright law. It is an infringement under the UK copyright law if the restricted acts carried out in relation to either the whole copyright work or a ‘substantial part’ of the work¹²⁴, and either directly or indirectly.¹²⁵ The US copyright law adopts the ‘substantial similarity’ approach to determine an infringement of copyright.¹²⁶ Substantiality is commonly assessed by

¹²⁴ Several factors can be used to assess whether a substantial part of the work has been reproduced such as the quality and quantity of the part that has been taken, “whether the copying relates to the idea or the expression of the idea, or whether the part which has been copied is commonplace or well-known or derived from some other source.” (Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008) 91) See also, *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 (HL); *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273.

¹²⁵ UK CDPA, section 16(3).

¹²⁶ One of the tests devised to determine substantial similarity is the ‘total concept and feel’ test. The test was introduced in a case involving infringement in greeting cards. The Appeal Court found that in total concept and feel the greeting cards are substantially similar because the combination of the characters depicted and the mood they portrayed and the layout of the words on the greeting card are very similar. (*Roth Greeting Cards v United Card Company*, 429 F. 2d 1106, 1110 (9th Circuit 1970). Fundamentally, *de minimis* concept applies: copying that is trivial or insignificant does not constitute actionable copyright infringement. (*Newton v Diamond*, 349 F. 3d 591, 594 (2nd Circuit 1960); *Ringgold v Black Entertainment Television, Inc.*, 126 F. 3d 70, 74 (2nd Circuit 1997)). For an exclusive treatise on the concept, see Eric Osterberg and Robert Osterberg, *Substantial Similarity in Copyright Law* (Practising Law Institute 2015).

quantity and quality of the copied content.¹²⁷ Since fansubs involve verbatim copy the whole original works, the copied parts are therefore very likely to be substantial. Though they are not whole copy like fansubs, mash-ups and viddings necessarily incorporate identifiable copyright components of original audio and/or visual works which are verbatim copied. Besides, fanvids usually involve taking of the entirety of an audio track. For example, an Anime Music Video (or A.M.V.) typically copies fragments of Japanese-style anime or video games and synchronises the selected and edited clips to an original soundtrack or a popular song which the re-creator thinks most appropriate for the A.M.V. Hence these types of re-creations arguably involve a substantial use of that original work.

2.1.1.3 Non-literal copying of original work: fan fiction and related activities

Fan fiction authors usually derive the main characters, settings or original concept from the original works which are usually fictional stories to produce distinct stories of their own imagination and interpretation. These re-creators do not reproduce an exact copy of any part of the expression of original works, e.g., original texts of a novel or scenes or pictures from movies; instead they create their own stories indirectly based on fragments of original works but with their own writing skills.

Comparing to fansubs, fanvids and mash-ups which directly incorporate whole or part of original audio-visual works, fan fictions at most involve indirect copying not verbatim copying or plagiarising. In case of literal reproduction, it is not complicated to prove direct taking of identifiable parts of original work to claim a copyright infringement. Non-literal copying, however, is problematic: no direct and exact elements is taken from the original work, instead the reproduced parts are for example the theme, characters or the plot of a fictional story without using the actual words from an original novel or verbatim copy of a scene in an original film.¹²⁸

¹²⁷ *Ibid.*

¹²⁸ Non-literal copy may be considered as “adaptation” or within the meaning of “reproduction”.

Under the substantiality concept, copyright law does not require that the entirety of the copyright work be copied to constitute an infringement; however, using the plot, characters and setting of a novel for a fan fiction without reproducing a single sentence of the original is difficult to determine whether it involves substantial taking.¹²⁹

It is a complex task to determine whether a non-literal copying is substantial and thus constitutes copyright infringement. From an analysis of a number of cases concerning non-literal copying in various jurisdictions, courts usually first identify what has been taken i.e. determine whether the second work has copied elements from the first work, find the ‘chains’ between the two works and identify the similarity. If the similar elements have been found, then courts would consider whether such elements are protected by copyright and whether they are substantial similarities.

To assert a successful claim of copyright infringement, the original source work must constitute copyright protected material.¹³⁰ Fundamentally, to have copyright protection¹³¹, the work must be original¹³² and must be a subject matter of copyright protection.¹³³ In relation to fan fiction, the owner of original work must demonstrate that the fictional facts or characters used in a fan fiction are his personal expression not just

¹²⁹ Although an online re-creator may have invested his creative effort and skill to produce his work, copyright infringement occurs if the re-creator has appropriated a substantial part of the original work. Similar to the UK’s ‘substantial part’ doctrine, under the US principle of ‘substantial similarity’, a re-creation can be infringing even if the original work has been changed or altered.; “With respect to the copying of original elements, a defendant need not copy the entirety of the plaintiff’s copyrighted work to infringe, and he need not copy verbatim.” (Eric Osterberg and Robert Osterberg, *Substantial Similarity in Copyright Law* (Practising Law Institute 2015) §1:1 cited *Nichols v Universal Pictures Corporation*, 45 F 2d 119, 121 (2d Cir 1930) and *Peter Pan Fabrics, Inc v Martin Weiner Corp*, 274 F 2d 487, 489 (2d Cir 1960)).

¹³⁰ For example, in *Feist Publications, Inc. v. Rural Telephone*, the US court held that to establish infringement the plaintiff must first prove ownership of a valid copyright. (*Feist Publications v Rural Telephone Service*, 499 US 340, 361 (1991)).

¹³¹ Copyright protection criteria differ by jurisdictions. (For instance, to be protected under the UK and US copyright, a work must be fixed in a tangible medium of expression. (See sections 3(2) and (3)6 of the UK CDPA and sections 101 and 102(a) of the US Copyright Act). However, fixation is not required under the copyright law in civil law countries such as France. (J.A.L Sterling, *World Copyright Law* (3rd edn, Sweet & Maxwell 2008) 330.

¹³² For a discussion on the concept of originality in copyright law, see chapter 3.1.2.1.

¹³³ The subject matter of copyright protection set out in, for instance, article 2 of the Berne Convention.

ideas¹³⁴ and that they are not in the public domain which can freely be used by anyone. The derived fictional elements must also pass copyright protection criteria.

Some fan fiction authors may only use the characters from the original work but create completely different plots or concepts. In this case, assessing the copyrightability of fictional characters is a complicated task since there is no uniform guideline of how to determine whether a character described in text is protected by copyright. Regarding copyright in characters, the US courts have applied two tests: the “sufficiently delineated” test and the “story being told” test.

For the first test, a fictional character is protected if it is “sufficiently delineated” independently of the work in which it appears. For instance, *Tarzan* was distinctively delineated in the original book, *Tarzan of the Apes* and therefore was protected¹³⁵:

“Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.”¹³⁶

Under this test, *Harry Potter* and *Captain Kirk* are possibly “sufficiently delineated” and thus protected as well.

According to the second test, a literary character is protected if it constitutes “the story being told”; but if the character is “only the chessman in the game of telling the story”¹³⁷ it is not protected by copyright. As addressed in a case of *Sam Spade*, since the novel *The Maltese Falcon* is driven by plot and atmosphere, *Sam Spade* the fictional private detective and the protagonist of the story was not protected by copyright.¹³⁸

¹³⁴ For an analysis on fictional facts, see Matt Kellogg, ‘The Problem of Fictional Fact: Idea, Expression, and Copyright’s Balance between Author Incentive and Public Interest’ (2011) 58 J. Copyright Soc’y U.S.A. 549.

¹³⁵ *Burroughs v Metro-Goldwyn-Mayer*, 683 F. 2d 610 (2nd Cir 1982).

¹³⁶ *Burroughs v Metro-Goldwyn-Mayer*, 519 F. Supp. 388, 391 (SDNY 1981).

¹³⁷ *Warner Bros. Pictures v Columbia Broadcasting System*, 216 F. 2d 945, 950 (9th Cir 1954).

¹³⁸ *Ibid.*

These two tests however could yield different results in some cases. For example, while *Professor Dumbledore* may be “sufficiently delineated” for protection, he might not constitute “the story being told” in the *Harry Potter* series. Besides, the tests are debatable and only applied in the US courts.¹³⁹ Despite the ambiguity of copyright in fictional characters, original authors and fans tend to consider that popular characters are protected by copyright.

Generally, in regard to non-literal copying of original elements either characters or non-characters, courts in many jurisdictions adopt the following principles to decline copyright protection in some forms of expression: idea/expression dichotomy, merger doctrine and *scènes à faire*.¹⁴⁰

The most important doctrine for non-literal infringement analysis is probably the idea/expression dichotomy that copyright law protects the expression of an idea but not the idea itself.¹⁴¹ Copyright therefore inhibits the use of the expression of the copyright holder but does not deter the use of the underlying ideas. The principle of idea and expression dichotomy forms the core consideration in much case law regarding non-literal copy infringement involving various types of works e.g. novels¹⁴², films¹⁴³, images and

¹³⁹ Aaron Schwabach, *Fan Fiction and Copyright* (Ashgate 2011).

¹⁴⁰ These copyright doctrines can be considered together to eliminate the unprotectable elements.

¹⁴¹ The idea/expression dichotomy is recognised as an international copyright norm. International legislations concerning the idea/expression dichotomy can be found in Article 9(2) of the TRIPS Agreement and in Article 2 of the WCT which provide that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Under Section 102(b) of the US Copyright Act, copyright protection under the US law does not extend to idea. Also, Article 1(2) of the EU Directive on the legal protection of computer programs explicitly states that it merely applies to the expression of a computer program not the underlying ideas and principles. Although the UK copyright law does not expressly provide statutory basis for the idea/expression dichotomy, it is recognised in case law that copyright does not protect ideas but only the expression of such ideas. (*Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 (HL); *Navitaire Inc v Easyjet Airline* [2004] EWHC 1725 (Ch); *Baigent and another v Random House Group Ltd* [2007] EWCA Civ 247).

¹⁴² See e.g. *Ravenscroft v Herbert* [1980] RPC 193 (‘The Spear of Destiny’); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257 (11th Cir. 2001) (‘Gone With The Wind’); *Dan Brown and Random House v Lewis Perdue* (SDNY 2005) (‘Daughter of God’); *Baigent v Random House* [2007] F.S.R. 24 (‘The Holy Blood and The Holy Grail’).

¹⁴³ See e.g. *Nichols v. Universal Pictures Corporation*, 45 F. 2d 119 (2nd Cir., 1930) (‘The Cohens and the Kellys’); *Dawn Associates v Links*, 203 U.S.P.Q. 831 (N.D. Ill. 1978) (‘Night of the Living Dead’); *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200 (SDNY 2010) (‘The Rear Window’). Cases regarding non-literal copy of screenplay or script in a movie are such as *Christoffer v Poseidon Film*

other artistic works¹⁴⁴, fabric design¹⁴⁵, TV formats¹⁴⁶, TV programmes¹⁴⁷ and computer programmes¹⁴⁸. In most of the cases, the plaintiffs were not successful in claiming a copyright infringement because the alleged taking was found to be unprotected ideas unless the appropriation from the original work was unique, detailed or original expression of ideas, not just ideas.

Under the merger doctrine¹⁴⁹, if an expression inextricably merged with its underlying idea i.e. if there is only one or very limited number of ways to express certain idea, expression of such idea cannot be protected by copyright because granting exclusive ownership for any particular form of expression would deter all possible future use of the idea.¹⁵⁰

Distributors [2000] ECDR 487 ('The Cyclops') and *Benay v. Warner Bros. Entertainment, Inc.*, 607 F. 3d 620, (9th Cir., 2010) ('The Last Samurai').

¹⁴⁴ See e.g. *Steinberg v. Columbia Pictures Industries*, 663 F. Supp. 706 (S.D. N.Y. 1987) ('Moscow on the Hudson'); *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2005] F.S.R. 20 ('Ideal Home').

¹⁴⁵ The prominent case concerning idea/expression distinction in the UK is *Designers Guild v Russell Williams (Textiles)*, [2001] ECDR 10.

¹⁴⁶ It can be concluded that in most cases the courts found that the script, theme or treatment of the show in question was merely a general idea or concept and therefore rejected the copyright claim. However, in a very few cases, where the courts were satisfied that the television formats were unique in concept and have distinctive protectable elements, substantial copy between the disputed shows could possibly be found. The leading UK case law regarding a talent show format is *Green v Broadcasting Corporation of New Zealand* [1989] R.P.C. 700; Cases concerning *Big Brother* format infringement in the Netherlands and Brazil are *Castaway Television Productions and Planet 24 Productions v Endemol* (Dutch Supreme Court, 2004) and *Endemol v. TV SBT* (Brazil, 2004); TV formats cases in Canada e.g. *Hutton v. Canadian Broadcasting Corp* (1989), 29 CPR (3d) 398 (Alta QB); (1992), 41 CPR (3d) 45 (Alta CA); *Cummings v. Global Television Network Quebec* (2005), JE 2005-1088 (CS Que); JE 2007-609 (CA Que); Other formats cases in the US are e.g. *CBS Broadcasting v. ABC*, No. 02 Civ. 8813 (LAP), (S.D.N.Y. Jan. 13, 2003) ('Survivor'); *Milano v. NBC Universal*, 584 F. Supp. 2d 1288 (CD California 2008) and *Latimore v. NBC Universal*, No. 12-1385-cv., (2nd Cir., 2013) ('The Biggest Loser'); *Castorina v. Spike Cable Networks*, 784 F. Supp. 2d 107 (EDNY 2011) ('Two Left Feet');

¹⁴⁷ See e.g. *Miles v ITV Network Limited* [2003] EWHC 3134 (Ch) ('Trusty and Friends').

¹⁴⁸ See e.g. *John Richardson Computers v Flanders* [1993] F.S.R. 497; *Ibcos Computers Ltd v Barclays Mercantile Highland Finance* [1994] F.S.R. 275; *Navitaire v Easyjet Airline Company* [2005] ECDR 17; *Nova Productions v Mazooma Games* [2006] RPC 14; *SAS Institute v World Programming* [2013] R.P.C. 17; *Computer Associates v Altai* 982 F. 2d 693 (2nd Cir.1992); *Tetris Holding v. Xio Interactive*, 863 F. Supp. 2d 394 (DNJ 2012).

¹⁴⁹ For an analysis of the doctrines of merger and scènes à faire, see e.g. Stanley Lai, *The copyright protection of computer software in the United Kingdom* (Hart 2000).

¹⁵⁰ For example, the idea of a jewelled bee pin and its expression are indistinguishable; therefore cannot be protected under copyright (*Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F. 2d 738, 742 (9th Cir.1971)).

Under the related doctrine of *scènes à faire*¹⁵¹, incidents, characters or settings which inevitably follow from a common theme and can only be expressed in a stereotyped form affords no copyright protection¹⁵² because granting a copyright “would give the first author a monopoly on the commonplace ideas behind the *scenes a faire*”¹⁵³. Stock scenes and standard ideas considered as unprotected *scènes à faire* are, for example, a general “story from the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization”¹⁵⁴; “[e]lements such as drunks, prostitutes, vermin and derelict cars ... appear in any realistic work about the work of policemen in the South Bronx”¹⁵⁵; common theme of underwater civilization¹⁵⁶; “the idea of a mosque-style palace with minarets ... in a story about Arabian or African royalty” and “visits to fast-food restaurants and nightclub sequences”¹⁵⁷; and photographing a vodka bottle for advertisements with limited possible ways to do so.¹⁵⁸

After identifying similar elements in the two works and separating protected from non-protected materials, courts would consider whether the similar elements in the second

¹⁵¹ The *scènes à faire* doctrine was first introduced in a 1942 case in which the similar church scenes in two works were not copyrightable.

“They are what the French call ‘*scènes à faire*’. Once having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme. Courts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists.” (*Cain v. Universal Pictures*, 47 F. Supp. 1013, 1017 (SD California 1942).

The doctrine is also adopted in English law (e.g. *John Richardson v Flanders* [1993] F.S.R. 497 accepted the US decision in *Computer Associates International v. Altai* (1992) 20 U.S.P.Q. 2d 1641 which in itself applied the doctrines of merger and scenes a faire).

¹⁵² “Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain ‘stock’ or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law.” (*Hoehling v. Universal City Studios*, 618 F. 2d 972, 979 (2nd Cir. 1980); “No one can own the basic idea for a story. General plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind.” (*Berkic v. Crichton*, 761 F. 2d 1289, 1293 (9th Cir. 1985).

¹⁵³ *Landsberg v. Scrabble Crossword Game Players*, 736 F. 2d 485, 489 (9th Cir. 1984).

¹⁵⁴ *Berkic v. Crichton*, 761 F. 2d 1289 (9th Cir.1985).

¹⁵⁵ *Walker v. Time Life Films*, 784 F. 2d 44 (2nd Cir. 1986).

¹⁵⁶ *Evans v. Wallace Berrie*, 681 F. Supp. 813 (SD Florida 1988).

¹⁵⁷ *Beal v. Paramount Pictures Corp.*, 20 F. 3d 454 (11th Cir. 1994).

¹⁵⁸ *Ets-Hokin v. Skyy Spirits*, 225 F. 3d 1068 (9th Cir. 2000).

work are substantially similar with the protected elements of the first work.¹⁵⁹ If the similar elements are merely ideas (idea/expression dichotomy) or stereotypical scenes (as scènes à faire) or expression that merged with the underlying idea (merger doctrine) or simply exist in the public domain, substantial similarity usually would not be found and copyright infringement claim would likely be rejected.

To determine legality of fan fiction, the above analysis applies. For example, a fan fiction which uses the theme of vampire and werewolf or a concept of a wizard boarding school may be considered as scene a faire or merely an idea, therefore not protected by copyright. However it is more complex when a fan fiction author uses the names of the places and characters written in a fictional story such as the names of the protagonists in *Twilight*, *Edward* and *Bella*, with the storyline of a vampire and a werewolf who fall in love with a girl, or the names of the places such as *Hogwarts School* from *Harry Potter*. It is clear that ideas cannot be protected; however detailed scenes, plot outlines and characters may be protectable elements; specific and unique scenes and texts of a novel are most likely to be protected.

Despite the complexity to prove infringement, most writers and fans seem to assume that infringement occurs. The possibility that fan fiction is an infringement chills its creation and thus creativity; online re-creators tend to comply with cease and desist letters from copyright holders by removing their re-creations. This issue is further discussed in chapters 3, 4 and 5.

2.1.2 Online communication and making available to the public

In the culture of online re-creation, disseminating or sharing works is one of the primary motives of re-creating. As discussed in chapter 1, online re-creators share their re-creations on the internet platforms such as uploading fansubs and mashups on *YouTube* and posting fan fiction on *FanFiction.net*. This action potentially constitutes an

¹⁵⁹ This procedure to analyse non-literal copying is not absolute; courts may adopt a similar or different framework.

infringement of the exclusive rights of the right owner to communicate and make the work available to the public and to perform the copyright protected work publicly.

The crucial right related to online sharing of work is the right to communicate the work to the public. This right was conferred to cope with the modern technology.¹⁶⁰ In compliance with the WIPO treaties¹⁶¹, the right of communication to the public including making available on demand was implemented in national laws in many countries.¹⁶² The exclusive right to authorise or prohibit any communication to the public of the work includes making available on-demand access: the making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them.¹⁶³ Following the 23rd recital in the preamble to the EU InfoSoc Directive¹⁶⁴, the ECJ determined that “communication to the public” must be interpreted broadly.¹⁶⁵ Broad interpretation might however encroach upon the right to freedom of speech. Freedom of expression or free speech will be critically discussed in chapter 3.2.

In summary, an online re-creator typically carries out one of the activities exclusively conferred on the copyright owner without permission; a copyright

¹⁶⁰ Makeen Fouad Makeen, *Copyright in a global information society* (Kluwer Law 2000) 1-31); Jane Ginsburg, ‘The (new?) right of making available to the public’ in David Vaver and Lionel Bently (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press 2004); De Wolf & Partners, ‘Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society’ (European Union, 2013).

¹⁶¹ Article 8 of the WCT, article 10, 14 of the WPPT and article 11, 14 of the Berne Convention.

¹⁶² The right of making available on demand is implemented such as in all the EU member states, Australia and Singapore. (Article 3 of the EU InfoSoc Directive; Australian Copyright Act 1968 sections 31(1)(a)(vi) and 31(1)(b)(iii); Singapore Copyright Act (Chapter 63) Part III Division 1 e.g. S.26(1)(a)(iv)); “The United States implemented the WIPO Internet Treaties through the Digital Millennium Copyright Act (“DMCA”) in 1998. Congress did not, however, amend the US law to include explicit references to “making available” and “communication to the public,” concluding that Title 17 already provided those rights.” <http://copyright.gov/docs/making_available/>.

¹⁶³ The exclusive rights of copyright owner are now extended to embrace all types of communication to the public, not only wired and wireless broadcast, but also communication by electronic transmission. The Berne Convention and the WIPO Treaties however do not define what constitutes “the public”.

¹⁶⁴ “...This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting...”

¹⁶⁵ Case C-466/12 *Svensson v Retriever Sverige* [2014] ECLI:EU:C:2014:76; *Paramount v British Sky Broadcasting* [2013] EWHC 3479 (Ch); Case C-306/05 *SGAE v Rafael Hoteles* [2006] ECLI:EU:C:2006:764.

infringement therefore potentially occurs. If a re-creation is made with authorisation from the right holders, such re-creation would be lawful. However, as we will see in part 2.2, obtaining permission to re-create is almost impossible for general re-creators.

2.2 Authorisation Difficulties

Permission or a licence from the copyright holder allows the licensee to exploit the work without infringing. Although right holders enforce their copyright against amateur re-creators as analogised to professional content providers, licensing mechanisms do not operate well for those re-creators.

First of all, it is difficult for a re-creator to identify and locate the proper owners of copyright due to the absence of registration requirement and due to the fact that copyright interests in a work (such as sound recording and musical composition) can be split between a number of parties¹⁶⁶. After finding the right owners, re-creators may face a problem of unwillingness to license. Copyright owners tend to contractually grant permission to professional users, but do not easily give authorisation to individual amateur users.¹⁶⁷ Moreover, collective administration, a system that enables licensing from numerous owners to multiple users, is for non-altering uses rather than for re-creation of works.¹⁶⁸ This is possibly due to the fact that most licensing is based on revenue sharing, but amateur re-creations produce minimal or no revenue to share.

Not only that it is a tremendous hurdle to obtain licences from multiple copyright holders, licensing fees for a use of their content are potentially cost-prohibitive.¹⁶⁹ This is inextricably linked to the valuable asset approach of right holders. Negotiating a deal to

¹⁶⁶ Michael Hughes, 'Dealing with Talking Girls and Dangerous Mice: An Assessment of Mashups and their Place in Copyright in Canada' (LLM thesis, University of Toronto 2011) 29-30.

¹⁶⁷ Daniel Gervais, 'The Tangled Web of UGC' (2009) 11 Vand. J. Ent. & Tech. L. 841, 848; This issue is also commented by an interviewed original author that he would prefer to license his work to a professional company (see chapter 5.2.2).

¹⁶⁸ *Ibid*; This issue is also concerned by an interviewed online re-creator (see chapter 5.2.2).

¹⁶⁹ Edward Lee, 'Copyright-exempt Nonprofits' (2013) 45 Ariz. St. L.J. 1433, 1443.

authorise a use of their works for re-creations would also be extremely difficult. There is no guarantee that the right owners will grant licences for use of re-creations. The most likely outcome of the negotiation is a licence refusal.¹⁷⁰ Normal copyright licensing system therefore dissuades online re-creations.

Sometimes right holders may voluntarily grant permission to re-creators to use their works. Some original creators may declare their permission for fans to use their works for re-creations such as fan fictions and fanvids and some authors join the open-access licensing scheme allowing members of the public to access and use their online content for free under standardised licences. Nevertheless, as previously discussed, it is more likely that copyright owners will not give authorisation.

To conclude, it is almost impossible for an online re-creator to obtain permission to re-create due to some obstacles discussed above and due to some practical issues identified in the social norms analysis in chapter 5.2.2. Thus, online re-creations tend to be created without authorisation and consequently tend to be infringing.

2.3 Moral Rights Concerns

Alongside the conferred economic rights, the author of the copyright protected work is also granted moral rights to protect his non-pecuniary interests. Civil law countries tend to provide more rigorous moral rights protection than those countries in common law systems. In France, for example, moral rights are “perpetual, inalienable and imprescriptible”,¹⁷¹ whereas in most countries including the UK¹⁷², moral rights last for the

¹⁷⁰ *Ibid*, 1444; Michael Hughes, ‘Dealing with Talking Girls and Dangerous Mice’ (LLM thesis, University of Toronto 2011) 29-30.

¹⁷¹ Article L121-1, French Intellectual Property Code.

¹⁷² Section 86 of the UK CDPA.

same period as economic rights¹⁷³. The rights are generally not alienable¹⁷⁴ but can be waived in some jurisdictions¹⁷⁵.

Article 6bis of the Berne Convention secures protection of the two moral rights which are the author's right of attribution or paternity to claim authorship of the work and the right of integrity to object to any distortion of his work. Article 6bis of the Berne Convention states that:

“Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.”

Members of the Berne Convention are bound to comply with Article 6bis. For instance, France grants the right of respect namely respect for name (attribution right) and respect for work (integrity right) in article L121-1 of its Intellectual Property Code. Section 106A of the US Copyright Act¹⁷⁶ also recognises the two moral rights however limited for authors of works of visual art.

Though not being recognised under the international framework, the right of divulgation and the right of withdrawal are specific rights in some countries such as France and Germany. Divulgation right allows the author of the work to have control of when, where and how his work will first be divulged to the public.¹⁷⁷ As for the right of withdrawal, the author can withdraw his work from further reproduction and circulation in return for indemnification to the assigned distributor for the damage that might occur to him.¹⁷⁸ These two moral rights do not have a significant implication in terms of online re-creations; re-creators generally use the work that has already been published and the right

¹⁷³ Under the Article 6bis(2) of the Berne Convention, the moral rights granted to the author in Article 6bis(1), shall be maintained after his death, “at least until the expiry of the economic rights”.

¹⁷⁴ E.g., Section 94 of the UK CDPA.

¹⁷⁵ E.g., Section 87 of the UK CDPA.

¹⁷⁶ The provision is amended by the Visual Artists Rights Act of 1990.

¹⁷⁷ E.g., Article L121-2, French Intellectual Property Code.

¹⁷⁸ E.g., Article L121-4, French Intellectual Property Code.

of withdrawal is available only in a small number of countries and rarely asserted.¹⁷⁹ Thus for the purpose of this thesis, these two rights will be set aside.

The Attribution right

The right of attribution or paternity is relatively broad as it gives the author the right to assert that he is the creator of his work so that his authorship will be recognised and exercised as he wishes including publishing his work anonymously or pseudonymously.¹⁸⁰ The author can also prevent false attribution, the use of his name as the author of the work he did not create.¹⁸¹

Regarding the attribution right, some online re-creators give credits by stating the names of the owners of original works, but many do not. In case of fan fiction, from a sample of 100 *Harry Potter* stories from *FanFiccion.net*, only twenty-one fan authors cited a disclaimer that original *Harry Potter* story belongs to J.K. Rowling.¹⁸² This raised a potential infringement problem of attribution right in most online re-creations. Besides, acknowledging the name of the original author must be adequate to attribute authorship of the work, not merely tributes. For example, in *Sawkins v Hyperion Records*¹⁸³, the English court held that the acknowledgement by Hyperion of the contribution of Sawkins, the author of a musical work, in the CD booklets that “With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording” was insufficient to identify Sawkins as the author of the work. Hyperion therefore infringed the moral right of Sawkins under section 77 of the 1988 CDPA.

¹⁷⁹ Paul Goldstein and P. Bernt Hugenholtz, *International Copyright* (OUP 2010) 354-355.

¹⁸⁰ WIPO, ‘Guide to the Berne Convention’ (WIPO Geneva 1978) 41.

¹⁸¹ E.g., section 84, UK CDPA; section 106A(a)(1), US Copyright Act.

¹⁸² <<https://www.fanfiction.net/book/Harry-Potter/>> (accessed 21 March 2016).

¹⁸³ *Sawkins v. Hyperion Records* [2005] EWCA Civ 565.

The Integrity Right

The right of integrity allows the author to object to any distortion, mutilation or modification of his work which would prejudice the author's honour or reputation. Generally, following the Berne formulation, the author must demonstrate that the claimed distortion is prejudicial to his honour or reputation. The formulation and application of the integrity right vary in national laws.

It is arguable that music sampling or video mash-ups that involve cutting and rearranging original materials infringe the moral right of integrity. In a French case, *Schoendoerffer v Mod Films*¹⁸⁴, a reduction of the length of a movie from 131 to 119 minutes without consent of the director infringed his moral right. In an English case, *Morrison Leahy Music v Lightbond*¹⁸⁵, George Michael objected that a mix of samples from his musical work distorted his work. Though the issue was not decided, the judge accepted that it is an arguable case whether the change of context of musical selections constitute a derogatory treatment of the composition. However, in *Confetti Records v Warner Music*¹⁸⁶, an addition of a rap to a track of garage music did not constitute derogatory treatment because the court did not find that the distortion or mutilation prejudiced the author's honour or reputation. It is therefore an arguable case that a remix of extracts of original work may derogate the primary work such that the author's honour or reputation is prejudiced.

One of the most interesting fans' practice which could distort the original work and thus affect the integrity right is 'slash' which is a genre of fan fiction exploring the romantic and sexual relationship between the fictional characters mostly of the same sex. The term 'slash'¹⁸⁷ comes from the slash punctuation mark used to indicate the names of

¹⁸⁴ TGI Paris, March 23 1994, (1995) 164 R.I.D.A. 332.

¹⁸⁵ [1993] E.M.L.R. 144.

¹⁸⁶ [2003] EWCH 1274 (Ch).

¹⁸⁷ Some scholars consider 'slash' in a broad definition for any romantic or erotic pairing (e.g. Will Brooker, *Using the Force: Creativity, Community and Star Wars Fans* (Continuum 2002); Aaron Schwabach, *Fan Fiction and Copyright* (Ashgate 2011)), while others adopt a narrower scope of 'slash' only for same-sex pairings or homoerotic stories (e.g. Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (University of Pennsylvania Press 1992); Rebecca Tushnet, 'Legal Fictions:

the characters in a pairing such as *Harry/Hermione*, *Edward/Bella* and the popular same-sex pairings: *Kirk/ Spock*, *Holmes/Watson*, and *Harry/Draco*. Though ‘slash’ genre typically refers to written fan fiction, nowadays there are a number of drawings, photo manipulations and fanvids that depict erotic situations between popular characters.

But whose perspective does the court apply when considering whether a derogation of a work prejudices the author’s honour or reputation? The UK court tends to apply an objective test of reasonableness¹⁸⁸ while the civil law approach (such as in France) adopts a subjective test rather than an objective test. Nevertheless, some countries may apply both perspectives such as in a Canadian case, *Snow v Eaton Centre*¹⁸⁹. In this case, the Ontario High Court of Justice found that the integrity right of Snow, the sculptor of a flock of geese, was infringed because Christmas red ribbons decorated around the geese necks distorted the sculpture’s integrity which was prejudicial to Snow’s honour and reputation. In this case, the court applied both subjective and objective tests. It considered the author’s perspective that his work had been made to look ridiculous by the addition of ribbons. It also took into account the testimony of experts in the field which supported the prejudice of the author’s honour or reputation. Therefore, in conclusion, whether a distortion of a work prejudices the creator’s honour or reputation may depend on the perspective of the author and/or the opinion of other people.

Hence, in general, whether a re-creation prejudices the honour or reputation of the original author depends on the perspectives of the author and/or members of the society. Accordingly, in case of a homoerotic slash, in a society where homosexuality is a crime and if the original author is a member of that society, the derogatory argument seems strong; whereas in a country which prohibits discrimination on grounds of sexual orientation, such derogatory treatment claim may be declined. Slash specifically homoerotic fictions may therefore infringe the author’s right of integrity if they are found

Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L. A. Ent. L. Rev. 651; Sarah Jones, ‘The Sex Lives of Cult Television Characters’ (2002) 43(1) Screen 79; and Catherine Tosenberger, ‘Homosexuality at the Online Hogwarts: Harry Potter Slash Fanfiction’ (2008) 36 Children’s Literature 185).

¹⁸⁸ E.g., *Tidy v Trustees of the Natural History Museum* [1996] 39 I.P.R. 501.

¹⁸⁹ (1982), 70 CPR (2d) 105.

as a distortion of the original works and harmful to the original authors' honour and reputation.

As discussed above, copyright both economic rights and moral rights significantly limit activities involving re-creation and obtaining authorisation from a right holder would not be possible. Moreover, in spite of a number of copyright exceptions that permit limited use of copyright works without permission of the copyright owner, there is no viable copyright defence which is really useful for online re-creators.

2.4 Inadequacy of Copyright Defences

There are certain defences to copyright infringement to allow a reasonable use of copyright work without permission of the right owners.¹⁹⁰ Exemptions relevant to online re-creations are such as private copying in continental Europe, the fair use doctrine in the US, fair dealing provisions in the common law countries and the Canadian user-generated content exception.

The InfoSoc Directive¹⁹¹ allows EU member states to introduce private copying limitation for non-commercial use of copyright content in return for a fair compensation¹⁹² to the right holders. In the countries where private copying exemptions are provided¹⁹³, online re-creators can freely use copyright content to produce their re-creations under general conditions that they are not for commercial and not for public uses.¹⁹⁴ Therefore, under the private copying provisions, re-creators can lawfully write fan fictions and edit mash-ups for pure personal enjoyment of the original works as long as they keep the

¹⁹⁰ Limitations and exceptions to the reproduction right are permitted by Article 9(2) of the Berne Convention and Article 13 of the TRIPS agreement.

¹⁹¹ Article 5(2)(b) of the InfoSoc Directive.

¹⁹² In most national legislatures, 'fair compensation' presents in the form of a levy on recording equipment. For a discussion on private copying levies, see e.g. Stavroula Karapapa, *Private Copying* (Routledge 2014).

¹⁹³ The EU member states that apply private copying are for example Germany, France, Denmark, Austria, Belgium, Italy, Poland and the Netherlands.

¹⁹⁴ For a critical analysis on defining 'private' and 'non-commercial', see Stavroula Karapapa, *Private Copying* (Routledge 2014).

works on the shelf and do not share them with other people (in some countries, sharing the works with family and close friends are acceptable).¹⁹⁵ However, online re-creations are usually communicated online to reach the widest audience; in such situation, re-creators therefore cannot avail themselves of private copying limitations.

Other defences to copyright are such as the US fair use doctrine and the UK fair dealing. Though the US courts regularly held that parody amounts to fair use, it is not certain that a parody work or other forms of criticism such as satire falls within the scope of the fair use doctrine. Besides, other types of online re-creations such as fan fictions¹⁹⁶ and mash-ups are still problematic under the fair use exception. Fanvids, mash-ups and other works involving direct taking of original works are not likely to be fair uses. The UK fair dealing defence does not provide any specific exception for online re-creations, apart from private copying and parody exceptions implemented in October 2014. The existing limitations and exceptions in various jurisdictions including the US fair use and the UK fair dealing do not sufficiently provide a reasonable space for online re-creations. The free use doctrine under German law and the non-commercial user-generated content provision implemented in Canada are also limited and have some issues that need to be addressed. All these pertinent limitations and exceptions will be critically analysed in chapter 4.

¹⁹⁵ The concept of ‘public’ may be interpreted diversely in different national copyright laws. For example, in Hungary, performing music in a classmate reunion or a party for members of a club may not be a copyright infringement under the Article 38(1)(f) of the Hungarian Copyright Act stating that “[i]f the performance is not designed to earn or increase income even in an indirect manner and the participants do not receive remuneration, the works may be performed... for private use and at occasionally held private social gatherings”. Article 38(4) further explains that “[a] party held by an economic organization or a legal entity other than an economic organization exclusively for its members, officers and employees shall be taken to be a private event”. Thus the scope of private performance in Italy is broader than those in some other jurisdictions such as France which allows performances only if they are carried out exclusively within the family circle. (Article L122-5(2) of the France Intellectual Property Code).

¹⁹⁶ Many scholars have commented on the legality of fan fiction particularly in relation to the US fair use exception, e.g., Michelle Chatelain, ‘Comment: Harry Potter and the Prisoner of Copyright Law’ (2012) 15 Tul J Tech & Intell Prop 199; Aaron Schwabach, *Fan Fiction and Copyright* (Ashgate 2011); Christina Ranon, ‘Honor Among Thieves: Copyright Infringement in Internet Fandom’ (2006) 8 Vand. J. Ent. & Tech. L. 421; Leanne Stendell, ‘Fanfic and Fan Fact’ (2005) 58 SMU L Rev 1551.

2.5 The ‘Giant Grey Zone’

Online re-creations constitute a ‘giant grey zone’ within copyright.¹⁹⁷ As previously demonstrated, though online re-creations involve unauthorised use of copyright protected materials and therefore are potential copyright infringements, these works have uncertain legal status due to the lack of case law in this area.¹⁹⁸ Moreover, existing copyright exceptions such as the US fair use doctrine are notoriously difficult to predict, again, due to the lack of precedent decisions relating to various types of online re-creations. Re-creators would not possibly know if their works categorised as a fair use or not.¹⁹⁹ Thus, upon receipt of a cease and desist order or a takedown notice, they would not fight back or file a counter notification; instead they would shun possible litigation and remove their contents.²⁰⁰ Because of the absence of other applicable copyright exceptions, and thus, the lack of clarity about its legal status, an online re-creation can easily be alleged to be an infringement and can promptly be taken down as discussed below.

The legal environment of online re-creation culture is “not only murky, it is also hostile”.²⁰¹ Online re-creators face the threat of litigation and removal of their re-creations. Not only causing anxiety and fearfulness on the part of online re-creators, current copyright law also appears as a threat for the general public. Considering the risk of being sued by the content owners, the public including students, schools and universities fear to

¹⁹⁷ “There is a giant grey zone in copyright, consisting of millions of usages that do not fall into a clear category but are often infringing.” (Tim Wu, ‘Tolerated Use’ (2008) 31(4) *Colum. J. L. & Arts* 617, 617).

¹⁹⁸ For example in case of fan fiction, Stendell comments: “Because there are no reported cases, the discussion of the legalities of fan fiction is largely speculative, confined to the realm of law review articles and Internet discussions, produced by legal professionals and amateurs debating the issue.” (Leanne Stendell, ‘Fanfic and Fan Fact’ (2005) 58 *SMU L Rev* 1551, 1554).

¹⁹⁹ Lipton comments that “it is virtually impossible in many cases for a potential defendant to know, prior to defending an infringement action, whether or not her use is, in fact, properly characterized as a fair use. Even if the defendant honestly believes she is making a fair use of a work, she will not be excused from liability unless she can establish the defense in litigation.” (Jacqueline Lipton, ‘Cyberspace, Exceptionalism, and Innocent Copyright Infringement’ (2011) 13(4) *Vand. J. Ent. & Tech. L.* 767, 774).

²⁰⁰ See chapter 5.2.2.

²⁰¹ Warren Chik, ‘Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law’ (2011) 11 *J. Marshall Rev. Intell. Prop. L.* 240, 250-251.

engage with or do anything related to the online culture since the re-creations are presumptively illegal.²⁰²

Although online re-creations are potential copyright infringements, copyright owners of the underlying works are not enthusiastic in bringing the case to court. Due to the absence of relevant case law, the legality of online re-creations is left speculative. Hence there is still a threat of litigation if copyright owners choose to enforce their rights in courts.

The reasons why it is relatively unusual for the copyright holders to take a legal action against online re-creations especially fan-based creations can be outlined as follows. First, it is usually not worth litigating when considering that the costs of legal enforcement likely outweigh any possible economic harm²⁰³. Second, “[c]opyright holders seem to be aware of the potential for backlash if the public perceives them as targeting enthusiastic fans who only wish to support the show through their Internet activities”²⁰⁴. Third, in the online environment, instead of heading to court, copyright owners can opt to exercise their rights through the copyright enforcing tool i.e. ‘notice and take down’ procedure which yields an active and effective result of the allegedly infringing contents to be removed or taken down.

Notice and Takedown

Without going to court, copyright can enforce their copyright against re-creators by issuing cease and desist letters.²⁰⁵ This alternative usually gives successful results since

²⁰² Patricia Aufderheide and Peter Jaszi, ‘Recut, Reframe, Recycle’ (2010) 6 *Journal of Law and Policy for the Information Society* 13, 16-17; Michael Heller, *The Gridlock Economy* (Basic Books 2008) 15; Lawrence Lessig, *Remix* (Penguin Press 2008) 108.

²⁰³ Joseph Liu, ‘Copyright Law’s Theory of the Consumer’ (2003) 44 *B.C. L. Rev.* 397, 417.

²⁰⁴ Sarah Trombley, ‘Visions and Revisions: Fanvids and Fair Use’ (2007) 25 *Cardozo Arts & Ent. L.J.* 647, 656.

²⁰⁵ Henry Jenkins, *Fans, Bloggers, and Gamers: Media Consumers in a Digital Age* (New York University Press 2006) 134-151.

the re-creators are not likely to resist a cease and desist order owing to a threat of facing litigation.²⁰⁶

In the online environment, the equivalent option for copyright holders is the enforcing tool, “notice and take down” procedure.²⁰⁷ The notice and take down regime provides immunity or “safe harbour” for an intermediary such as *YouTube* that it will not be liable if upon obtaining a proper notice, it expeditiously removes or disables access to the material that is claimed to be infringing. Under this procedure, once the hosting service provider is notified by copyright owners or their agents or becomes aware of the presence of copyright infringing material on its server, it must act expeditiously to remove or disable access to such material.

The DMCA was believed to balance “the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet”²⁰⁸. To safeguard the rights of the internet users, the DMCA allows the user to issue a counter notification²⁰⁹ stating that his content is not unlawful and he “has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.”²¹⁰ Unless the copyright holder has started court proceedings to remove the allegedly infringing material, the online service provider is obliged to replace the removed content and cease disabling access to such material between 10-14 business days following receipt of the counter notification.²¹¹

²⁰⁶ See chapter 5.2.2.

²⁰⁷ The Digital Millennium Copyright Act (DMCA), enacted in 1998, extended the control of copyright owners on the internet platforms while providing limitation on online service providers’ liability for copyright infringement by their users. The DMCA added the notice and take down provisions, Section 512, to Chapter 5 of the US Copyright Act. Similar provision adopted by the European Union in Article 14 of the E-commerce Directive.

²⁰⁸ U.S. House, Committee on Digital Millennium Copyright Act of 1998 (Committee Reports 105th Congress (1997-1998) House Report 105-551, Part 2).

²⁰⁹ The requirements of counter-notification are specified in section 512(g)(3) of the DMCA.

²¹⁰ Section 512(g)(3)(c), DMCA.

²¹¹ Section 512(g)(2)(c), DMCA.

A prominent case regarding the DMCA takedown notice and the US fair use defence²¹² is *Lenz v Universal*.²¹³ In 2007, Stephanie Lenz posted a home video of her children dancing in a kitchen on *YouTube*. In the twenty-nine seconds video, a poor quality sound of Prince's song, 'Let's Go Crazy', was being played in the background. *YouTube* removed Lenz's video due to the DMCA takedown notice by Universal, the copyright owner of the song. Pursuant to section 512(g) of the US Copyright Act, Lenz issued a DMCA counter notification to *YouTube* who put the video back online about six weeks later. Lenz then filed a lawsuit against Universal for misrepresentation under the DMCA and sought a declaration judgment that her content was non-infringing. The court satisfied that Lenz's video was a fair use and thus not an infringement. The court in this case set a good faith requirement from the perspective of copyright owner to evaluate whether the material constitutes a fair use before issuing a takedown notice.²¹⁴ The requirement helps reducing overused and abusive takedown notices²¹⁵ from copyright owners such as by automated search programs for titles or fragments of copyright protected works without examining the allegedly infringing content²¹⁶.

This case can also be seen as a role model for internet users especially *YouTube* users to argue with DMCA takedown notices by filing counter notifications that their contents are non-infringing due to the fair use defence. Nevertheless, for most online re-creations²¹⁷, it is very unlikely that re-creators would fight back by counter notices: because they will have the burden to prove that their re-creations are not infringements while there is no landmark case of re-creations especially fanvids and mashups that could successfully avail of the US fair use doctrine or any other applicable exemption.

²¹² See the fair use discussion in chapter 4.1.

²¹³ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (2008); 801 F.3d 1126 (2015).

²¹⁴ Ninth Circuits issued an amended opinion regarding the case in March 2016. It added further support that a copyright holder must form a subjective good faith belief that the use was not authorised by law. (*Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) opinion amended, No. 13-16106, 2016 WL 1056082 (9th Cir. Mar. 17, 2016).

²¹⁵ For examples of abusive takedown notices see e.g. Jordan Sundell, 'Tempting the Sword of Damocles: Reimagining the Copyright/DMCA Framework in a UGC World' (2011) 12 Minn. J.L. Sci. & Tech. 335, 346-348.

²¹⁶ Steven Seidenberg, 'Copyright in the Age of YouTube' (2009) 95 A.B.A. J. 46, 48.

²¹⁷ Parody is more likely to be considered as fair use due to a number of fair use cases on parody. See chapter 4.4.1.1.

Virtual worlds created based on works of popular culture are also threatened by the notice and takedown regime. For instance, in 2009, a sim created based on Frank Herbert's *Dune* novels in *Second Life* was ordered to be removed by a DMCA takedown notice.²¹⁸ The sim creators did not contest but complied with the notice; as a result, all *Dune*-related items and names were removed and the *Dune*-themed sim was converted to a generic sci-fi desert environment.²¹⁹

Hence, due to the lack of court case and obscure legal status of online re-creations, counter notification procedure does not conduce to the balance between the interests of copyright holders and those of the re-creators. The online re-creators are not competent to challenge the copyright enforcement and their rights to freedom of speech²²⁰ are not sufficiently considered. Since online re-creations can possibly constitute copyright infringement and may easily be taken down, the re-creators might be restrained from making the new works especially when they are aware of potential copyright litigation. This gives a chilling effect that these creative works will be considered as unlawful, if not ultimately be decreased or blocked completely.

In summary, pursuant to the current copyright law and its active enforcing mechanism, an online re-creation can easily be considered as copyright infringement and can “expeditiously” be removed or taken down by the copyright holders and online service providers, and not by the court.

2.6 Conclusion

Due to the difficulties to obtain authorisation from the right owners, online re-creations are potentially infringing the economic rights of copyright holders particularly the rights to reproduction and communication. Apart from economic rights, re-creators may also infringe the author's moral rights mainly the attribution right and integrity right.

²¹⁸ Patrick McKay, ‘Culture of the Future’ (2011) 24 Regent U L Rev 117, 137.

²¹⁹ *Ibid.*

²²⁰ See chapter 3.2.

Infringements are usually assumed to occur despite the various nature of each type of re-creations; ranging from works that usually have high level of originality and incorporate minimal fragments of copyright works such as fan fictions, works that are in between for example mash-ups, fanvids and virtual worlds to those involve highly substantial amount of original work with small amount of creative input such as fansubs. Under the notice and takedown procedures, online re-creations can easily be removed by a copyright claim despite the fact that they may not actually be infringing. This active copyright enforcement affects the rights of the re-creators and the interest of the society provided by the online re-creation culture. The rights and interests of re-creators and the public which justify creative re-creations are analysed below in chapter 3.

CHAPTER 3 - Justifications of Online Re-creations: the Rights of the Re-creators and the Interests of the Public

As delineated in the previous chapter, online re-creations are potentially infringing copyright of the underlying protected works, and thus their making is discouraged by copyright law. The crucial question is: are these re-creations harmful to society, and thus justly discouraged? This chapter proposes that re-creations and their online culture are beneficial to individuals and the society at large due to the three principles: creativity, freedom of speech and the public interest.

3.1 Creativity

This chapter analyses the conceptions of creativity and the relation between creativity, copyright and re-creations. Human creativity naturally involves borrowing, imitating and reproducing earlier works of others. Creative re-creations are the result of the natural process and they are new creativity which should be encouraged. However, copyright law which has the purpose of stimulating creativity is currently suppressing creative re-uses of protected works. Chapter 3.1.1 will first discuss the notion and importance of creativity and the nature of the human creative process. Chapter 3.1.2 then analyses the relationship between copyright, creativity and online re-creations.

3.1.1 Human and Creativity

Creativity is associated with all areas of human activity including the arts, sciences and business and the outputs of creativity regularly used in everyday living. Because of creativity, there is an extensive domain of knowledge and works we currently benefit

from. The value of creativity is at both the individual and societal levels.²²¹ At an individual level, creativity is involved in problem solving in everyday life; while at a societal level, it “can lead to new scientific findings, new movements in art, new inventions, and new social programs.”²²²

Creativity is essential for the production of culture. Both creativity and culture have great importance for social quality.²²³ Santagata comments that “creativity and culture are the pillars of social quality, seen as a context of a free, economically developed, fair and culturally lively community with a high quality of life. Creativity and culture are inextricably bound.”²²⁴ Social quality includes the ability of people to engage in social, economic and cultural life and participate in the development of their communities to improve well-being and individual potential. The more creative products there are, the better the quality of life is.

3.1.1.1 The Conceptions of Creativity

Remarkably, the concept of creativity is complex and there is no single comprehensive definition of creativity.²²⁵ Scholars provide different explanations and definitions of creativity since they examine different aspects of the phenomenon.²²⁶ Creativity therefore has a number of conceptions from diverse disciplines and

²²¹ Robert Sternberg and Todd Lubart, ‘The Concept of Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 3.

²²² *Ibid.*

²²³ Walter Santagata, *The Culture Factory: Creativity and the Production of Culture* (Springer 2010) 33-41.

²²⁴ *Ibid.*, 34-35.

²²⁵ From the historical research on creativity, the thoughts of creativity differ from periods of time: from the pre-Christian views, to Christian views (or early Western), Renaissance (or science), to Western and Eastern views. (Robert Albert and Mark Runco, ‘A History of Research on Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 16-19).

²²⁶ For instance, “[p]sychologists have tended to view creativity as an individual-level phenomenon. That is, they have tended to concentrate on the cognitive processes, personality traits, and developmental antecedents associated with individual creators. This focus follows naturally from the very nature of psychology as a scientific enterprise dedicated to understanding individual mind and behavior.” (Dean Simonton, ‘Creative Cultures, Nations and Civilizations’, in Paul Paulus and Bernard Nijstad (eds), *Group Creativity: Innovation Through Collaboration* (OUP 2003) 304).

perspectives.²²⁷ This chapter will concentrate on the prominent aspects of creativity and conclude on a definition of creativity for the purposes of this thesis.

From the creativity studies in various disciplines, the common aspects of creativity are something novel (or original), appropriate (or fitting) and fulfilled. Besides, creativity crucially involves co-operation between individuals in the society both in the past and at the present by re-using works of others.

In the field of philosophy of art, creativity can be defined as “the capacity to generate ideas or artefacts that are both new and positively valuable”.²²⁸ Sawyer also provides the sociocultural definition of creativity as “the generation of a product that is judged to be novel and also to be appropriate, useful, or valuable by a suitably knowledgeable social group.”²²⁹ From a Western perspective in psychology, creativity can be defined as the ability to produce work that is novel and appropriate.²³⁰ Similarly, Pope proposes ‘original’ and ‘fitting’ as two parts of a notion of creativity:

“Creativity may be ‘original’ in the sense both of drawing on ancient origins and of originating something in its own right: either way, the overall aim or end is a ‘fitting’ – an active exploration of the changing proportions, measure, ratios – between older modes of understanding and newer ones.”²³¹

Novelty is often viewed as a distinctive characteristic of creative products. Novel work is original, distinct from previous work and unexpected. Nickerson notes that

²²⁷ There are a number of studies on creativity in various disciplines including sociology, psychology, anthropology, economics, management, science and philosophy. See e.g. Robert Sternberg, *Handbook of Creativity* (CUP 1999); Rob Pope, *Creativity: Theory, History, Practice* (Routledge 2005); Kerry Thomas and Janet Chan (eds), *Handbook of Research on Creativity* (Edward Elgar 2013); Albert Rothenberg and Carl Hausman (eds), *The Creativity Question* (Duke University Press 1976); David Bohm, *On Creativity* (Routledge 1996); Chris Bilton, *Management and Creativity: From Creative Industries to Creative Management* (Blackwell 2007); Phillip McIntyre, *Creativity and Cultural Production* (Palgrave 2012).

²²⁸ Margaret Boden, ‘Creativity’ in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (2nd ed, Routledge 2005) 477.

²²⁹ Robert Sawyer, *Explaining creativity: the science of human innovation* (OUP 2012) 8 (original italics omitted).

²³⁰ Robert Sternberg and Todd Lubart, ‘The Concept of Creativity: Prospects and Paradigms’ in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 3; Todd Lubart, ‘Creativity Across Cultures’ in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 339; Raymond Nickerson, ‘Enhancing Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 392.

²³¹ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 59-60.

“originality should be understood to mean original or novel to the individual involved, so that a thought would be considered creative if it is novel to the one who produces it, irrespective of how many others may have entertained that thought.”²³² This concept of originality is similar to a thought in the philosophy of art that originality has an aspect of novelty: a new work must have “a recognizably discrete identity, a qualitative difference, but that may not be sufficient for artistic creativity”.²³³

Appropriate work is useful, adaptive, fulfils a need or satisfies the problem constraints. This aspect of creativity relates to ‘fitting’. Fitting is to be appropriate and approved and can be referred to as the process of ‘filling an appropriate space’.²³⁴ Creativity draws upon the conception of “ ‘fitting’ into old patterns that already exist and of finding new patterns that will ‘fit’ current and constantly changing circumstances, needs and desires.”²³⁵ The concept of fitting therefore involves solving a mechanical problem as well as fitting an unfulfilled need for amusement, entertainment, enlightenment, etc. such as affixing a fragment of a photograph to a collage where appropriate to satisfy an artistic value and producing a fan work to achieve a new understanding of the original work.

Another characteristic of creativity is fulfilment. As Evans and Deehan put it, “anyone who fulfils his or her potential, who expresses an inner drive or capacity ... may be described as creative”.²³⁶ Eastern views of creativity involve “a state of personal fulfilment, a connection to a primordial realm, or the expression of an inner essence or ultimate reality”²³⁷ rather than focusing on innovative products. Creativity can also be viewed as human expression of communicative experience.²³⁸ In this sense, “creativity

²³² Raymond Nickerson, ‘Enhancing Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 392-394.

²³³ Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 186.

²³⁴ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 58.

²³⁵ *Ibid*, 58 (cited David Bohm, *On Creativity* (Routledge 1998)).

²³⁶ Peter Evans and Geoff Deehan, *The Keys to Creativity* (Grafton 1988) 20-21.

²³⁷ Todd Lubart, ‘Creativity Across Cultures’ in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 340.

²³⁸ Keith Negus and Michael Pickering, *Creativity, Communication and Cultural Value* (SAGE 2004) 24-32.

requires the capacity to reach others and achieve a resonance within their lives.”²³⁹ Expressive form and narrative are important to make meaning out of one’s experience; and through them, we achieve communicative value.²⁴⁰ When the communicative value is achieved, it is the moment of fulfilment.²⁴¹ Human expression and self-fulfilment are crucially related to freedom of speech and the interest of the public and are further discussed in chapters 3.2 and 3.3.

For this thesis, the notion of creativity includes two main features concluded from the above conceptions of creativity. First, from an objective aspect, creativity can be defined as the ability to produce work that is original and appropriate. To be original, the work must be independently created and originated by its creator (either by drawing on ancient origins or emanating from its own right). This is similar to the concept of originality under copyright law (see chapter 3.1.2.1). The work is appropriate in the sense that it fits a need, satisfies a problem or fulfils an artistic or communicative value. Second, from a subjective perspective of the creator, creativity involves personal fulfilment or communicative experience.

The process of creativity, in a broad sense, involves re-using previous materials through social collaboration. Creativity is not merely a matter of an individual but a matter of “people working in intended or unintended collaboration”,²⁴² and to co-operate, participated co-creators need not agree with one another.²⁴³ This aspect of creativity corresponds with the definition of creativity offered by Csikszentmihalyi that:

“What we call creativity is a phenomenon that is constructed through an interaction between producers and audience. Creativity is not the product of

²³⁹ *Ibid*, 32.

²⁴⁰ *Ibid*, 37-41.

²⁴¹ John Dewey, *Art as Experience* (Perigee Books 2005) 35-36.

²⁴² David Harrington, ‘The ecology of human creativity’ in Mark Runco and Robert Albert (eds), *Theories of creativity* (SAGE 1990) 144.

²⁴³ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 66.

single individuals, but of social systems making judgments about individuals' products."²⁴⁴

An emphasis on the notion of creative co-operation is that, in the presently preferred sense, co-operation "involves kinds of interaction indirectly and at a distance, in different spaces and times, not just direct collaboration in a shared space- and time-frame."²⁴⁵ In this regard, creators in the modern world can virtually co-operate with the creators of the former works. This is also particularly precise in the internet age where people can co-create a work, both with and without intention to co-operate, regardless of the place and time difference. In this perspective, creativity is perceived as a collective, team-based process rather than as individual genius.

3.1.1.2 The Natural Creative Process

*"Practically speaking, there is no 'creation from nothing' (ex nihilo). There is always something 'before the beginning', just as there is always something 'after the end'."*²⁴⁶

*"The truth is that all matter arises from a set of antecedent conditions."*²⁴⁷

Creation has long been thought of as a divine, mystery and the supernatural. The orthodox religious notion of creation was that God was the Creator of things from the Void or Nothing (*ex nihilo*).²⁴⁸ While Plato's writing on creativity discussed divine inspiration or supernaturalism as the source of creative acts²⁴⁹, Aristotle perceived creation as a natural ceaselessly on-going process of re-using existing materials²⁵⁰. Since the mid-

²⁴⁴ Mihaly Csikszentmihalyi, 'Implications of a Systems Perspective for the Study of Creativity' in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 313. For an essay on the systems approach to creativity, see Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention* (Harper Collins 1996).

²⁴⁵ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 66.

²⁴⁶ *Ibid*, xv.

²⁴⁷ Phillip McIntyre, *Creativity and Cultural Production* (Palgrave 2012) 4.

²⁴⁸ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 37.

²⁴⁹ *Ibid*, 27-37.

²⁵⁰ Aristotle, *Metaphysics* (Ross W. D. (tr) OUP 1928), e.g.:

nineteenth century, the notion of divine creation from nothing has significantly been contested. All scholars now agree that creativity should be conceived as natural re-creation from something that previously existed.²⁵¹ As a natural creative process, human have always built on existing works of the past either by incorporating parts of them in the new work or by taking them as inspiration. McIntyre concludes a conception of human creativity as “the use of imagination, expertise and perseverance to make something new and fresh, transforming the old into something novel or original which may then lead to astounding cultural works.”²⁵² Similarly, Dutfield and Suthersanen find that:

“Creation does not occur in a vacuum. A vast majority of scientific and cultural creations, if not all, are built on pre-existing creations and discoveries. This type of innovation can be said to be cumulative in that it is based on multiple steps or increments. New ‘things’ are produced by combining existing elements to [produce] new combinations or variations.”²⁵³

All creative works are therefore inevitably built on works of former creators. Even the most creative works are rooted in the past experience, influenced by preceding products of others and have built upon an improvement of craftsmanship and ideas over a period of years. It is impossible to imagine the famous artists, writers and composers without immersing themselves with the dozens of earlier talented works of others. Einstein acknowledged that his theory of relativity could not have been conceived without the benefit of the precedent theories and discoveries of other great physicists

“Of things that come to be, some come to be by nature, some by art, some spontaneously. Now everything that comes to be comes to be by the agency of something and from something and comes to be something.”

²⁵¹ Paul Oskar Kristeller, ‘Creativity and Tradition’ (1983) 44(1) *Journal of the History of Ideas*, 107; Thomas Ward, ‘What’s Old About New Ideas?’ in Steven Smith, Thomas Ward, Ronald Finke (eds), *The Creative Cognition Approach* (MIT Press 1995) 157-178; Raymond Nickerson, ‘Enhancing Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 392-394; Robert Weisberg, ‘Case Studies of Creative Thinking: Reproduction versus restructuring in the real world’ in Steven Smith, Thomas Ward, Ronald Finke (eds), *The Creative Cognition Approach* (MIT Press 1995) 53-72; Leslie Kim Treiger-Bar-Am, ‘Adaptations with Integrity’ in Helle Porsdam (ed), *Creativity and Other Fairy Tales* (Edward Elgar 2006); Paul Thompson, ‘Community and Creativity’ (2009) 37(2) *Oral History* 34; Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 184-185; Phillip McIntyre, *Creativity and Cultural Production* (Palgrave 2012).

²⁵² Phillip McIntyre, *Creativity and Cultural Production* (Palgrave 2012) 26.

²⁵³ Graham Dutfield and Uma Suthersanen, ‘The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity’ (2004) *IPQ* 379, 382 (citation omitted).

who had come before him.²⁵⁴ The past is embodied in every new creation. Even so-called child prodigies must have grown their experience and competence within a particular domain. Exemplifying the case of Mozart, according to Hayes²⁵⁵ and Weisberg²⁵⁶, the development of Mozart's musical experience indicates that his earliest works involved immersion in the works of contemporaries among whom he grew and possibly involved using former composers' music as models of composition. Howe also points out that Mozart only produced the distinctive music after a lengthy period of training as the outcome of a combination of personality, environment and hard work, not due to magic or miracles or some innate gift that he possessed since he was born.²⁵⁷ The thoughts that led to the focus on the individual genius of divine inspiration are no longer tenable to explain creativity. Besides, if creativity is understood as "requiring radical change, productive of far-reaching new value, then we should confine our study to special talent or genius."²⁵⁸ Thus, in a very brief summary, "[c]reation is always from something not 'from nothing'."²⁵⁹

The human ability of creating and collecting knowledge and material artefacts, sharing them among themselves and passing them along to the following generations is necessary for individuals' self-improvement and social development. Cumulative creativity is what makes human culture unique. In a psychological study, Aunger states that:

“... what distinguishes humans is *cumulative* culture. Human culture includes traditions that build on their earlier accomplishments to reach more sophisticated culminations, either in thought or in material form. Thus the key to human cultural evolution is that a new 'ratchet' effect arose, in which

²⁵⁴ Gerald Holton, 'Einstein's Search for the *Weltbild*' (1981) 125(1) Proceedings of the American Philosophical Society 1.

²⁵⁵ John Hayes, 'Cognitive Processes in Creativity' in John Glover, Royce Ronning, and Cecil Reynolds (eds), *Handbook of Creativity* (Plenum Press 1989).

²⁵⁶ Robert Weisberg, 'Creativity and Knowledge', in Robert Sternberg (ed), *Handbook of Creativity* (CUP 1999) 235-236).

²⁵⁷ Michael Howe, *Genius Explained* (Cambridge University Press 1999) 3-7.

²⁵⁸ Albert Rothenberg and Carl Hausman (eds), *The Creativity Question* (Duke University Press 1976) 8.

²⁵⁹ Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 191.

cultural advances were built upon progressively in a way not seen in the social traditions of other animals.”²⁶⁰

Rogers provides a definition of the creative process as “the emergence in action of a novel relational product, growing out of the uniqueness of the individual on the one hand, and the materials, events, people, or circumstances of his life on the other.”²⁶¹

Human creativity is a mental process of uniting existing elements with new or useful connections by which the mind transforms information into concepts and produces new ideas with the power of the brain.²⁶² This mental process is significantly influenced by the environmental and social conditions of the external world which happened through communication.²⁶³ Creativity is crucially a result of an interactive process between individuals and social and cultural contexts. In this regard, Csikszentmihalyi views that creativity involves an interaction between a person, a field and a domain:

“[W]hat we call creativity is never the result of individual action alone; it is the product of three main shaping forces: a set of social institutions, or *field*, that selects from the variations produced by the individual those that are worth preserving; a stable cultural *domain* that will preserve and transmit the selected new ideas or forms to the following generations; and finally the *individual*, who brings about some change in the domain, a change that the field will consider to be creative.”²⁶⁴

The information or domain existed and stored in the culture long before the creative individual arrived on the scene. The person should have access to the domain and then work within the creative process to produce new combinations or some variations in the inherited cultural domain.²⁶⁵ Similarly, Cohen proposes that creative processes involve interactions between the individual and the cultural landscape:

²⁶⁰ Robert Aunger, *The Electric Meme: A New Theory of How We Think* (The Free Press 2002) 305.

²⁶¹ Carl Rogers, ‘Toward a theory of creativity’ in Carl Rogers, *On Becoming a Person: A Therapist’s View of Psychotherapy* (Constable&Robinson 1961) 350.

²⁶² Daniel Goleman, *Emotional intelligence: Working with emotional intelligence* (Bloomsbury 2004).

²⁶³ Walter Santagata, *The Culture Factory: Creativity and the Production of Culture* (Springer 2010) 28-29.

²⁶⁴ Mihaly Csikszentmihalyi, ‘Society, culture, and person: a systems view of creativity’ in Robert Sternberg (ed), *The Nature of Creativity: Contemporary Psychological Perspectives* (CUP 1988) 325 (original italics).

²⁶⁵ *Ibid.*, 325-339.

“[I]t is neither individual creators nor social and cultural patterns that produce artistic and intellectual culture, but rather the dynamic interactions between them. The artistic and intellectual value that emerges from these interactions is simultaneously real and contingent; it is possible to say both that particular outputs represent valuable additions to collective culture and that their value is determined by underlying knowledge systems that are historically and culturally situated.”²⁶⁶

Engagement with cultural resources is indispensable for self-constitution and creative play. Indeed, an efficient process of creation requires access to and use of preceding works and artefacts.²⁶⁷ Therefore a significant way the domain can contribute to the creative system is by enhancing the accessibility of those sources.²⁶⁸

3.1.1.3 Conclusion

Human creativity is an on-going process of re-using preceding materials. A creation is therefore always built from something, not from nothing. Creativity involves building on those sources to produce something that is original or novel and fits into pre-existing patterns or is appropriate in the current circumstances. It also involves a state of personal fulfilment and expressive forms of communication. In regard to the natural creation process, cumulative creativity needs co-operation between individuals and interaction between individuals and intellectual contexts or domains. Engagement is thus required for individuals to be able to immerse themselves in and benefit from the creative and cultural domain of the antecedents. Therefore the ability to access and use the domains is indispensable for the human intellectual process.

²⁶⁶ Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1153-1154.

²⁶⁷ Wallas proposed that the creative process consists of four stages: preparation, incubation, illumination and verification. The stage of preparation involves the gathering of knowledge or information is the vital part of the creative process. (Graham Wallas, *The Art of Thought* (Solis Press 2014)).

²⁶⁸ Mihaly Csikszentmihalyi, *Finding Flow: The Psychology of Engagement With Everyday Life* (Basic Books 1997) 38.

3.1.2 Copyright, Creativity and Online Re-creations

As previously discussed, creativity is the ability to create work that is original, appropriate and fulfils a need. The process of creativity also involves re-using of existing works in a social collaboration. Nevertheless, the current copyright law is obstructing the natural creative process. This part therefore discusses the correlation between copyright and creativity. It will analyse the roles of copyright law in encouraging and discouraging the process of creativity and re-creation.

3.1.2.1 Copyright and Creativity

From the legislative statements in different jurisdictions, copyright is regarded as a mechanism for the stimulation of creativity for the benefit of the society.

The Statute of Anne 1709²⁶⁹ was the first parliamentary English act for copyright regulation in books and other writings. It is described as “[a]n Act *for the encouragement of learning*, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.”²⁷⁰ The UK revision act of July 1842 recognised that “it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world”. The idea of copyright encouraging new creations has remained throughout from 1842.²⁷¹ The UK Government’s White Paper of 1986 also stressed that “[i]ntellectual property is about creative ideas – the products of the mind such as inventions, designs, music and drama. Widespread dissemination of these ideas benefits society as a whole and stimulates further creative activity.”²⁷²

²⁶⁹ The Statute of Queen Anne, 1709, Ch. XIX (emphasis added).

²⁷⁰ The Statute of Anne had two main purposes; for preventing future printing and publication of books and other writings without the consent of the authors or proprietors of such works and “for the encouragement of learned men to compose and write useful books”. (The Statute of Queen Anne, 1709, Ch. XIX).

²⁷¹ Gillian Davies, *Copyright and the Public Interest* (Sweet&Maxwell 2002).

²⁷² Department of Trade and Industry, *Intellectual Property and Innovation* (Cmnd 9712, 1986).

In the US, the goal of copyright to encourage creativity is stated in its Constitution. The copyright clause of the US Constitution 1787 is the direct descendant of the Statute of Anne.²⁷³ It states that “[t]he 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”.²⁷⁴ The word “science” in this clause retains its eighteenth-century meaning of “knowledge or learning”.²⁷⁵ It is also emphasised in a number of judicial decisions²⁷⁶ and articles that copyright is designed to “stimulate activity and progress in the arts for the intellectual enrichment of the public”²⁷⁷, to protect the public domain, and to grant an exclusive right to the author.²⁷⁸

In the Anglo-American systems, creativity is recognised in policy documents but not explicitly mentioned in the copyright statutes. In contrast, creative works are clearly protected in copyright law of civil law countries.

France and Germany explicitly declares protection for creative works of human minds. The copyright statute of France provides protection for “all works of the mind, whatever their kind, form of expression, merit or purpose”.²⁷⁹ Under German copyright law, “personal intellectual creations” constitutes creative works that will be protected.²⁸⁰ In addition, the EU Directive 2006 on the term of protection of copyright and certain related rights also recognises that copyright protection “ensures the maintenance and

²⁷³ Lyman Patterson, ‘The Statute of Anne: Copyright Misconstrued’, (1966) 3 Harv. J. on Legis. 223.

²⁷⁴ Article I, Section 8, Clause 8, US Constitution (emphasis added).

²⁷⁵ Lyman Patterson and Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press 1991) 48.

²⁷⁶ The US courts affirm that a fundamental purpose of the copyright law is to foster creativity. (See e.g., *United States v. Paramount Pictures, Inc.*, 334 US 131, 158 (1948); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417 (1984); *Warner Bros. v. American Broadcasting Companies*, 720 F. 2d 231, 240 (2nd Cir. 1983)).

²⁷⁷ Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1107.

²⁷⁸ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1261 (11th Cir. 2001).

²⁷⁹ Articles L.112-1, L.112-2 and L.112-3, French Intellectual Property Code 1992.

²⁸⁰ Articles 2(2) and 11, German Law on Copyright and Neighbouring Rights 1965.

development of creativity in the interest of authors, cultural industries, consumers and society as a whole”.²⁸¹

The implications from these legislations are that copyright protection is granted for the interest of the right holders (authors and publishers) and for the purpose of encouraging knowledge, learning and creativity for the ultimate benefit of the public. An important element of the public interest is the dissemination of the works; in return, authors are granted protection but only for a limited period of time.²⁸² Ultimately, an increase in the number of works in the public domain advances the interest of the public in access and use of the works. In this regard, Davies comments that “[t]he premise is accepted that creating is worthwhile and that copyright provides a means of giving creators what is properly due to them, thereby stimulating cultural activity and the production and distribution of new works for the public, a result which cannot be other than for the common good.”²⁸³

What is ‘creativity’ under the copyright policy? In a general consideration of creativity under copyright law, the conception of ‘originality’²⁸⁴ could be considered as a minimum threshold of creativity required by the law.²⁸⁵ Originality contains elements of the definition of creativity provided above. As a fundamental rule in many jurisdictions, a work must originate from its maker to obtain protection. This level of originality merely emphasises the independence from preceding works. Under the US copyright law, not merely being independently created, the work must also possess at least some minimal degree of creativity.²⁸⁶ The strictest test of originality²⁸⁷ can be found in the system of

²⁸¹ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

²⁸² See chapter 3.3 for further discussion on the correlation between creativity, copyright and the public interest.

²⁸³ Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 5.

²⁸⁴ “Originality overlaps with creativity, but does not coincide with it.” (Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 186).

²⁸⁵ The UK copyright law adopts a low threshold of creativity. The test for originality is “skill, judgement and labour.” (*Ladbroke v William Hill* [1964] 1 All ER 465).

²⁸⁶ Creativity is a prerequisite for copyright protection under the US law. See, *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); Dennis S. Karjala, ‘Copyright and Creativity’ (2008) 15 *UCLA Ent. L. Rev.* 169.

author's rights where the author's effort or investment is not sufficient, but the object to be protected must be a 'work of the mind'²⁸⁸ or a 'personal intellectual creation'²⁸⁹ where there is a personal input of a creative element.

However, as previously discussed, there is no single conformed definition of creativity. Creativity as an object which copyright aims to foster has never been clearly defined by copyright policymakers. A concern is raised that the minimal investigation of the theories of creativity and the creative process is a serious shortcoming for copyright theorists.²⁹⁰ Patry criticises that proclaiming that we wish to encourage creativity without knowing the kind of creativity we aim to encourage and then figuring out how to stimulate that creativity is "an empty gesture".²⁹¹ Interestingly, Sawyer suggests that many of the implicit beliefs about creativity from the Western and European cultures, which are the grounds for several aspects of the current intellectual property regime, are false or highly misleading.²⁹² If the law is not aligned with the empirically observed nature of creativity, its goal to promote knowledge and creative works will be less effective. He concludes that the overall creativity of society may be better enhanced by modifying intellectual property law to better align with the empirical process of creativity and innovation.

Despite the absence of substantial understanding of creativity, lobbyists for the copyright industries tend to assert that copyright is the single most important prerequisite

²⁸⁷ For an analysis on the 'originality' concept particularly in the EU, see Eleonora Rosati, *Originality in EU copyright* (Edward Elgar 2013).

²⁸⁸ French copyright law protects "a work of the mind" or "œuvre de l'esprit" (French Intellectual Property Code 1992, Articles L111-1; see also Article L112-1 "The provisions of this Code shall protect the rights of authors in all works of the mind...") All translations are from WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=5563>>.

²⁸⁹ In German copyright law, a copyright work must be a "personal individual creation" or "eine persönliche geistige Schöpfung" (see German Copyright Act, Articles 2(2) (as amended July 16, 1998). For an interesting discussion on the level of creativity under the German copyright law, see Gerhard Schricker, 'Farewell to the "level of creativity" (Schöpfungshöhe) in German copyright law?' (1995) 26(1) IIC 41.

²⁹⁰ Molly Shaffer Van Houweling, 'Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy' (2007) 40 U.C. Davis L. Rev. 1253; In this regard, Cohen argues that the study of creativity has been problematic for copyright scholars and the boundaries of copyright's epistemology excludes many other approaches to investigating the creative process. (Julie Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 U.C. Davis L. Rev. 1151).

²⁹¹ William Patry, *How to Fix Copyright* (OUP 2011) 18-19.

²⁹² R. Keith Sawyer, 'Western Cultural Model of Creativity' (2011) 86 Notre Dame L. Rev. 2027.

for creative culture²⁹³ and since “[n]o one wants to be against creativity, and if copyright equals creativity then no one wants to be against copyright.”²⁹⁴ Under such influence, copyright lawyers and scholars are in the habit of assuming that copyright law is centrally critical in stimulating creativity.²⁹⁵ Nonetheless, there are two contradictions to such assumption: First, though copyright fulfils some important functions to encourage creative practices and provide economic benefits²⁹⁶, it does not play a single and direct role in generating creative inspiration and output.²⁹⁷ Other motivations particularly inner drives to create works are discussed below in chapter 3.3.3.1 and supported by the empirical data analysis in chapter 5.2.1. Second, excessive copyright control of the ability to access to and exploit existing cultural and artistic products creates significant constraints on creative practices. This issue is substantially discussed further below.

3.1.2.2 Creative Copying: Copyright Constraints on Creative Re-creation

Interestingly, a number of copyright scholars²⁹⁸ have acknowledged the natural process of creativity that creative activity is a result of cultural and social play based on

²⁹³ As it is said, “[n]o man but a blockhead ever wrote, except for money.” See, e.g., *Acuff-Rose Music Inc v. Campbell* 510 U.S. 569, 584 (1994) (cited 3 Boswell’s Life of Johnson 19 (G. Hill ed. 1934)).

²⁹⁴ Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1192.

²⁹⁵ *Ibid.*

²⁹⁶ Tyler Cowen, *In Praise of Commercial Culture* (Harvard University Press 2000).

²⁹⁷ Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1193.

²⁹⁸ “Remix is the basic human condition.” (Rebecca Tushnet, ‘Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters’ (2010) 6(1) Journal of Law and Policy for the Information Society 1, 2); “Copying Culture Despite the strictures of copyright law, we all copy from each other madly and often without attribution.” (Ann Bartow, ‘Copyrights and Creative Copying’ (2004) 1 UOLTJ 75); “Creating a new work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it. A new work of fiction, for example, will contain the author’s expressive contribution but also characters, situations, plot details, and so on, invented by previous authors. Similarly, a new work of music may borrow tempo changes and chord progressions from earlier works.” (William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18(2) Journal of Legal Studies 325, 332); “Transforming earlier works is the way the creative process work. Creativity works via building blocks; even genius breakthroughs react to tradition. Thus borrowing from the past must be protected. Also the creative spark added, namely the transformation of the past, must be protected as the modifier’s expression.” (Leslie Kim Treiger-Bar-Am, ‘Adaptations with integrity’ in Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006) 75); “Each advance stands on building blocks fashioned by prior thinkers [...] important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences

preceding works and that humans cannot create out of nothing. Human intellectual creations are built on cumulative creativity²⁹⁹ and thus a work that is truly created *ex nihilo* is impossible.³⁰⁰ This means that new works will always copy or borrow some aspects of the past. As in Justice Laddie's words:

“The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress. When we are asked to remember the Eighth Commandment, “thou shalt not steal”, bear in mind that borrowing and developing have always been acceptable.”³⁰¹

In addition, Arewa comments that:

“Borrowing and varied types of copying have long been norms in creation. Similarly, sharing and copying of existing works, including copyrighted works, have long been characteristic aspects of a broad range of activities on both the distribution and creation sides. Intellectual property frameworks have not taken sufficient account of the realities of such collaborative and sharing practices.”³⁰²

In specific regard to the common uses of fictional facts, Kellogg suggests that the idea of borrowing plots, characters and other fictional facts is as old as storytelling itself.³⁰³ For example, Virgil's *The Aeneid* built on the works of Homer's *Odyssey*³⁰⁴ and

require continuous reexamination of yesterday's theses.” (Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1109); Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151; Neil Netanel, *Copyright's Paradox* (OUP, 2008); David Simon, ‘Culture, Creativity & Copyright’ (2011) 29 Cardozo Arts & Ent. L.J. 279.

²⁹⁹ Graham Dutfield and Uma Suthersanen, ‘The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity’ (2004) IPQ 379, 390. Gervais also comments that “authors take *from each other* and all those who created before them and made their work available for others to enjoy.” Daniel Gervais, ‘User-Generated Content and Music File-Sharing’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Irwin Law 2010) 467 (original italics).

³⁰⁰ Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 185-186.

³⁰¹ Justice Laddie, ‘Copyright: Over-strength, Over-regulated, Over-rated?’ (1996) 18(5) E.I.P.R. 253, 259.

³⁰² Olufunmilayo Arewa, ‘Youtube, UGC, and the Digital Music: Competing Business and Cultural Models in the Internet Age’ (2010) 104 Nw. U. L. Rev. 431, 434 (citation omitted).

³⁰³ Matt Kellogg, ‘The Problem of Fictional Fact: Idea, Expression, and Copyright's Balance between Author Incentive and Public Interest’ (2011) 58 J. Copyright Soc'y U.S.A. 549; “Retellings are an indispensable mechanism of cultural progress.” (Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1203); Similarly, Liebler comments that: “the use of existing stories,

Shakespeare's works came from predecessors and contemporaries.³⁰⁵ Gervais also states that “[i]t is abundantly clear that creating original content by reusing preexisting content is nothing new.”³⁰⁶ He then illustrates that many Walt Disney productions are created based on medieval fairy tales and a number of adaptations of novels and plays. For example, *Cinderella*, *Sleeping Beauty* and *Snow White*, the movies produced by Disney, are based on the stories by the Brothers Grimm. The literary works of Hans Christian Anderson have also been utilised by a numerous artists and authors with myriad modifications.³⁰⁷ His works, such as *The Little Mermaid* and *The Ugly Duckling*, have been adapted into famous Disney’s animated films. In 2013, another movie called *Frozen* has been added to the Walt Disney Animated Classics series. The story of this children’s favourite movie is again inspired by Hans Christian Andersen’s fairy tale entitled *The Snow Queen*.

From the traditional oral transmission of culture, facilitated by the advanced technologies, there are now new forms of cultural communication. Frosio notes that emerging creative re-creations in the digital age such as mash-ups, music sampling and vidding and the creative process in an environment like *YouTube* correspond to the logic of the creative production of the oral-formulaic tradition.³⁰⁸ The early tradition of re-creation involved copying. However, in the digital world, the kinds of copying involved are different: they are more sophisticated and much more verbatim taking. Though many online re-creations are not wholesale taking but involve new alteration or addition to communicate new meaning, the nature of digital copying potentially makes creative borrowing an infringement.

creative works and ideas as the basis of new works is a centuries-old practice employed by writers, storytellers and others.” Raizel Liebler, ‘Copyright and ownership of fan created works: fanfiction and beyond’ in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (Sage 2015) 391).

³⁰⁴ Leanne Stendell, ‘Fanfic and Fan Fact’ (2005) 58 SMU L Rev 1551, 1552 (fn 9).

³⁰⁵ Leslie Kurtz, ‘The Independent Legal Lives of Fictional Characters (1986) Wis. L. Rev. 429, 438.

³⁰⁶ Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 Vand. J. Ent. & Tech. L. 841, 844.

³⁰⁷ Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006).

³⁰⁸ Giancarlo Frosio, ‘Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix’ (2014) 13 J. Marshall Rev. Intell. Prop. L. 341.

As discussed in chapter 1, online re-creation is a culture of the digital era. This culture involves communication, interaction and co-operation between a significant number of individuals all over the world by remixing and reusing the works of others and producing new creations. Re-creation entails modifications of a single work and adaptations of a range of discrete elements from numerous existing works such as samplings and mash-ups. These re-creations can be regarded as “creative appropriation”³⁰⁹ or “creative copying” resulting from imaginative minds, expression of new idea and concept, or a critique of something. The benefits of online re-creations are that of creativity³¹⁰: self-fulfilment and self-expression; social communication and cultural participation; and individual improvement and social development.³¹¹

Many of these subsequent creations are not simply copies. To illustrate, fan fiction writers usually derive the main characters, events and/or settings from the underlying popular works to create distinctive stories which reflect their own imagination and interpretation. They narrate the stories of the protected works in new ways, using their own writing skills. Effective expression sometimes requires reasonable portions of copying, recasting or distributing existing works without modification. For instance, fanvids and AMVs entail selecting and copying of unmodified images, sounds and texts of popular works; vidders then rearrange those original components and add their own creative and self-expressive commentary into it.

Nevertheless, as a fundamental rule, copyright law deters people from using existing works in creation of new works without permission of the right holders. Where works are created by incorporating preceding works protected by copyright, there is an inevitable question of potential infringement.³¹² As critically analysed in chapter 2, an unauthorised re-creation can easily be claimed a copyright infringement. In this regard,

³⁰⁹ Neil Netanel, *Copyright's Paradox* (OUP 2008).

³¹⁰ Eastern perspectives of creativity view that “re-creation of ‘the old’ is valued”. Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 57; In this regard, Schiffer comments that “[t]here are many aspects to creativity, but one definition would include the ability to take existing objects and combine them in different ways for new purposes.” (Linda Schiffer (ed), ‘Definitions of Creativity’ (*Creativity Basics*, 4 August 1999) <<http://members.optusnet.com.au/charles57/Creative/Basics/definitions.htm>>).

³¹¹ See also chapters 3.1.1, 3.2 and 3.3.

³¹² The critical analysis on some pertinent copyright exceptions and limitations is in chapter 4.

Vaidhyathan argues that copyright is negatively affecting creativity particularly in the arts.³¹³ He illustrates that artists who borrow from and build upon earlier cultural expressions by sampling and remixing music have been facing copyright lawsuits and forced to pay substantial amount of damages. Bearing in mind that “all artists build on what comes before them,” Lewis proposes that the re-contextualised works of music and art such as mash-up and music sampling that are truly transformative should also be protected under the law.³¹⁴

3.1.2.3 Revising Copyright for Creativity

“If we genuinely want to encourage creativity, we must encourage copying.”³¹⁵

Due to the consensus that all creative products are built upon prior works, excessive scope of copyright protection would restrain the stimulation of authorship and creativity. Indeed, creative and cultural productions can be harmed by monopoly protection of copyright that impedes the development of new expressions out of old ones and inhibits the creative process.³¹⁶ Judge Kozinski expresses the concern about the adverse impact of the overprotection of works:

“Overprotecting intellectual property is as harmful as underprotecting it. Culture is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.”³¹⁷

³¹³ Siva Vaidhyathan, ‘Copyrights and Copywrongs: the Rise of Intellectual Property and How It Threatens Creativity’ (New York University Press 2001).

³¹⁴ Nicholas Lewis, ‘Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art’ (2005) 55 Am. U. L. Rev. 267.

³¹⁵ William Patry, *How to Fix Copyright* (OUP 2011) 90.

³¹⁶ Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1109; Ann Bartow, ‘Copyrights and Creative Copying’ (2004) 1 UOLTJ 75.

³¹⁷ *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Judge Kozinski dissenting).

Besides, copyright law neglects that copying is inherent in the creative process.³¹⁸ Such copyright failure has now revealed adverse consequences in the creative productions. First, copyright generates a monopoly on creative content. Macmillan comments that the rationale for copyright that it promotes the production of creative works that enable culture and democracy to develop has been misused to allow an aggregation of private power over cultural output: big media and entertainment companies are empowered to act as a cultural filter, controlling what people can consume.³¹⁹ Second, as critically analysed above, copyright law threatens the remix of creativity and culture.³²⁰

The ideal relationship between copyright, creativity and the public interest can be summarised as follows: Copyright provides rewards to incentivise authors or artists in creation of useful arts and knowledge. This stimulates knowledge and creativity for the society as a whole. The copyright protection lasts for a limited period of time. With the lapse of protection terms, copyright works will enter the public domain and become the common good which people can freely use. The distribution and stimulation of creativity as well as works in the public domain constitute the public interest. Nevertheless, new creative works may significantly involve use of others' works which are still under copyright protection.

As discussed above in chapter 3.1.1, the ability to access and use existing works is crucial for the natural creative process. Individuals should be able to immerse themselves with and make use of the materials of the social and cultural domain. However, copyright protection, which is considered to be for the purpose of the stimulation of creative production, has become an obstruction to intellectual domain. Consequently, copyright which aims to encourage creativity and innovation and stimulate

³¹⁸ Olumfunmilayo Arewa, 'The Freedom to Copy: Copyright, Creation, and Context' (2007) 41 UC Davis L Rev 477, 488; Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10 Cardozo Arts & Ent. L.J. 293, 319.

³¹⁹ Fiona Macmillan, 'What might Hans Christian Andersen say about copyright today' in Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006).

³²⁰ Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006); Lawrence Lessig, *Remix* (Penguin Press, 2008).

further creative activity prevents accessibility to cultural domain of society and interrupts the natural process of human creativity.

The process of requiring permission is unworkable due to certain difficulties discussed in chapter 2.2. Creativity based on copying therefore arises mainly from unauthorised use.³²¹ Creative copying of existing works to re-create a new intellectual creation should not be prohibited. Indeed, re-used and re-contextualised works should reasonably be permitted if copyright law does aim to encourage the distribution of new expressions with the public.³²² When amending the copyright policy, the creative process and the nature of creativity as being communal, cumulative, social and collaborative should be taken into consideration.³²³ Copyright law therefore needs to be revised to better serve creativity by allowing for greater access and less restriction.³²⁴ “The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work.”³²⁵ It is therefore necessary to seek the optimal point between encouraging the creation and dissemination of new works and allowing the prosperity of subsequent creativity.

³²¹ William Patry, *How to Fix Copyright* (OUP 2011) 213.

³²² “An intellectual property regime which provides for the protection of traditional cultural creativity should also permit the natural development of culture through permissible borrowings.” (Michael Blakeney, ‘Hans Christian Andersen and the protection of traditional cultural expressions’ in Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006) 115).

³²³ David Simon, ‘Culture, Creativity & Copyright’ (2011) 29 *Cardozo Arts & Ent. L.J.* 279; Giancarlo Frosio, ‘Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix’ (2014) 13 *J. Marshall Rev. Intell. Prop. L.* 341; Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 *U.C. Davis L. Rev.* 1151.

³²⁴ Lawrence Liang, ‘Beyond Representation: The Figure of the Pirate’ in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (University of Chicago Press 2011) 175; Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”* (Irwin Law 2010) 397; Christophe Geiger, ‘Promoting Creativity through Copyright Limitations’ (2010) 12(3) *Vand. J. Ent. & Tech. L.* 515.

³²⁵ William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18(2) *Journal of Legal Studies* 325, 332.

3.1.2.4 Conclusion

Creativity is based on copying. It is a natural and fundamental process that individuals use existing materials to re-create. A number of online re-creations combining prior works with new creative elements are creative copying. These subsequent creations are the result of the creative process and they are new creativity which should be encouraged. Copyright law which is currently suppressing creative re-uses of protected works and cultural icons should be amended to achieve its goal to stimulate creativity. The law should reasonably allow people to gain access to and engage in the intellectual cumulative domain and to exchange communicative expressions which are essential for the process of creative productions.

3.2 Freedom of Speech

Another principle that justifies online re-creation is the right to freedom of speech. In the 21st century, online re-creation is a form of speech that contributes to human self-fulfilment and autonomy as well as participation in community and culture. Re-creators of creative expression have the human rights to freedom of speech and to participate in cultural life. However, the current copyright law can conflict with free speech particularly when it restricts utilisation of an existing work in making a new expression.

3.2.1 The Status Quo and its Origins

3.2.1.1 Why Freedom of Speech?

There are several arguments for the justification of a free speech principle.³²⁶ The predominant argument is concerning the importance of discovering truth.³²⁷ It is associated with Milton's *Areopagitica*³²⁸ and John Stuart Mill's thesis, "On Liberty",³²⁹ that an opinion ought not to be suppressed as its value is for truth to be discovered.³³⁰ The rationale has its role in some US cases³³¹ including *Abrams v US*³³² in which Justice Holmes, the dissenting judge, proposed that freedom of speech creates a 'marketplace of ideas' which promulgates truth.³³³

Another argument is that free speech is essential for democratic participation. Freedom of speech protects the rights of citizens and enables them to engage in the democracy or self-government³³⁴. Alexander Meiklejohn, the leading proponent of this principle, stated that "[a]s the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged."³³⁵

³²⁶ The justifications presented in this research are not exhaustive; there are other arguments for the principle of freedom of speech. Other proffered theories are, for instance, that free speech maintains a balance in society between stability and change (Thomas I. Emerson, 'Toward a General Theory of the First Amendment' (1962) 72 Yale L J 877) and that there are reasons for suspicion of government (Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 21) as a negative justification.

³²⁷ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 7.

³²⁸ John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England of 1644* (Bandanna Books, 1992).

³²⁹ John Stuart Mill, *On Liberty* (J W Parker and Son, 1859).

³³⁰ "[I]t is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied" (John Stuart Mill, *On Liberty* (J W Parker and Son, 1859) 95).

³³¹ *Whitney v California*, 274 US 357 (1927) and *Kovacs v Cooper*, 336 US 77 (1949).

³³² *Abrams v. United States*, 250 US 616 (1919).

³³³ Justice Holmes gave the following statement essentially regarding the 'marketplace of ideas'; "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." (*Abrams v United States*, 250 US 616, 630 (1919).

³³⁴ "The principle of the freedom of speech springs from the necessities of the program of self-government." (Alexander Meiklejohn, *Political Freedom: the Constitutional Powers of the People* (OUP 1965) 27).

³³⁵ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (Harper & Brothers 1948) 25.

The theory has an obvious drawback that it is merely limited to political speech and leaves out other areas of expression including artistic and literary.³³⁶

The most significant principle for this discussion is freedom of expression as an aspect of autonomy and self-fulfilment. This links to the nature of creativity previously discussed in chapter 3.1. As human beings, we are cognitive and communicative by nature. The ability to formulate and express our thoughts is valuable in self-determination and autonomy. The constraints on such ability adversely affect our individual personality and its growth. The argument does not only justify political speech, but also applies to all speech including artistic discourse. Freedom of speech “serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity”.³³⁷

In the law of copyright, the exclusive right to copy obviously inhibits a person to duplicate and express something in exactly the same way that another does. Is this detrimental to human self-fulfilment and autonomy? As Nimmer put it, “free speech as a function of self-fulfilment does not come into play. One who pirates the expression of another is not engaging in *self*-expression in any meaningful sense”.³³⁸ From this perspective, repeating another person’s expression verbatim does nothing for self-improvement and personality. Haungs also comments that “[c]opyright does nothing to inhibit self-fulfillment, since expressing the beliefs and opinions of another person in the exact words used by that other person is not necessary to development of one's own ideas.”³³⁹

³³⁶ Andrew Nicol, et.al., *Media Law & Human Rights* (OUP 2009) 3.

³³⁷ *Procurier v. Martinez*, 416 US 396, 427 (1974) citing Thomas Emerson, ‘Toward a General Theory of the First Amendment’ (1962) 72 Yale L. J. 877.

³³⁸ Melville Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 U.C.L.A. L. Rev. 1180, 1192 (original italics).

³³⁹ Michael Haungs, ‘Copyright of Factual Compilations: Public Policy and the First Amendment’ (1990) 23 Colum. J. L. & Soc. Probs. 347, 366, fn 122.

This may seem persuasive that copyright does not interfere with freedom of speech as a contribution to self-fulfilment. Nevertheless, the conflict does arise when a person needs to use an existing expression as a raw material in making another expression. In circumstances where a person cannot communicate his opinion without mentioning or using another person's work, the prohibition on such copying results not only in a restriction of an individual's freedom of speech but also in a restriction of that individual's autonomy and self-fulfilment.³⁴⁰ Loughlan illustrated two forms of speech namely, appropriation art and parody which, by their very nature and purpose, are necessary to be created "by the incorporation within themselves of the prior expression of another individual and while neither can exist as an original, independent, autonomous creation, both are themselves undoubtedly 'authored' by individuals who are expressing themselves through their creation".³⁴¹ There are also other forms of expression which have the same nature of basing the re-creation upon other people's works such as fan fiction, vidding, mash-up and virtual world. The crucial consideration is that the right to free expression and self-fulfilment of those re-creators is necessarily limited if their new expression breaches copyright law.

The aforementioned free speech principles may deserve a revision when it comes to speech on cyberspace. Online media do not only distribute and give access to information and expression, but also allow participation and interaction which subsequently alter forms of speech. So, perhaps, there should be a reconsideration of these principles to be consistent with the change of speech.

For the digital age, Balkin believes that the purpose of freedom of speech is to promote a democratic culture.³⁴² In his definition, a democratic culture is a culture in which people can actively participate in the production of cultural meanings that, in turn,

³⁴⁰ Patricia Loughlan, 'Copyright Law, Free Speech and Self-Fulfilment' (2002) 24 Sydney L Rev 427, 433.

³⁴¹ *Ibid*, 434.

³⁴² Jack Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 Sydney L. Rev. 5 and Jack Balkin, 'Digital Speech and Democratic Culture' (2004)79 NYU L. Rev. 1.

constitute themselves and other people in the society.³⁴³ Balkin points out that salient characteristics of internet speech are that; it covers a wide range of subjects and mode of expression (not only politics but also popular culture); it reflects how creative an ordinary individual can be; it is a new creativity developed from the ability to build on what existed before; it is participatory and interactive; and lastly, internet speech is a social activity which creates new communities, cultures and subcultures.³⁴⁴ Freedom of speech allows people to freely participate in the growth and development of the cultures which, in turn, help constitute them as individuals.

The new digital activities have an impact on private rights particularly copyright in new ways. Therefore a consideration of the relation between free speech and copyright is necessary and thus discussed in chapter 3.2.2.

3.2.1.2 “Speech”

An interesting question is whether free speech should cover speech involving all types of fact, information, and opinion, in other words, what types of speech should be safeguarded by a freedom of speech principle.

Though not all self-expression constitutes “speech” and not all “speech” implicates “freedom of speech”³⁴⁵; political speech is considered as the archetypal kind of communication covered by free speech. This view is effectively influenced by the argument from self-governance that the purpose of free speech is for well-functioning democracy. The democracy argument, however, does not directly justify artistic speech.

³⁴³ “A democratic culture is democratic not in the sense that everyone gets to vote on what is in culture. It is democratic in the sense that everyone gets to participate in the production of culture. People are free to express their individuality through creativity and through participation in the forms of meaning-making that, in turn, constitute them and other people in society.” (Jack Balkin, ‘How Rights Change: Freedom of Speech in the Digital Era’ (2004) 26 Sydney L. Rev. 5, 12).

³⁴⁴ Jack Balkin, ‘Digital Speech and Democratic Culture’ (2004) 79 NYU L. Rev. 1.

³⁴⁵ Neil Netanel, *Copyright’s Paradox* (OUP 2008) 31; Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) ch 3.

The perspective that speech under the scope of free speech covers only political speech is highly contestable. Firstly, many creative or artistic expressions are valuable for individuals and for society. They may also have political and social implications; art speech, for instance, can have a vital function in a representative democracy, and therefore, deserves free speech protection in the same way as overtly political speech.³⁴⁶ Secondly, and perhaps more importantly, human rights are not merely for the protection of individuals, but also for the protection of activities and relations that make individuals' lives more valuable.³⁴⁷ The right to freedom of expression and communication must therefore protect both artistic expression and communication of information. Thirdly, within the online communication culture, people not only make speech and expression about politics, but also exchange views on other topics such as fashion, television show, music, art and popular culture. This exchange also makes their lives more valuable.

Interestingly, in some jurisdictions, the right to freedom of expression explicitly comprises artistic expression. For example, section 16 of the South African Constitution proclaims that everyone has the right to freedom of expression which includes “freedom of artistic creativity”.³⁴⁸

As a result, one may simply draw a conclusion that “[i]t is far better to acknowledge that speech goes well beyond the boundaries of deliberation about public issues.”³⁴⁹ Indeed, freedom of speech would “encompass not just speech that delivers a clear political message but also creative expression that is neither overtly political nor

³⁴⁶ Marci Hamilton, ‘Art Speech’ (1996) 49 Vand. L. Rev. 73.

³⁴⁷ Steven Lukes, *Liberals and Cannibals: The Implications of Diversity* (Verso, 2003) 162. See also Article 27(1) of the UDHR, “(e)veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

³⁴⁸ Article 16(1) of the Constitution of the Republic of South Africa (1996) states that:

“Everyone has the right to freedom of expression, which includes-

- a. freedom of the press and other media;
- b. freedom to receive or impart information or ideas;
- c. freedom of artistic creativity; and
- d. academic freedom and freedom of scientific research”.

³⁴⁹ Jack Balkin, ‘How Rights Change: Freedom of Speech in the Digital Era’ (2004) 26 Sydney L. Rev. 5, 13.

rationality apprehensible”.³⁵⁰ In summary, speech should not solely involve political discourse but should also include artistic and creative expression.

3.2.1.3 Freedom of Speech and Human Rights

The statement, “[a]ll human beings are born free and equal in dignity and right”³⁵¹, illustrates the nature of human rights discourse. Society agreed that certain fundamental and inalienable rights are inherent to every individual by the virtue of his or her humanity.³⁵² All human beings are all equally entitled to human rights without discrimination; besides, “one cannot stop being human, no matter how inhuman one's behaviour or the treatment one is forced to endure, they are inalienable rights”³⁵³.

The right to “freedom of speech” or “freedom of expression” is recognised as one of the human rights in international human rights law. The primary international instruments are the UDHR and the ICCPR; in regional conventions, significantly the ECHR; as well as in national instruments and constitutions such as the UK Human Rights Act 1998, the First Amendment to the US Constitution and the French Constitution of 1958.

The Preamble to the UDHR declares that “human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”. The terms “freedom of speech” and “freedom of expression” are sometimes used interchangeably³⁵⁴. It is noteworthy that the two terms are not synonymous; freedom of expression includes the right to seek, receive and impart information and ideas³⁵⁵. Article 19 of the UDHR states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without

³⁵⁰ Neil Netanel, *Copyright's Paradox* (OUP 2008) 33.

³⁵¹ Article 1 of the UDHR.

³⁵² Magdalena Sepúlveda, et al, *Human Rights Reference Handbook* (3rd edn, University for Peace 2004).

³⁵³ Jack Donnelly, ‘In Defense of the Universal Declaration Model’ in Gene Lyons and James Mayall (eds), *International Human Rights in the 21st Century* (Rowman & Littlefield, 2003) 21.

³⁵⁴ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 5.

³⁵⁵ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008) 226.

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

Article 19(1) of the ICCPR provides that “[e]veryone shall have the right to hold opinions without interference”. Article 19(2) continues to say that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” The exercise of the right to freedom of expression under Article 19(2) may be subject to certain restrictions including those for respect of the “rights or reputations of others”. Copyright protection is one of those rights.³⁵⁶

3.2.2 Copyright and Freedom of Speech

The right to freedom of speech imposes limits on the scope of copyright, and vice versa. An understanding of the interplay between copyright and freedom of speech, particularly the negative consequence of the curtailment of free speech by copyright, can help to establish a borderline of expanding copyright protection and to achieve a proper balance between the two bodies of law.

3.2.2.1 Copyright and Human Rights

(i) The Interface between Intellectual Property and Human Rights

The interface between intellectual property rights (particularly copyright) and human rights needs to be explored here due to the three main reasons. Firstly, the rapid changes in technological and cultural environments as well as the emergence of user-generated contents³⁵⁷ in creative communities have significantly triggered a debate on the

³⁵⁶ *Ibid.*

³⁵⁷ See chapter 1.

conflict between the rights of intellectual property holders and the rights of individuals and cultural communities.³⁵⁸ Secondly, the enforcement measures that encounter copyright infringements particularly in the digital environment such as notice and take down procedure³⁵⁹ have arguably failed to sufficiently recognise the rights of online users. Thirdly, the intersection between the two legal regimes has been expanded in many ways including by non-multilateral agreements³⁶⁰ which impose higher standards of intellectual property protection and enforcement than those provided in the TRIPS agreement³⁶¹ or the so-called “TRIPS-plus”³⁶² provisions.

The discussion on the interplay between intellectual property and human rights traditionally concerns the conflict approach, which views that the two rights are fundamentally in conflict, and the coexistence approach which considers them essentially compatible.³⁶³ Beyond the two approaches, when there are conflicts at the intersection of the human rights and intellectual property regimes, Yu argues that it is crucial to distinguish between the human rights and non-human rights aspects of intellectual property protection; and the non-human rights basis of intellectual property protection should be subordinated to human rights obligations under the principle of human rights primacy.³⁶⁴ Intellectual property rights that protect economic investments of legal entities

³⁵⁸ Peter Yu, ‘Intellectual Property and Human Rights in the Nonmultilateral Era’ (2012) 64 Fla. L. Rev. 1045, 1058.

³⁵⁹ See chapter 2.5.

³⁶⁰ Peter Yu, ‘Intellectual Property and Human Rights in the Nonmultilateral Era’ (2012) 64 Fla. L. Rev. 1045; Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 34-48; Laurence Helfer, ‘Toward a Human Rights Framework for Intellectual Property’ (2007) 40 UC Davis L. Rev. 971, 984-987.

³⁶¹ Since the minimum but high standards of intellectual property protection are set out in international treaties including the TRIPS Agreement and TRIPS-plus treaties are proliferated, the idea of maximum standards within those treaties ought to be explored. (See, e.g., Henning Grosse Ruse-Khan, ‘Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection’ (2009) 1 Trade L & Dev 56).

³⁶² For a definition of “TRIPS-plus”, see, e.g., Peter Drahos, ‘BITs and BIPs: Bilateralism in Intellectual Property’, (2002) 4 J World Intell Prop L 791, 792-793.

³⁶³ Laurence Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’ (2003) 5 Minn Intell Prop Rev 47; Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 65-81.

³⁶⁴ Peter Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2007) 40 UC Davis L Rev 1039; Peter Yu, ‘Intellectual Property and Human Rights in the Nonmultilateral Era’ (2012) 64 Fla L Rev 1045.

like business companies rather than individuals are examples of those that have no human rights attributes.³⁶⁵ In this regard, copyrights or author's rights have a stronger human rights basis than patents and trademarks.

(ii) Copyright as a Human Right

Copyright can be recognised under several international human rights instruments including the UDHR.³⁶⁶ Copyright as an intellectual property, is also regarded as a property right guaranteed by Article 1 of the First Protocol to the ECHR.³⁶⁷ In a UNDP Discussion Paper, Correa and Matthews pointed out that intellectual property rights may have a human rights dimension because intellectual property is “essentially the same as ‘property’ in tangible assets and must therefore be secured by the same legal guarantees”³⁶⁸.

The human rights aspect of intellectual property also reflects in Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR³⁶⁹ which proclaim that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Accordingly, copyright can be considered as an instrument for the protection of “moral and material interests” of authors and creators, and therefore, elevated to the status of a human right.³⁷⁰ However, it should be noted that some commentators use the terms “creators’ rights”, “creators’ human rights”

³⁶⁵ Audrey Chapman, ‘Core Obligations Related to ICESCR Article 15(1)(c)’ in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 316-17 (noting that there is no “basis in human rights to justify using intellectual property instruments as a means to protect economic investments”).

³⁶⁶ The three most important IP-related international documents are the 1984 UDHR and two legally binding 1966 ICESCR and the ICCPR.

³⁶⁷ (Paris, 20th March 1952); Copyright is considered to be a property right under this Article. (See, e.g., *Ashdown v Telegraph Group* (2001) Ch 685).

³⁶⁸ Carlos Correa and Duncan Matthews, ‘Discussion Paper: The Doha Declaration Ten Years on and Its Impact on Access to Medicines and the Right to Health’ (UNDP 2011) 13.

³⁶⁹ For a discussion of this provision, see, Audrey Chapman, ‘Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)’, Vol. XXXV, No. 3, Copyright Bulletin 4 (UNESCO 2001).

³⁷⁰ Paul Torremans (ed), ‘Copyright As A Human Right’ in *Copyright and Human Rights* (Kluwer 2004); Peter Drahos, ‘The Universality of Intellectual Property Rights’ in *Intellectual Property and Human Rights*, (WIPO 1999) 13; Robert Ostergard, ‘Intellectual Property: A Universal Human Right?’ (1999) 21 HRQ 156.

or “the right to the protection of interests in intellectual creations” to refer to the human rights to “moral and material interests” under the UDHR and the ICESCR as distinct from “intellectual property rights”.³⁷¹ This is compatible with the General Comment no.17 (2005) of the UN Committee on Economic, Social and Cultural Rights (CESCR) which emphasises that the scope of protection of the author’s moral and material interests as set forth in Article 15(1)(c) “does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements”.³⁷²

Specifically for copyright, Loverdou comments that copyright is capable of being a human right in itself.³⁷³ One reason is that copyright recognises both economic and moral rights of the author in regard to a personality right which is fundamentally subsisted in the author’s right system.³⁷⁴ Afori also considers that moral rights (especially those strongly protected within author’s right system in Continental Europe) are considered as being closest to the heart of the human rights protections for creators.³⁷⁵ This rationale, however, seems to suggest that copyright can be counted as a human right only if it is originated from a personality right, and so leaves out copyright from a common law background.

³⁷¹ “[N]owhere in the provisions is anything mentioned about intellectual property rights, although commentators at times have mistakenly described article 27(2) and article 15(1)(c) as the intellectual property provisions of the UDHR and the ICESCR, respectively.” (Peter Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2007) 40 UC Davis L Rev 1039, 1079); Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 173; Graeme Austin and Amy Zavidow, ‘Copyright Law Reform Through a Human Rights Lens’ in Paul Torremans (ed), *Intellectual Property and Human Rights*, (Kluwer 2008) ch 10.

³⁷² CESCR, General Comment No.17, *Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15(1)(c) of the ICESCR)*, 7–25 November 2005, E/C.12/2005/GC/17.; The General Comment No.17 also underscores a number of aspects to demonstrate that creator’s human rights are distinct from the traditional conception of intellectual property rights.

³⁷³ Athina Loverdou, ‘Copyright and Freedom of Expression: Revising the Berne Convention’ (PhD thesis, Queen Mary, University of London 2006) 57-58.

³⁷⁴ There are two different systems of protection of works, that is, the copyright system (found in the UK, US and some other common law countries) and the author’s right system (adopted in Continental Europe such as France and Germany and other civil law countries). Copyright system basically grants economic rights enabling a copyright owner to control and commercialise his work. Whereas author’s right is generally emanated from the personality of the author (the creation of the author’s mind) and, in its nature, represents moral and economic aspects. For the distinction between the two systems, see, e.g., J.A.L Sterling, *World Copyright Law* (3rd edn, Sweet & Maxwell 2008) 16-17. For legal theories and bibliography concerning copyright in Continental Europe, see, Francis J Kase, *Copyright thought in continental Europe* (Fred Rothman & Co, 1967).

³⁷⁵ “The center of copyright as a human right lies in the moral rights arena” (Orit Fischman Afori, ‘Human Rights and Copyright’ (2004) 14 Ford Intell Prop Media &Ent L J 497, 524.)

3.2.2.2 Copyright and Freedom of Speech in relation to Human Rights

As previously stated, freedom of speech is a human right recognised under human rights law. The relationship between intellectual property rights (including copyrights) and human rights, on the other hand, is complicated and controversial.³⁷⁶

In my view, the right to freedom of speech seems to deserve a stronger position in the human rights hierarchy than copyright does. As discussed above, copyright may have a human rights and non-human rights basis. Under the principle of human rights primacy, the protection of the non-human rights aspects of copyright should be subordinated to the right to freedom of speech which is a fundamental human right in the event of a conflict between the two sets of rights.³⁷⁷

However, no rights, not even human rights, are ultimately absolute: even the right to life has limitations.³⁷⁸ All are subject to reasonable restrictions, for example, in the public interest, on the ground of national security and public order, and to secure due recognition and respect for the rights and freedoms of others.³⁷⁹ In other words, a right has its own limits and is to be balanced with other conflicting rights. Nothing suggests that copyright is inviolable and must for that reason be absolutely protected.³⁸⁰ In fact,

³⁷⁶ For books and articles on the interplay between intellectual property and human rights, see Laurence Helfer (ed), *Intellectual Property and Human Rights* (Edward Elgar 2013); Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011); Willem Grosheide (ed), *Intellectual property and Human Rights : a Paradox* (Edward Elgar 2010); Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer 2008); and Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 5 *Minn Intell Prop Rev* 47 (2003).

³⁷⁷ Peter Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 *UC Davis L Rev* 1039, 1079-1093.

³⁷⁸ The right to life can be restricted when it is absolutely necessary e.g. "in defence of any person from unlawful violence" and "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained" (Article 2 of the ECHR).

³⁷⁹ See, e.g., Article 29(2) of the UDHR; Article 19(3) of the ICCPR; Article 8(1)(c) of the ICESCR; The first paragraph of Article 1 of the first Protocol to the ECHR: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

³⁸⁰ "The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that

copyright ought to be balanced with other rights including the right to freedom of speech, and vice versa.³⁸¹

Historically, copyright's contour has been shaped by the right to freedom of speech. This demonstrates how society achieved the balance when the two rights collide. Some examples of the historical reconciliation between the two rights are illustrated below in chapter 3.2.2.3. To be able to balance the two rights, we need to examine the correlation between them; to what extent they complement and collide with each other.

3.2.2.3 Copyright and Freedom of Speech: Co-Existence with Harmony or Conflict?

Before the late nineteenth century, the implication of the intellectual property for the human rights protection was rather overlooked.³⁸² During the 1990s, there was a widespread human rights movement and the incorporation of human rights principles in treaties.³⁸³ At the same time, the international intellectual property rules and institutions were rapidly expanded.³⁸⁴ Then, the TRIPS agreement provoked the debate with provisions and expansion of intellectual property rights³⁸⁵. It is therefore only recently that

reason be absolutely protected.”(*Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10 [2011] para 43).

³⁸¹ “[I]n the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures” (*Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10 [2011] para 45); “[C]onventions (based on copyright protection) interfered with [the] right to freedom of expression. Such interference breaches Article 10 unless it was ‘prescribed by law, pursued one or more of the legitimate aims referred to in Article 10 § 2 and was ‘necessary in a democratic society’ to attain such aim or aims.”(*Neij and SundeKolmisoppi v. Sweden*, no. 40397/12 [2013]).

³⁸² P Bernt Hugenholtz, ‘Copyright and Freedom of Expression in Europe’ in Rochelle Cooper Dreyfuss, Harry First and Diane Leenheer Zimmerman (eds), *Innovation Policy in an Information Age* (OUP 2000) 343; Peter Yu, ‘Intellectual Property and Human Rights in the Nonmultilateral Era’ (2012) 64 Fla L Rev 1045, 1049; Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 1-2.

³⁸³ Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 1-2.

³⁸⁴ *Ibid*; “In the past, intellectual property issues were considered arcane, obscure, complex, and highly technical.” (Peter Yu, ‘Currents and Crosscurrents in the International Intellectual Property Regime’ (2004) 38 Loy LA L Rev 323, 419).

³⁸⁵ Graeme Austin and Amy Zavidow, ‘Copyright Law Reform Through a Human Rights Lens’ in Paul Torremans (ed), *Intellectual Property and Human Rights*, (Kluwer, 2008) 261.

these two fields have been intensively explored by scholars and recognised within the international instruments. There are questions on whether these two concepts conform to, or instead, collide with each other.

(i) In Conformity

There are some arguments that copyright supports freedom of speech. One simple argument is that copyright, by providing economic incentives, encourages authors and artists to express their ideas, and in that process, create a new work.³⁸⁶ Therefore, copyright is an engine of free expression. Copyright and freedom of expression can be viewed as “harmonious and complementary concepts”.³⁸⁷

A doctrinal argument that copyright does not conflict with free speech is concerning idea/expression dichotomy.³⁸⁸ Copyright does not suppress others to express the same idea in different expression, but only inhibit the use of the expression of the copyright holder. This is well balanced between the deterrence of copying someone else’s expression and the public interests in the copyright encouragement of creative works.³⁸⁹ Nimmer commented that “[o]ne who pirates the expression of another is not engaging in self-expression in any meaningful sense.”³⁹⁰ Barendt contends that Nimmer significantly disregarded works in which idea and expression are inseparable. Besides, Nimmer’s comments did not sufficiently consider the right to free speech in regards to a creation of works that need to use or mimic the distinctive expression of the copyright holder in order

³⁸⁶ See e.g., *Harper & Row v. Nation Enterprises*, 471 US 539, 558 (1985); William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ 18 J. Leg. Stud. 325, 325-33, 344-53 (1989).

³⁸⁷ Pamela Samuelson, ‘Copyright and Freedom of Expression in Historical Perspective’ (2003)10 J. Intell. Prop. L. 319.

³⁸⁸ See chapter 2.1 for a discussion on the dichotomy of idea and expression.

³⁸⁹ Melville Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L Rev 1180, 1192; Patrick Masiyakurima, ‘The Futility of the Idea/Expression Dichotomy in UK Copyright Law’ (2007) 38 IIC 548.

³⁹⁰ Melville Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L Rev 1180, 1192 (emphasis omitted).

to be able to communicate his ideas or make significant political or artistic points out of the copyright work as in parody and appropriation arts.³⁹¹

The doctrinal argument that freedom of speech is recognised within copyright legislation itself through intrinsic limitation devices, such as the US ‘fair use’ and the UK ‘fair dealing’ defence, is accurate to some degree. However, these defences guarantee freedom of speech only to limited extents, and which, I will argue, are insufficient.³⁹² For instance, whereas there are a number of articles and case law which claim to demonstrate that the US fair use doctrine sufficiently secures protection of free speech³⁹³, some argue that the exception does not adequately accommodate free speech concerns³⁹⁴ due to a number of factors for fair use scrutiny and its characters of case-by-case analysis³⁹⁵ (see chapter 4.1.1). Fair dealing under the UK CDPA safeguards the right to free speech³⁹⁶ in relation to the use of copyright work for a limited range of purposes such as for reporting current events, parody, private copying and quotation. Nevertheless the fair dealing provisions do not effectively and sufficiently lessen the conflict between copyright and free speech since their applications are still too limited (see chapter 4.2.1).

³⁹¹ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 249, 256.

³⁹² See chapter 4.

³⁹³ See, e.g., Melville Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L Rev 1180; Paul Goldstein, ‘Copyright and the First Amendment’ (1970) 70 Colum L Rev 983, 1017-1022; Robert Denicolat, ‘Copyright and Free Speech: Constitutional Limitations on the Protection of Expression’ (1979) 67 Cal L Rev 283; Justice Ginsburg emphasised that the fair use defence and the idea/expression dichotomy are “copyright’s built-in free speech safeguards”. (*Eldred v Ashcroft*, 537 US 186, 221 (2003)).

³⁹⁴ “[I]f ever fair use secured First Amendment interests, today’s fair use doctrine provides no more than a bare, insubstantial trace of that protection.” (Neil Netanel, ‘Locating Copyright Within the First Amendment Skein’ (2001) 54 Stanford L Rev 1, 23); “This contributes to the open-ended nature of the limitation, which, in turn, exacerbates its inconsistent application.” (Athina Fotini Loverdou, ‘Copyright and Freedom of Expression: Revising the Berne Convention’ (PhD thesis, Queen Mary University of London 2006) 188 citing Nimmer at para. 13.05[A]; Gideon Parchomovsky and Kevin Goldman, ‘Fair Use Harbors’ (2007) 93 Va L Rev 1483.

³⁹⁵ The doctrine of fair use have frequently been described as the “most troublesome in the whole law of copyright.” (*Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2nd Cir. 1939); Courts frequently quote the pronouncement in *Dellar*, see e.g., *Meeropol v Nizer*, 560 F.2d 1061, 1068 (2d Cir 1977); *Triangle Publications, Inc v Knight-Ridder Newspapers, Inc*, 626 F.2d 1171, 1174 (5th Cir 1980); *Sony Corp. of America v Universal City Studios, Inc*, 464 US 417, 475 (1984); *Monge v Maya Magazines, Inc*, 688 F 3d 1164, 1170 (9th Cir 2012); Fair use is troublesome due to its flexibility. (William Walker Jr, ‘Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium’ (1983) 43 La L Rev 735, 740).

³⁹⁶ For an article discusses the interaction of fair dealing defences and freedom of expression in the UK, see Patrick Masiyakurima, ‘The Free Speech Benefits of Fair Dealing Defences’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer 2008) 235-256.

(ii) In Conflict

In *Ashdown v Telegraph*, the English court has considered, for the first time, the intersection between copyright and the right to freedom of expression guaranteed by Article 10 of the ECHR.³⁹⁷ It acknowledged that copyright could constraint the exercise of the right to free speech³⁹⁸ and the conflict between the two rights may exist even though the fair dealing defence was provided within the copyright statute.³⁹⁹

In *Ashdown v Telegraph*, the newspaper, Sunday Telegraph, published a series of articles containing verbatim extracts and substantial sections from a confidential minute of a meeting between Ashdown and the then Prime Minister when they discussed the possibility of forming a coalition between the Labour and Liberal Democratic parties. Ashdown claimed that the unauthorised publication of his minute was a copyright infringement. The Telegraph Group sought to rely on the defences of fair dealing for the purpose of criticism or review⁴⁰⁰, fair dealing for the purpose of reporting current events⁴⁰¹ and the common law defence of public interest⁴⁰² in compatibility with the right to freedom of expression under Article 10 of the ECHR. These defences were not successful for this particular case.

The Court of Appeal in this case essentially recognised that, in most circumstances, the right to free speech in copyright cases is sufficiently protected because copyright law normally allows the publication of information and ideas contained in a literary work, if not copying the exact same words⁴⁰³, and because copyright exceptions and limitations, particularly fair dealing, are provided within the copyright legislation

³⁹⁷ See generally, Jonathan Griffiths, 'Copyright Law after Ashdown - time to deal fairly with the public' (2002) 3 IPQ 240; Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 259-283.

³⁹⁸ *Ashdown v Telegraph Group*, [2001] Ch 685 at 693.

³⁹⁹ *Ashdown v Telegraph Group*, [2001] Ch 685; [2002] Ch 149.

⁴⁰⁰ Section 30(1) of the CDPA 1988.

⁴⁰¹ Section 30(2) of the CDPA 1988.

⁴⁰² Section 171(3) of the CDPA 1988; The interaction between copyright and the public interest are significantly discussed in chapter 3.3.

⁴⁰³ *Ashdown v. Telegraph Ltd* [2001] E.M.L.R. 44, para 39.

itself⁴⁰⁴. It conceded that in exceptional circumstances copyright may conflict with the right to freedom of expression despite the existence and application of fair dealing provision:

“...rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the court to look closely at the facts of individual cases (as indeed it must whenever a “fair dealing” defence is raised)...”⁴⁰⁵

Such rare circumstances are for example to report information of the greatest public interest not related to a current event but to a document produced in the past.⁴⁰⁶ Such publications seem to have great public significance if concern political speech. Thus rare cases implied in *Ashdown* may not be adequate to safeguard free speech in circumstances where copying is a fundamental part of the expressive re-creations not concerning political or public events.

The clash between copyright and free speech has become more visible due to copyright expansion⁴⁰⁷. Over recent years, particularly in the digital era, copyright has greatly expanded its scope through intensive pressure from recording companies, movie studios and other mass media corporations.⁴⁰⁸

Vertically, copyright’s term of protection has been extended. For instance, in England⁴⁰⁹, the term of protection under the Statute of Anne lasted for fourteen years from publication for the author of a book or his assignee. The duration, since then, has been

⁴⁰⁴ *Ibid*, para 66.

⁴⁰⁵ *Ibid*, para 45.

⁴⁰⁶ *Ibid*, para 44; Jonathan Griffiths, ‘Copyright Law after Ashdown - time to deal fairly with the public’ (2002) 3 IPQ 240, 245-246.

⁴⁰⁷ See chapter 3.3.2.2 for further discussion on copyright extension.

⁴⁰⁸ Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 34-42.

⁴⁰⁹ For the history of copyright terms of protection in the UK, see Anthony Robinson, ‘The Life and Terms of UK Copyright in Original Works’ (1997) 2 Ent L R 60.

extended for various reasons. Until the Copyright Act 1911, the term was extended to the life of the author plus fifty years *post mortem auctoris* (“*p.m.a.*”) into conformity with the standard set by the Berne Convention. Then, in 1996, in order to harmonise the duration of copyright throughout the European Economic Community, the duration of copyright under the UK law was increased the term of copyright to the life of the author plus seventy years *p.m.a.*

In the US, the Sonny Bono Copyright Term Extension Act (CTEA)⁴¹⁰ of 1998, enlarged the duration of copyright by twenty years. The copyright term under the US law was, therefore, extended from life plus fifty years to life plus seventy years. In *Eldred v Ashcroft*⁴¹¹, the Court rejected the First Amendment challenge to extension of copyright term under the CTEA on holding that when “Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary”.⁴¹² The Court simply denied that there were legislative restrictions on freedom of speech on the ground that they are intended to promote free speech. Nonetheless, it is obvious that copyright term extension does cause a delay for creative works to enter the public domain which leads to the deterrence of other’s use of pre-existing expression.

Horizontally, copyright has been expanded beyond merely protecting literal copying. It now prevents others from parodying, deriving, recasting, remixing or incorporating parts of existing works into a new creation. Pre-existing expression constitutes raw materials for others to build upon, criticise, translate, parody, refer, remake and remix. Human creativity is, at the very least, inspired by other’s speech and expression.⁴¹³

The tension between copyright and free speech, at the time when copyright did little more than protect merely verbatim copying, was minimal. Whereas, at the present, a re-creation which results in a similarity, non-verbatim copying, or includes literal copying

⁴¹⁰ Pub.L. No. 105-298, 112 Stat. 2827 (1998).

⁴¹¹ *Eldred v Ashcroft*, 537 US 186 (2003).

⁴¹² *Ibid*, 221 (citing *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539, 560 (1985)).

⁴¹³ See chapter 3.1.

of small portions of copyright work might be infringing.⁴¹⁴ It is clear that copyright has restricted an author's freedom to utilise others' expression in creating an independent expressive work. By this, the conflict between the right to freedom of speech and copyright is increased. Netanel suggests that "[o]nce copyright holders' exclusive rights extended beyond mere verbatim and near-verbatim copying, it became necessary to define some outer limit to those rights, lest copyright holders' proprietary control over existing expression unduly burden new speech."⁴¹⁵

In summary, some arguments seem to support that copyright does serve as an engine of free speech whilst collision between the two rights is still presenting.

(iii) In Conciliation

Over the years, society has attempted to reconcile copyright with other competing rights including the right to free speech in the event of conflicts. For example, many intrinsic copyright exceptions are a result of such balancing exercise. For public uses, copyright exceptions include, for instance, quotation⁴¹⁶, library and archival uses⁴¹⁷, access to books for the visually impaired⁴¹⁸ and uses by the media⁴¹⁹ in order to balance copyright with the freedom of the press to carry news of the day and the interest of the public at large in receiving information.

Besides, in a number of cases concerning reporting of news and historical events, courts in many countries are required to reconcile between copyright and the right to free speech as well as the public interest. In the US, the use of several stills from Zapruder

⁴¹⁴ See chapter 2.

⁴¹⁵ Neil Netanel, *Copyright's Paradox* (OUP, 2008) 61.

⁴¹⁶ Article 10(1), Berne Convention.

⁴¹⁷ See, e.g., Article 31, Japanese Copyright Act; Article 46, German Copyright Act; Section 108, US Copyright Act.

⁴¹⁸ See, e.g., Article 37, Japanese Copyright Act; Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013).

⁴¹⁹ Article 2(8), Berne Convention.

footage of President Kennedy's assassination for a historical book was allowed.⁴²⁰ The court held that such use was "fair and reasonable" since it was in the public interest to provide information on the factual and historical event.

In the UK, the lower court permitted media use of still images of Princess Diana and Dodi Fayed to convey the facts about their visit to the Villa Windsor before their deaths. However, the Court of Appeal found that there was no public interest in having the stills published when the information could have been conveyed in a way that did not infringe copyright.⁴²¹ In *Ashdown*⁴²², the Court of Appeal ruled that the defendant could have made limited quotation instead of printing Ashdown's secret minute verbatim.

These achievements in balancing copyright with other rights illustrate that copyright cannot be used to prevent re-use of a work when it clashes against the right to freedom of speech and the public interest.⁴²³ Such circumstances, however, cannot be specified in advance; the appropriate balance varies in accordance with the social dynamics of the particular re-use. Therefore, individual reconciliation of copyright and other competing rights is always needed.

(iv) Digital Media

The intersection between copyright and the right of freedom of speech was aggravated when the scope and term of copyright protection were extended; the potential for friction has become exacerbated when the digital technology has changed the social standard and forms of speech.

⁴²⁰ *Time Incorporated v. Bernard Geis Associates*, 293 F Supp 130 (1968).

⁴²¹ *Hyde Park Residence v Yelland* [2001] Ch 143; [2000] 3 WLR 215; [2000] EMLR 363; [2000] RPC 604.

⁴²² *Ashdown v Telegraph Group Ltd*, [2001] Ch 685; [2002] Ch 149.

⁴²³ The concept of public interest will be discussed in chapter 3.3.

With the advent of the internet and the rapid growth of digital technology, the conflict between copyright and free speech is increasing.⁴²⁴ The digital revolution has modified social relations, and at the same time, fostered interactivity. It has reduced the costs of copying and circulating digital information over the internet and has developed common standards of information exchange.⁴²⁵ As a result, online social communities and platforms have sprung into existence. The result is a culture of social exchange of ideas and expressions in a digital arena.

Balkin suggests that internet speech has two significant characteristics.⁴²⁶ Firstly, it routes around traditional mass media by avoiding the old gatekeepers who controlled public speech. Secondly, it non-exclusively appropriates or takes some contents from mass media and uses them as raw materials for creativity. Internet speech includes blogs, critique website, fan fiction, and a fan's remake of a popular movie. Balkin also illustrates that a fan-made sequel is another way of "talking back" to a mass media product.

Internet users are no longer mere passive consumer of media but are also active producers by using digital technologies to comment on, and appropriate, existing materials for their own expression. This evokes a more severe conflict between copyright and freedom of speech; whereas copyright insists on suppressing online re-creators with intensive control over their use of copyright materials, the nature of online culture together with free speech encourages digital consumers to liberally make a new expression out of old ideas or pre-existing methods of expression. The right to free speech of online re-

⁴²⁴ Many commentators are aware of this situation such as, Raymond Shih Ray Ku, 'F(r)ee Expression?: Reconciling Copyright and the First Amendment' (2006) 57 Case W Res L Rev 863, 866; Neil Netanel, *Copyright's Paradox* (OUP 2008); Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 451; Jack Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 Sydney L Rev 5; Jack Balkin, 'Digital Speech and Democratic Culture' (2004) 79 NYU L Rev 1.

⁴²⁵ Jack Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 Sydney L Rev 5 and Jack M Balkin, 'Digital Speech and Democratic Culture' (2004) 79 NYU L Rev 1.

⁴²⁶ *Ibid.*

creators is even more affected by use of an extra copyright power such as the DMCA⁴²⁷ and the digital right management instruments⁴²⁸ to suppress internet speech.

3.2.3 Copyright, Freedom of Speech and Online Re-creations

The type of speech which is most restrained by copyright is speech that involves “creative appropriation”. Creative appropriation ranges from “modifications and adaptations of a single work to samplings, remixes, and mash-ups that incorporate an array of discrete components from numerous existing works.”⁴²⁹ These online creative works are, for instance, written works such as fan fictions, videos such as a cover of a song, mash-up or parody on *YouTube*, and a virtual reality of existing places or scenes from a popular culture. Creative re-creations require reproduction of existing elements in order to communicate new expressions. Fan authors express their thoughts and imagination concerning a popular work by writing a fiction using fragments from the original story. Re-creators incorporate or remix some original audio-visual materials to create a video parodying an object or demonstrating another aspect of the original works with their own effort, originality, and creativity. These activities fulfil and satisfy the re-creators; these online re-creations are also a means of communicating their messages to the society and opening floor for discussion.⁴³⁰

As analysed in chapter 2, under the current copyright law, these creative works are potentially infringing copyright. Barendt argues that:

“some infringing works should be regarded as an exercise of free speech rights because they are integral to the development of its author or because they enhance the general public understanding of literature or the arts. This is clearly the case with parodies, satire, and appropriation art, all of which may

⁴²⁷ See Chapter 2; See also, Julia Hörnle, ‘Internet Service Provider Liability - Let's (not) play piggy in the middle’ (2002) 7 Communications Law 85.

⁴²⁸ Digital rights management technologies are technological devices that prevent access to and copying of digital content.

⁴²⁹ Neil Netanel, *Copyright's Paradox* (OUP 2008) 58, 196.

⁴³⁰ See chapter 5.2.1.

quote or in other ways exploit existing work, and thereby infringe copyright. Indeed, their effectiveness as a parody or appropriation art depends on reproduction or adaptation of significant parts of the earlier work.”⁴³¹

Those works are, by nature, appropriative; it is impossible to create works such as fan fiction or parody without incorporating some fragments from an original work. Copying in these circumstances is therefore unavoidable. But the consequence is that a creator of this genre of works is being treated as a copyright infringer whose right to freedom of expression is inequitably ignored as demonstrated in chapter 2.

Moreover, copyright potentially increases the cost of speech by requiring licensing fee payment⁴³² and due to the difficulties in obtaining permission from the copyright owner⁴³³. This chills expression of those (and most) subsequent creators who are amateur with limited financial resources. These creators may decide to alter their expression or cease to produce their expressive creation altogether.⁴³⁴ Apparently, the impact of copyright law upon free speech reaches its peak in situations where a person cannot express his idea using prior expression of another person.

Apart from the right to freedom of speech, another human right which is relevant to copyright and online re-creation is the right to participate in cultural life. Article 27(1) of the UDHR states that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Article 15(1)(a) of the ICESCR also recognises the right of everyone to take part in cultural life. Interestingly, the texts of the right to participate in cultural life co-exist within the same provisions as the right of creators including copyright.⁴³⁵

⁴³¹ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 255.

⁴³² Raymond Shih Ray Ku, ‘F(ree) Expression?: Reconciling Copyright and the First Amendment’ (2006) 57 Case W Res L Rev 863, 868; “Alternatively, if license fees for such uses are required, the cost of particular expression increases, sometimes prohibitively.” (Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 221).

⁴³³ See chapter 2.2.

⁴³⁴ See chapter 5.2.2.

⁴³⁵ Article 27(2), the UDHR.

In 1976, UNESCO issued a *Recommendation on Participation by the People at Large in Cultural Life* which delineated the concept of culture to include “all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities”.⁴³⁶ In 2009, the CESCR also viewed that the concept of culture “must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.”⁴³⁷ In relation to Article 15(1)(a) of the ICESCR which is the human rights to participate in the cultural life, the CESCR considered that:

“[culture] encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.”⁴³⁸

Online re-creations are part of the creative culture of the 21st century.⁴³⁹ Copyright law has made a barricade around the online re-creation culture and outlawed subsequent creators who participate in the culture. Therefore, such deterrence also implicates the human rights to participate in the cultural life of the community, to enjoy the arts and to

⁴³⁶ UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It* (26 November 1976) I.3 (a).

⁴³⁷ CESCR, General Comment no.21, *Right of everyone to take part in cultural life (art. 15, para. 1a of the ICESCR)*, 21 December 2009, E/C.12/GC/2 para 12.

⁴³⁸ *Ibid*, para 13.

⁴³⁹ See chapter 1; “[C]ultural rights should accordingly be considered more than merely rights to enjoy a cultural product. Cultural rights are real human rights aimed at protecting an important part of human dignity.” (Yvonne Donders, ‘The Legal Framework of the Right to Take Part in Cultural Life’ in Yvonne Donders and Vladimir Volodin (eds), *Human Rights in Education, Science, and Culture* (UNESCO 2009) 231).

share in scientific advancement and its benefits as safeguarded by Article 27(1) of the UDHR and Article 15(1)(a) and (b) of the ICESCR.⁴⁴⁰

It is a natural human activity to “participate in culture through building on what [we] find in culture and innovating with it, modifying it, and turning it to [our] purpose”.⁴⁴¹ Freedom of expression protects such ability of individuals and promotes the development of a culture that is more participatory. However, copyright expansion has prevented people from building upon other’s expression in creating their own.

“Our speech does not arise from a tabula rasa. Rather, we are born into an expressive universe brimming with texts, songs, and images that others have created. We cannot make sense of our world, find our own voice, communicate to others, or seek to affect others’ perceptions and understandings without appropriating, recoding, referring to, and imparting the expressive works that constitute our common language.”⁴⁴²

Indeed, a reconciliation between the interests of the copyright holders and the right to free speech as well as the right to participate in cultural life of online re-creators is still in need. To achieve a proper balance in a conflicting circumstance, the fact that copyright has a history of being a promoter of free speech and the public interest should also be taken into account⁴⁴³.

3.2.4 Conclusion

Copyright can collide with freedom of speech particularly when it prohibits utilisation of an existing work in making a new expression. In the internet age, people communicate with one another and participate in the online culture of their choice by digital speech including creative re-creations that contain political, artistic and/or communicative value. Free speech challenges to copyright enforcement ought to be

⁴⁴⁰ Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property* (CUP 2011) 233-242.

⁴⁴¹ Jack Balkin, ‘Digital Speech and Democratic Culture’ (2004)79 NYU L Rev 1, 4.

⁴⁴² Neil Netanel, *Copyright’s Paradox* (OUP 2008) 43.

⁴⁴³ Pamela Samuelson, ‘Copyright, Commodification, and Censorship’ in Niva Elkin-Koren and Neil Netanel (eds), *The Commodification of Information* (Kluwer Law 2002) 65-66.

sustained “when copyright law is used to suppress the dissemination of information of real importance to the public or to stifle artistic creativity, parody, or satire, and moreover, when the legislation itself does not provide adequate safeguards for that freedom.”⁴⁴⁴ In the analysis of the copyright effects on freedom of an individual to expression, the public interest is often related and led to a crucial discussion. Therefore, not only that an individual’s free speech is a crucial issue for creative expression in the online re-creation culture, the interest of the public on this matter is also important and needed to be discussed in the following part of this chapter.

3.3 The Public Interest

*“Ultimately the most important factor determining the theoretical shape of copyright is the public interest.”*⁴⁴⁵

Copyright is considered to be in the public interest because it encourages creation and dissemination of new works. This chapter will study the public interest in relation to copyright and online creative re-uses. It will first discuss the notion of the public interest and then analyse the interplay between copyright, the public interest and the re-creation practice in the digital age.

3.3.1 The Discourse of the Public Interest

The public interest is a term that is used in many areas of law such as in freedom of information, media law, public law, patent law and copyright law. For instance, in freedom of information the public interest plays an important role in allowing public

⁴⁴⁴ Eric Barendt, ‘Copyright and Free Speech Theory’ in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (OUP 2006) 32-33.

⁴⁴⁵ Copyright Law Review Committee, *Copyright Reform: A Consideration of Rationales, Interests and Objectives* (Office of Legal Information and Publishers, Australia 1996) 14.

access to information held by a public authority.⁴⁴⁶ Carter and Bouris comment that “[t]he ‘public interest’ is an amorphous concept, which is typically not defined in access to information legislation. This flexibility is intentional. Legislators and policy makers recognise that the public interest will change over time and according to the circumstances of each situation.”⁴⁴⁷

In the area of media law, Morrison and Svennevig state that “[t]he broad concept of ‘the public interest’ is familiar to large proportions of the public, and it is considered a suitable defence for media intrusion of privacy under appropriate circumstances. However, there did not seem to be any one firm definition of the term.”⁴⁴⁸ Although the public interest is recognised in all jurisdictions⁴⁴⁹, a formal definition of the term cannot be found. Some suggest that “it was in the media’s interest not to have a clear definition of public interest, since such a loose definition could be brought into play to justify practices” in order to balance the public interest with the media and privacy.⁴⁵⁰

The UK Editors’ Code of Practice (“Code”) sets the benchmark for ethical standards and protects both the rights of the individual and the public’s right to know. It comprises clauses imposing duties on the members of the press including accuracy, privacy, the protection of children and vulnerable groups, and so on. The Code also includes the public interest exceptions to some of the clauses that might normally breach the Code in order to allow publication of material that would be in the wider public interest. Though the public interest has not been defined, the Code provides guidelines about what can be considered as in the public interest:

- “1. The public interest includes, but is not confined to:
 - i) Detecting or exposing crime or serious impropriety.

⁴⁴⁶ See e.g., Patrick Birkinshaw, *Freedom of Information* (CUP 2010); John Macdonald, *The law of Freedom of Information* (2nd edn, OUP 2009).

⁴⁴⁷ Megan Carter and Andrew Bouris, *Freedom of Information: Balancing the Public Interest* (UCL 2006) 4.

⁴⁴⁸ David Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy* (A Report for British Broadcasting Corporation, et.al. 2002) 1.

⁴⁴⁹ *Ibid* 7; Megan Carter and Andrew Bouris, *Freedom of Information: Balancing the Public Interest* (UCL 2006) 4.

⁴⁵⁰ David Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy* (A Report for British Broadcasting Corporation, et.al. 2002) 7.

- ii) Protecting public health and safety.
- iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2. There is a public interest in freedom of expression itself.”

But what does the “public interest” mean when it comes to creativity?

Defining the “public interest” is not an easy task.⁴⁵¹ There is no conformed definition of public interest. For the purpose of this discussion, I will attempt to develop a definition of public interest in relation to law and copyright by beginning with dictionary definitions and then narrowing down the concept by examining the discourse of public interest in other areas of law.

In a general meaning for common usage, according to the Random House dictionary, the public interest means: “the welfare or well-being of the general public; commonwealth”, and “appeal or relevance to the general populace”.⁴⁵²

The Oxford English dictionary⁴⁵³ defines ‘the public’ as “ordinary people in general; the community”. It provides five different meanings of the word ‘interest’ as followed;

- 1) the feeling of wanting to know or learn about something or someone;
- 2) money paid regularly at a particular rate for the use of money lent, or for delaying the repayment of a debt;
- 3) the advantage or benefit of a person or group;
- 4) a stake or involvement in an undertaking, especially a financial one;
- 5) a group or organization having a common concern, especially in politics or business.

⁴⁵¹ House of Commons, *Public Administration Committee Reports* (Third Report, HC 398-I, 1998) 75.

⁴⁵² Random House Unabridged Dictionary, ‘Public Interest’ <<http://www.dictionary.com/browse/public-interest>>.

⁴⁵³ Angus Stevenson (ed), *Oxford Dictionary of English* (3 edn, OUP 2010).

In a general definition for legal purposes, Black's Law Dictionary defines public interest as: "[s]omething in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government".⁴⁵⁴

In summary, from the above dictionaries' definitions, the term "interest" is not limited to monetary or economic benefits but also involves the well-being, welfare, public order and fulfilment as well as legal rights and liabilities. Certainly, the meaning of interest which referring to the money paid for the use of money lent, or for delaying of debt payment is not relevant to the discourse of the public interest. Its concept for legal purposes, as supported by Black's Law Dictionary, is not so trivial that it refers to the matters that people think interesting to know. Clearly, as stated by Morrison and Svennevig in 'The Public Interest, the Media and Privacy', the concept of public interest "involves matters that are held to affect a considerable number of people. It cannot, in general, be something that people are merely interested in knowing about".⁴⁵⁵

As for the term "public", it can refer to a substantial number of people, a community, the society at large, and the general public. Nevertheless, the media scholars, Morrison and Svennevig, comment that "[w]here something might affect a single individual, it can be in the public interest if that effect involves some general principle that, in turn, has impact upon a wider population".⁴⁵⁶ Besides, the size and shape of the public may vary from society to society;⁴⁵⁷ it may also depend on the nature of the subject

⁴⁵⁴ Henry Black, *Black's Law Dictionary* (6th edn, West 1990).

⁴⁵⁵ David Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy* (A Report for British Broadcasting Corporation, et.al. 2002) 1.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ As Dreier points out:

"[W]hile the term "public interest" is often cited, there is a certain vagueness inherent in it. Who is, or who represents, the "public"? In some instances, the reference is to the "general" public, i.e. to society as a whole. In other instances, the reference is to the interest of a certain subgroups of society: for example, end-users, who are viewed as in opposition to the interests of the rightholders. Furthermore, the label "public" is sometimes used to mask private—often commercial—interests; by the same token, denial of a "public interest" can be a mask for

matter and the type of interest which the public is asserted to have in relation to that matter⁴⁵⁸.

The general concept of public interest is “wide-ranging and expansive”⁴⁵⁹. It is possible that different publics or communities have dissimilar interests.⁴⁶⁰ The public interest has different meanings in different contexts, different societies; and it changes over time. From the public law perspective, there is the public interest in life, health, and freedom⁴⁶¹. There is also the public interest in disclosing essential data that are important for public life (right to information), the public interest in freedom of speech and discovering truth (media law) and the interest in public health (patent law aspect).

For the objective of this research, the notion of public interest is specifically explored within the scope of copyright law, which therefore disregards unrelated elements such as physical safety of members of the public. My starting point is that the public interest in the copyright context can be defined as something in which the public, society as a whole or a certain subgroup of society has some monetary interest, or some interest involving their well-being, advancement and legal rights or liabilities. The interests of the

unfettered individualistic interests. In fact, post-modern discourse has made it clear that every one of us forms part of several “publics,” each of which has its own unique interests.”(Thomas Dreier, ‘Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?’ in Rochelle Cooper Dreyfuss, et al. (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (OUP 2001) 297).

⁴⁵⁸ As illustrated in an International Federation of Accountants (IFAC) policy position paper in accountancy profession:

“While IFAC stresses that the “public” is inclusive of all society, it identifies the broad groups that comprise the public and how each group is impacted by the accountancy profession. For “interests,” the benefits that should be realized from the responsibilities of the accountancy profession and the associated costs are identified. These benefits and costs are generally, but not always, economic in nature and their implications will impact different levels of society.” (International Federation of Accountants, ‘A Definition of the Public Interest’ (IFAC Policy Position 5, 2012).

⁴⁵⁹ Megan Carter and Andrew Bouris, *Freedom of Information: Balancing the Public Interest* (UCL 2006) 4.

⁴⁶⁰ “There is a recognition that different publics, or communities with differing interests, exist. The possibility of something being ‘in the public interest’ for one section of the population, but against the interests of another is a matter of some debate.” (David E. Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy* (A report for British Broadcasting Corporation, et.al. 2002) 1).

⁴⁶¹ See e.g., Norton Long, ‘Public Administration, Cognitive Competence, and the Public Interest’ (1988) 20(3) *Administration & Society*, November 334.

public in the copyright system are crucially related to creativity and freedom of speech as discussed in chapters 3.1 and 3.2.

The public interest has shaped the contour of copyright since the eighteenth century and will continue to do so. The link between the public interest and copyright has since been a subject of debate namely how to balance the two. The correlation between copyright and the public interest is discussed in the following part.

3.3.2 Copyright and the Public Interest

3.3.2.1 The Correlation

As a fundamental rule, copyright grants exclusive rights in various types of original works⁴⁶² such as literary and artistic works⁴⁶³. The granted rights⁴⁶⁴ encourage authors or artists in creation of useful works, creativity and knowledge to benefit the society as a whole.⁴⁶⁵ The copyright protection (at least for the economic rights) lasts for a limited term.⁴⁶⁶ With the lapse of protection terms, copyright works enter the public domain and become a common good which people can freely use. The distribution and stimulation of creativity as well as works in the public domain constitute the public interest. This is a significant and fundamental balance between the rights of the copyright holders and the public interests in dissemination of works and access to protected works.

The public interests in relation to copyright are therefore as follows:

⁴⁶² The concept of originality varies in different jurisdictions, see chapter 3.1.

⁴⁶³ Article 2, Berne Convention.

⁴⁶⁴ The exclusive rights vary with legal traditions and national implementations such as the rights to reproduce, distribute and publicly perform the original works.

⁴⁶⁵ Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002).

⁴⁶⁶ There is no universal copyright term of protection. Article 7(1) of the Berne Convention prescribes the minimum duration as “the life of the author and fifty years after his death”.

(i) Creativity and learning

As criticised in chapter 3.1, creativity is indispensable for the enrichment of society. Copyright is widely believed to be a mechanism for the stimulation of creativity and useful knowledge for the benefit of the public.⁴⁶⁷ It also fosters “the growth of learning and culture by encouraging creators to produce works for the public welfare”⁴⁶⁸. Nevertheless, although copyright fulfils some significant function in encouraging new creations by providing economic interests, it does not play a single and direct factor to generate creative incentives (see below in part 3.3.3.1). To encourage creativity and cumulative knowledge, copyright should allow creative re-uses of protected works instead of deterring it.

(ii) Freedom of speech

Copyright can also be considered as an engine of free expression⁴⁶⁹ by providing economic incentives, encourages authors and artists to express their ideas and in that process, create a new work.⁴⁷⁰ In this view, copyright co-operates with freedom of speech in the stimulation of creative expression for the fulfilment of individuals and society as well as the promulgation of opinion and truth. These benefits of copyright are crucial to the interest of the public. Nevertheless, freedom of speech requires ability to access and use the existing works during the term of protection. Particularly in the internet age, people communicate with one another by digital speech including creative re-creations that contain political, artistic and/or communicative value. Thus, copyright can collide with freedom of speech when it prohibits utilisation of an existing work in making a new expression (see chapter 3.2).

⁴⁶⁷ See chapter 3.1.2.1.

⁴⁶⁸ This is essentially the underlying purpose and philosophy of the traditional US copyright law. See, Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 124.

⁴⁶⁹ See chapter 3.2.2.3.

⁴⁷⁰ See, e.g., *Harper & Row v. Nation Enterprises*, 471 US 539, 558 (1985); William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ (1989)18 J. Leg. Stud. 325, 325-333.

(iii) Dissemination of works and access to protected works

The exclusive rights under copyright law are granted to encourage authors in creation of useful works and widespread dissemination of works benefits the public. “If the ideas and experiences of creators can be shared by a wide public within a short space of time they contribute to the advance of society.”⁴⁷¹ This is coherent to the natural process of creativity analysed in chapter 3.1.1.2 that creative works are built on works of former creators, influenced by the environmental and social conditions of the external world, and required communication between people in the society.

The preceding public interests related to creativity and free speech require access and use of existing works during the term of copyright protection. After the lapse of copyright terms, the protected works will enter into the public domain and become the common good which other people can freely exploit. This is the interests of society in access to protected works and in stimulus of further creativity. The existence of a public domain can be considered as a crucial part of the public interest served by copyright law.⁴⁷² However, an extension of copyright duration delays works entering the public domain and the rise of the cost in creating new works due to an intensive copyright protection may paradoxically lower the number of works created⁴⁷³. This causes an imbalance between copyright, the rights of the users and the public interest. Copyright strives to provide a better balance by embodying restricted limitations and exceptions on the exclusive rights. Nevertheless the existing copyright exemptions are insufficient to achieve a proper reconciliation between the competing interests particularly in the digital age. These issues are discussed further below in the following parts and in chapter 4.

⁴⁷¹ Stephen Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1989) para 1.05.

⁴⁷² “The concept of the public domain suggests a pool of concepts, themes, and works that can be freely drawn upon by those seeking to express their own ideas. The interests of copyright owners (not necessarily those of the creators of copyright works) are best served by a narrow public domain. The rights of creators, users, and society arguably lie with a more robust public domain.” (Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 64-65).

⁴⁷³ William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18(2) *Journal of Legal Studies* 325, 332.

3.3.2.2 Public Interest Debates on Extension of Copyright

Technology has long shaped the contour of copyright, but digital technologies have particularly accelerated the expansion of copyright protection i.e. the breadth of copyright subject matter⁴⁷⁴, the scope of protection⁴⁷⁵ and the length of protection. This has significantly enlarged the monopoly power of right holders. Broader copyright protection activated by entertainment industries causes an adverse effect on the benefits of the public. Any expansion of copyright to more kinds of works, stronger rights and for a longer length of time results in fewer opportunities to use protected works and the reduction of the number of works in the public domain; this significantly affects the public interest in access and use of the works.

The following demonstrates the public interest discussions regarding the extension of copyright duration, for example, in the UK and the US, and the expansion of the scope of protection on an international level.

(i) Extension of copyright term

United Kingdom

The English Statute of Anne was passed in 1709. Its purposes were for the encouragement of learning and encouragement of learned men to compose and write useful books and for preventing piracy. Under the Statute of Anne, there was an overlap between authors' interests, trade interests, and public interests.⁴⁷⁶ It recognised the interest of authors and their assigns to have the sole right to print books for a limited period of 14 years from the date of publication. It also provided for the public interest in access to

⁴⁷⁴ Early versions of copyright law protected only books, charts and maps. Copyright now applies to new forms of creation e.g. audio and/or visual arts, architectural works, and computer programs.

⁴⁷⁵ In the pre-Internet history, copyright legislation essentially expanded to cover new means of dissemination of works; the right of public performance was extended to the communication by radio waves which was later expanded to cover television broadcasting, and was subsequently extended to communication by cable and satellite. Copyright law has now been extended to cover communication on the internet (see, e.g., the WCT and WPPT).

⁴⁷⁶ Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart 2010) 26.

protected work; by imposing that nine copies of a book had to be deposited to certain libraries throughout the country; and by providing that any person could make a complaint if a book's price was "high and unreasonable" to ensure that people can have access to cheap books.

The Statute planted the seeds of the underlying principles which became the foundation of modern copyright in the Western world.⁴⁷⁷ The underlying principles of the modern international copyright system are that: the author has the exclusive rights as the results of his labour in creating the work; the author is therefore entitled to just economic rewards; the reasonable reward provides a stimulus to intellectual creativity; and there is a social requirement in the public interest to encourage authors to create and disseminate their works to the public at large⁴⁷⁸.

After the Statute of Anne, subsequent English Copyright Acts granted copyright protection for other works and extended the term of protection. This inevitably provoked a controversy on the balance of copyright and the public interest.

To illustrate, on the revision of the 1842 Copyright Act, there was a debate on the extension of the protection period beyond the death of the author.⁴⁷⁹ The issue was on the rights of the author and the public interest. Talfourd proposed that life plus sixty years would increase the rewards available to authors and achieve a fair balance of public and private interests.⁴⁸⁰ He believed that the copyright duration at that time was much too short for the achievement of that justice which society owed to authors, especially to those whose reputation was of slow growth and enduring character.⁴⁸¹ The opponents were anxious that books would become very scarce and expensive; the rise in costs would

⁴⁷⁷ Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 17.

⁴⁷⁸ Stephen Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1989) paras 1.03-1.05; Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 13.

⁴⁷⁹ Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (CUP 1999).

⁴⁸⁰ *Ibid*, 20.

⁴⁸¹ Hansard, Parliamentary Debates, 25 April 1838, vol.42, 556.

hinder public education to access knowledge by cheap books.⁴⁸² The copyright monopoly ought not to last longer than is necessary for securing remuneration to authors for supplying good books to society.⁴⁸³ Macaulay opposed that such extension would “inflict grievous injury on the public, without conferring any compensating advantage on men of letters”⁴⁸⁴ He feared that that “many valuable works will be either totally suppressed or grievously mutilated”.⁴⁸⁵ The debate ended with a compromise. The proposal of copyright term continuing after the death of the author was accepted. However, a period of 7 years *p.m.a.* was adopted instead of the 60 years after the death of the author as demanded by Talfourd.⁴⁸⁶

At the turn of the twentieth century, the public interest issue arose again when the new term of protection of life plus 50 years *p.m.a.* was required by the Berlin Act of 1908⁴⁸⁷. A new Committee was appointed to consider whether the amendments according to the Berlin Act should be adopted in the UK Copyright Act.⁴⁸⁸ The Committee concluded that it would not be prejudicial to the public interests to adopt the proposed term; it would rather assist the development and progress of literature and art.⁴⁸⁹ Eventually, the current term of copyright protection under the UK is life plus 70 years *p.m.a.*⁴⁹⁰

⁴⁸² Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (CUP 1999) 21.

⁴⁸³ Hansard, Parliamentary Debates, 5 February 1841, vol.56, 346-348.

⁴⁸⁴ *Ibid*, 344.

⁴⁸⁵ *Ibid*, 353.

⁴⁸⁶ Ronan Deazley, ‘Commentary on International Copyright Act 1844’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* < www.copyrighthistory.org>.

⁴⁸⁷ The Berne Convention, revised at Berlin in November 1908, known as the Berlin Act.

⁴⁸⁸ There were several major amendments including protection for new works such as photographs and sound recordings.

⁴⁸⁹ “We do not consider that it would be prejudicial to the public interests to adopt the proposed term, and we think that it would tend to beneficial assistance in the development and progress of literature and art.” (Report of the Committee on the Law of Copyright, (Cmnd 4976, 1909) 16). Later, in 1996, the term under the UK copyright law was increased further to the life of the author plus 70 years *p.m.a.* in order to comply with the EC Directive 1993 on duration of copyright protection.

⁴⁹⁰ See sections 12-15 of the UK CDPA.

United States

The study on the duration of copyright prepared for a Congressional Committee in 1961⁴⁹¹ pointed out that:

“The term should be long enough to provide an incentive for the author, ... Further, it is to the author’s advantage and to the advantage of the public, to provide an adequate term of protection to make it commercially feasible for publishers and other distributors to aid him in exploiting his work. The period of protection should be sufficient to provide an adequate economic return to all of these interests, if it is true, as seems to be assumed in the Constitution, that it is to the benefit of the public to promote the creation and dissemination of intellectual works”⁴⁹²

A similar situation to the UK appeared when there was a proposal for copyright term extension in the US law; it raised the public interest controversy. To bring the US into conformity with the international standard under the Berne Convention, the term was set at 50 years *p.m.a.* in the 1976 Act. The argument for the amendment is found in the House Committee Report in 1976. The Committee concluded that “[t]he advantages of a basic term of copyright enduring for the life of the author and for 50 years after the author’s death outweigh any possible disadvantages.”⁴⁹³

The term was then lengthened to life plus 70 years in the Sonny Bono Act of 1998⁴⁹⁴. The primary rationale for the extension was to bring the US law into line with the standard of the European Union. It was argued that 20 years less protection than the European countries would be unfair to the authors and harmful to the commercial interest of the US. The proposal was therefore supported for economic reasons. Opponents argued that such extension would benefit business sectors rather than individual authors and the public, and would threaten access to works that would otherwise enter into the public

⁴⁹¹ Committee on the Judiciary, *Duration of Copyright* (Study 30, US Government, Washington 1961) <<http://www.copyright.gov/history/studies/study30.pdf>>.

⁴⁹² *Ibid*, 74-75.

⁴⁹³ Copyright Law Revision (House Report No.94-1476, 1976) 136.

⁴⁹⁴ Copyright Term Extension (Public Law No. 105-298, 112 Stat. 2827 (1998)).

domain as well as impose substantial costs on the general public.⁴⁹⁵ Brown and Miller also contested that the extension would harm “other creators who are inspired by the great creative works of the past”⁴⁹⁶ and that “[t]he public should have access to that work as a means of providing incentive to new creators, disseminating these works to more students, historians, writers, and other Americans, and generally improving the public arts.”⁴⁹⁷ Despite the intense debate, the term was eventually extended.

(ii) Extension of scope of copyright

Not only the duration of copyright, the scope of protection has also been expanded to encompass more types of works and greater protection; for example, copyright protection has been extended to cover sound recordings, performances, film, broadcasts, and computer programs.⁴⁹⁸

The WIPO treaties, the WCT (regarding literary⁴⁹⁹ and artistic works), and the WPPT (regarding performances and phonograms), cover the new copyright protections in the challenge of digital technology particularly the internet.⁵⁰⁰ The Preamble to the WCT recognised “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.” The WCT can be seen as “a happy result”⁵⁰¹ of the attempt to strike a balance between copyright and the public interest by providing desirable new protections in the digital technology and taking account of the need to disseminate information for “furthering the advance of culture, learning and democratic

⁴⁹⁵ See, e.g., Philip Alberstat, ‘Copyright Extension in the United States: the Mouse that Roared’ (1999) 10(3) Ent. L.R. 61.

⁴⁹⁶ Hon. Hank Brown and David Miller, ‘Copyright Term Extension: Sapping American Creativity’ (1997) 44 J. Copyright Soc’y U.S.A. 94, 94.

⁴⁹⁷ *Ibid.*, 102.

⁴⁹⁸ For historical sources of the rights, see J.A.L Sterling, *World Copyright Law* (3rd edn, Sweet&Maxwell 2008) 79-84.

⁴⁹⁹ Literary works include computer programs (Article 4, WCT).

⁵⁰⁰ WIPO, *Press Release no. 106*, (Geneva, 20 December 1996).

⁵⁰¹ Thomas Vinje, ‘The New WIPO Copyright Treaty: a Happy Result in Geneva’ (1997) 19(5) E.I.P.R. 230.

participation”⁵⁰². It is indeed crucial to safeguard the rights of the copyright owners in the interactive networks. Nevertheless, it is doubtful whether the WCT has a sufficient consideration on the interest of the public in access and use of copyright protected works.

The most important right designed to deal with the advances of technologies is possibly the right to communication to the public.⁵⁰³ Article 8 of the WCT provides that “authors of literary and artistic works shall enjoy the exclusive right of authorising 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.” Though the rights relating to communication to the public have been in the Berne Convention since 1925, they were originally designed to cover radio and television broadcasts and other traditional media.⁵⁰⁴ The right to communicate works to the public is inextricably tied up with the public interest in the wide dissemination and enjoyment of copyright works. The exclusive right to control access to the work could cause an adverse effect on the public interest.⁵⁰⁵

In the balance, there are the interests of the copyright owners and the public interest in copyright in providing incentives for authors to produce intellectual works on the one hand, and the interest of the public in dissemination and public access to creative works on the other. The human creative process examined in chapter 3.1 is relevant here. The dissemination of and access to existing works is essential for the creation of new works. Consequently, there is the need for the copyright framework to strike a balance between the conflicting interests by allowing some uses of the work without infringing

⁵⁰² *Ibid*, 236.

⁵⁰³ Makeen Fouad Makeen, *Copyright in a Global Information Society* (Kluwer Law 2000) 1-31.

⁵⁰⁴ Kimberlee Weatherall, ‘An end to private communications in copyright?’ (1999) 21(7) E.I.P.R. 342, 342.

⁵⁰⁵ “Copyright owners who have the right to control whether a work is “made available” to the public can prevent members of the public gaining access to copyright works, or can impose strict contractual conditions on access. That is, if under this regime users may be required to pay even for the simple act of viewing works, it means that they can be prevented (unless, of course, they are willing to pay for the privilege) from deriving facts or ideas from the work.”⁵⁰⁵ (Kimberlee Weatherall, ‘An end to private communications in copyright?’ (1999) 21(7) E.I.P.R. 342, 345).

copyright. The crucial attempt to balance copyright with the public interest by providing more exceptions and limitations to copyright protection is discussed in the following part.

3.3.2.3 Achieving Balance: Limitations and Exceptions

The monopoly of copyright is not absolute; it has been restricted such as by the limited terms of protection, the idea/expression dichotomy and by limitations and exceptions to give the author sufficient incentive to produce works for the public and to ensure that the creative works are available for new works to be built upon.⁵⁰⁶ The need to impose some copyright limitations was recognised by the framers of the Berne Convention. Numa Droz, the Swiss president of the first Diplomatic Conference in 1884, reminded the delegates that “limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.”⁵⁰⁷ This consideration led to the establishment of the “three-step test” providing limitations or exceptions to exclusive rights under the Berne Convention.⁵⁰⁸

The copyright statutory limitations and exceptions include for example the uses of copyright works for the purpose of education and for the purpose of news reporting, which result from an attempt to balance the interest of copyright owner with the interest of the public in knowledge and in discovering the truth respectively. For instance, in the UK, the most important statutory defences for copyright infringement are fair dealing provisions for the purposes of private use, parody, research or private study, criticism, review and news reporting.⁵⁰⁹ The Government’s Green Paper in 1981 recognises that the right of

⁵⁰⁶ “No less than copyright itself, properly calibrated limitations on copyright serve copyright law’s basic goal to put copyrighted works to their most beneficial use by enabling new generations of authors to build on the works of authors who preceded them.” (Paul Goldstein and Bernt Hugenholtz, *International Copyright* (2nd edn, OUP 2010) 360.

⁵⁰⁷ WIPO, *Berne Convention Centenary 1886-1986* (International Bureau of Intellectual Property 1986) 105.

⁵⁰⁸ Article 9(2) of the Berne Convention.

⁵⁰⁹ See chapter 4.2.1.

reproduction is essential but copyright exceptions⁵¹⁰ are also needed because “the public interest demands that not every unauthorised reproduction of copyright material should constitute an infringement of copyright”.⁵¹¹ According to the Paper: “[t]hese exceptions are of obvious importance in that they seek to establish a proper balance between the legitimate interests of copyright owners and the legitimate desires of users of copyright material.”⁵¹² In the US, the fair use defence⁵¹³ is crucial for balancing copyright with the interest of the public at large.⁵¹⁴ Because copyright potentially restrains speech, the fair use doctrine helps reconcile the contradictory rights, free speech and copyright, by allowing the use of protected material in criticism, comment, parody, news reporting and similar uses in the public interest. The fair use doctrine “preserves proprietary rights in creative works while accommodating the public interest in open dialogue, deliberation, and the advance of knowledge.”⁵¹⁵ The fair use exception is an outcome of the need for balancing of interests with the public interest in reasonable access outweighing the statutory privilege of a copyright proprietor.⁵¹⁶

Although the statutory exceptions are the result of balancing copyright with the interest of the public, it is doubtful whether they provide a reasonable and sufficient balance particularly in the age of the internet. Chapter 4 below will analyse the pertinent copyright exceptions in the US, EU, UK, Germany and Canada. It will then conclude that the existing exceptions are inadequate to achieve a proper reconciliation.

⁵¹⁰ The Green Paper refers to the limited exceptions as included in the 1956 Copyright Act. Fair dealing is found in Section 6 of the 1956 Act.

⁵¹¹ Department of Trade, *Reform of the Law Relating to Copyright, Designs and Performers' Protection* (Cmnd. 8302, 1981) ch 13.

⁵¹² *Ibid* para 1-2.

⁵¹³ See chapter 4.1.

⁵¹⁴ “Once it is accepted, as it is in the United States, that the ultimate aim of the grant of copyright is to stimulate creativity for the public good, the fair use or fair dealing exceptions are to be seen as a recognition of the legitimate public interest which balances the protection given to the owners of copyright works.” (Anthony Mason, ‘Developments in the law of copyright and public access to information’ (1997) 19(11) E.I.P.R. 636, 637).

⁵¹⁵ Dan Burk and Julie Cohen, ‘Fair Use Infrastructure for Rights Management Systems’ (2001) 15 Harv. J. L. Tech 41, 43.

⁵¹⁶ Harry Rosenfield, ‘Constitutional Dimension of Fair Use in Copyright Law’ (1975) 50 Notre Dame L. 790, 801.

In summary, the public interests in copyright are basically the interest in dissemination of works and the interest in access and use of works by the public significantly for the purposes of creativity, free speech, education and useful information. The debates over the extensions of term and scope of copyright are related to the public interest in access and use of works. To achieve a proper balance between the protection of copyright and the wider public interest, some limitations and exceptions are implemented within the body of copyright law. However, these exemptions are insufficient (see chapter 4).

3.3.3 Copyright, the Public Interest and Online Re-creations

In order to provide a better balance between copyright and the public interest, the notion of the public interest concerning re-creation in the digital age is therefore analysed in this part.

As Scassa noticed, “[i]n contemporary times, the line between the creation of a new work and the use of the work of another has blurred significantly.”⁵¹⁷ The digital technologies and the internet have made the line between creators and users even more indistinct where users are engaged in transformative behaviour. “Creators are also users of works. The ability to actually access and use other works may be central to their creative activity.”⁵¹⁸ Re-creators are therefore users of existing works, and at the same time, are creators of new works. Creative re-creations provide some benefits for the public which are similar to those generated by copyright. The public interests in online re-creations as the digital media are as follows:

⁵¹⁷ Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 52.

⁵¹⁸ *Ibid*, 56.

3.3.3.1 Non-copyright incentives

It is widely believed that authors of works are incentivised by the economic rights granted by copyright.⁵¹⁹ However, copyright benefits may not be the single and direct incentive for works to be created. This happens in many instances such as where copyright in works created in the course of employment, where academics write for tenure or promotion rather than for royalties, and other situations where creators are not the owners of copyright. In these circumstances, “salary and benefits are both the incentive and reward for creation. Although it can be argued that copyright protection provides the basis for the company’s ability to continue to pay its employees, and thus encourages the creation and dissemination of work, this link is far from direct.”⁵²⁰ There are also other motives for creation including the desire for fame and recognition.⁵²¹ Besides, some authors even pay money to have their works distributed.⁵²²

Long before the coming of copyright, people created and re-created works naturally for personal fulfilment and engagement in cultural community.⁵²³ Some commentators propose that intrinsic and non-monetary motivations are much more important to encourage creation of new works than extrinsic factors as financial rewards.⁵²⁴ Davies suggests that “the expectation of financial reward is not the only reason for authors and other artists to create. They are not necessarily motivated primarily by monetary interests; many are impelled to create as part of their personality, creation being in their nature.”⁵²⁵ In this regard, Plant observes that “[t]here is ... an important group of

⁵¹⁹ See chapters 3.1.2.1 and 3.3.2.1.

⁵²⁰ Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 52-53.

⁵²¹ Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 248.

⁵²² See, e.g., Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167, 168-169.

⁵²³ See chapter 3.1.1.

⁵²⁴ See, e.g., Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 248; Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 52; Rebecca Tushnet, ‘Economies of Desire: Fair Use and Marketplace Assumptions’ (2009) 51 *Wm. & Mary L. Rev.* 513; Diane Leenheer Zimmerman, ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Inq. L.* 29; Eric E. Johnson, ‘Intellectual Property and the Incentive Fallacy’ (2012) 39 *Fla. St. U. L. Rev.* 623.

⁵²⁵ Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 248.

authors who desire simply free publication; they may welcome, but they certainly do not live in expectation of, direct monetary reward.”⁵²⁶ Online re-creators are such group of authors.⁵²⁷ By the nature of online re-creations such as fan fiction and parody, the primary motivation for re-creation is typically not from copyright. Fan authors are encouraged to write their stories by their own creative minds with a will to express their imagination. Parodists create works by their desire to comment upon something and express their opinions. These re-creators want to create and communicate their works to the public for free. Moreover, re-creators that are motivated by non-commercial factors tend to provide a broader array of creative content than creators that are incentivised solely by monetary rewards for mainstream markets.⁵²⁸ Indeed, an original author would not normally create a parody or fanvid of his work, and surely do not write a fan fiction of his own story. The dissemination of those creative re-creations contributes to the advanced society.

In summary, the economic incentive provided by copyright partially, but not completely, attributes to the stimulation of creative works. In fact, inner and non-commercial reasons are more important drives to create a work. This argument is evidenced by the empirical data analyses in chapter 5.2.1.⁵²⁹

⁵²⁶ Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167, 169.

⁵²⁷ See also, Carmit Soliman, ‘Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing’ (2012) 22 *Alb. L.J. Sci. & Tech.* 279, 287-289.

⁵²⁸ “[N]oncommercial creative uses, precisely because they are not motivated by copyright’s profit-based incentives, are more likely to contain content that the market would not produce or sustain...” (Rebecca Tushnet, ‘User-Generated Discontent’ (2008) 31 *Colum. J.L. & Arts* 497, 507).

⁵²⁹ It is noteworthy that the analysis of the re-creators’ motivations in chapter 5.2.1 biased towards those who are amateur users of protected works, not authors in the creative industries. Nevertheless, even among the creators in the music industries which need a mechanism (i.e. copyright) to preserve commercial markets, intrinsic motivations or emotional benefits (e.g. self-expression, communication, peer respect and popularity) are significant drives for music production. (See, e.g. Jiarui Liu, ‘Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation’ (2015) 38 *Colum. J. L. & Arts* 467).

3.3.3.2 Creativity and future creativity

Creative re-use is a matter of strong public interest. It is a natural behaviour of human to use existing materials to produce new matters.⁵³⁰ Besides, people are usually motivated to re-create by their internal non-monetary drives, not by financial factors.⁵³¹ This generates new creativity crucial for individuals and the enrichment of society. Creative re-creations are creativity which might be endorsed and transformed by the further development of technologies. Reasonably allowing the practice of re-creations would therefore pave the way for new forms of creativity in the future.⁵³² However, the public interest in creative re-creations is ignored in the current balance. As demonstrated, copyright and online re-creations are both important for the public and thus should be encouraged. Nonetheless, the two subjects clash against each other since intensive copyright monopoly stifles the process of creativity by obstructing useful re-creations. For the online re-creations to properly exist and benefit society without unreasonable prejudice to copyright, it is therefore necessary to re-balance the competing rights and interests: the rights of copyright holders and the public interests in copyright on the one hand, and the rights of re-creators such as the human rights to free speech and to participate in cultural life as well as the interests of the public from the creative culture on the other.

3.3.3.3 Freedom of speech and self-fulfilment

As discussed in chapters 3.1.1.1 and 3.2, personal fulfilment is part of the nature of human creative activities and fulfilment can be achieved by communicative expression. As human beings, we are cognitive and communicative by nature. The ability to express our thoughts is also valuable in self-determination and autonomy.

⁵³⁰ See chapter 3.1.

⁵³¹ See chapters 3.3.3.1 and 5.2.1.

⁵³² “The public interest in the encouragement of creation and the wide dissemination of works presumably serves the interests of further creation and the growth of knowledge and culture.” (Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 56).

The right to free speech is recognised as a fundamental human right which is important for the general interest of the public. Individual identity and self-fulfilment are constructed through expressive, communicative activity. Online re-creation is a new form of expression which involves artistic and/or political speech.⁵³³ Particularly within the online communication culture, people not only make speech and expression about politics, but also exchange views on other topics such as fashion, music, art and popular culture. This exchange makes their lives more valuable. The digital speech can foster criticism, debate, and discussion valuable for individuals and for society.

To conclude, freedom to re-create is an aspect of autonomy and self-fulfilment which benefits individual personality and its growth.⁵³⁴ The exercise of the freedom can lead to the development of more mature individuals and consequently benefiting society as a whole. Re-creators of creative expression have the human rights to freedom of speech and to participate in cultural life. Nevertheless, the current copyright law limits those rights when it restricts utilisation of an existing work in making a new expression.

3.3.3.4 Societal and cultural benefits from participation in culture

Because of technological changes, there is a shift from merely viewing or consuming culture towards actively participating in it.⁵³⁵ As Lessig explains, people now “add to the culture they read by creating and re-creating the culture around them”.⁵³⁶ People can easily take part in the online culture and become re-creators. The significant advantage of cyberspace is its potential for enhancing wide participation of individuals in social communication; people should therefore be able to participate actively in online creative culture⁵³⁷ and enjoy the right to participate in cultural life which is also a

⁵³³ See chapter 3.2.1.2.

⁵³⁴ As observed in chapter 3.3.1, an individual’s interest can amount to a large number of people with the same interest.

⁵³⁵ Lawrence Lessig, *Remix* (Penguin Press 2008) ch 1.

⁵³⁶ *Ibid*, 28.

⁵³⁷ Niva Elkin-Koren, ‘Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace’, (1996) 14 *Cardozo Arts & Ent. L.J.* 215.

fundamental human right.⁵³⁸ The right to participate in culture is endorsed by freedom of expression. As Tushnet notes:

“[w]hen most creative output is controlled by large corporations, freedom to modify and elaborate on existing characters is necessary to preserve a participatory element in popular culture. Copyright’s purpose, after all, is to encourage creativity for the public interest, not only to ensure monopoly profits”⁵³⁹

3.3.3.5 Learning and education

Learning and education provide numerous benefits for individuals and society at large, including fulfilment of life, enjoyment of literature and culture, improvement of skills, being more informed and socially involved citizens, and consequently creating a well-being of the society to live in.⁵⁴⁰

In the modern world, online re-creation culture is a new way of communication and interaction. Online re-creations are expressions categorised as a form of participatory culture.⁵⁴¹ A participatory culture can be described as “a culture with relatively low barriers to artistic expression and civic engagement, strong support for creating and sharing creations, and some type of informal mentorship whereby experienced participants pass along knowledge to novices.”⁵⁴² The digital culture has become a pervasive part of the everyday lives for many people especially young generations.⁵⁴³ Youth now are born

⁵³⁸ Article 27(1) of the UDHR (see chapter 3.2.3).

⁵³⁹ Rebecca Tushnet, ‘Legal Fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L.A. Ent. L.J. 651, 684.

⁵⁴⁰ Jere Behrman and Nevzer Stacey, *The Social Benefits of Education* (University of Michigan Press 1997); Walter McMahon, *Education and Development: Measuring the Social Benefits* (OUP 1999); W. Craig Riddell, ‘The Social Benefits of Education: New Evidence on an Old Question’ in Frank Iacobucci and Carolyn Tuohy (eds), *Taking Public Universities Seriously* (University of Toronto Press 2005) 138; OECD, *Education Indicators in Focus* (OECD 2013).

⁵⁴¹ Henry Jenkins, et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press 2009). (See also chapter 1).

⁵⁴² *Ibid.*

⁵⁴³ “Basic access to technology, the ability to navigate online information, and the ability to communicate with others online are increasingly central to our everyday participation in public life.” (Mizuko Ito, et al., *Hanging Out, Messing Around, and Geeking Out: Kids Living and Learning with New Media* (MIT Press

and grow up utilising computers and internet skills to engage in their culture. Online media is part of their lives and how they learn.⁵⁴⁴

The benefits from the culture include “opportunities for peer-to-peer learning, a changed attitude toward intellectual property, the diversification of cultural expression, the development of skills valued in the modern workplace, and a more empowered conception of citizenship.”⁵⁴⁵ The core advantage to mention here is learning which contributes to the development of skills and social capabilities.

The large scale ethnographic study of contemporary participatory cultures by the Digital Youth Project⁵⁴⁶ demonstrates that young people in the US are engaging in digital media and online communications⁵⁴⁷ and in turn learning and benefiting from them. Although the study focuses on American youth, due to the borderless cyberspace the study is applicable to a large number of teenagers all over the world not only in a certain country.

From the research, there are three genres of online participation prevalent among young people. First, many teenagers “hang out”⁵⁴⁸ with friends they already know from schools and their neighbourhoods through online networks. This demonstrates that apart from face-to-face meeting, they also use the media to virtually communicate with one another and maintain social relationships. Second, the digital technologies enable them to

2010) 345). “More than half of online teens are Content Creators.” (Amanda Lenhart and Mary Madden, *Teen Content Creators and Consumers* (Pew Internet 2005).

⁵⁴⁴ David Price, *Open: How We’ll Work, Live and Learn in the Future* (Crux 2013).

⁵⁴⁵ Henry Jenkins, et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press 2009) xii.

⁵⁴⁶ The project by Digital Youth Research in 2008, ‘the Kids’ Informal Learning with Digital Media: An Ethnographic Investigation of Innovative Knowledge Cultures’, is summarised in the book, Mizuko Ito, et al., *Hanging Out, Messing Around, and Geeking Out: Kids Living and Learning with New Media* (MIT Press 2010).

⁵⁴⁷ Digital media and online communication do not encompass only the online re-creation culture but also include communication through social network sites, online games and gadgets such as iPods and mobile phones.

⁵⁴⁸ “[H]anging out is a genre of participation that corresponds largely with friendship-driven practices in which engagement with new media is motivated by the desire to maintain connections with friends” (Mizuko Ito, et al., *Hanging Out, Messing Around, and Geeking Out: Kids Living and Learning with New Media* (MIT Press 2010) 53).

“look around”⁵⁴⁹ on the internet and “mess around”⁵⁵⁰ with tools, programs, and platforms. The term, “messaging around”, refers to a way of learning about the way a particular medium works, particularly through the processes of trial and error which is a more intense engagement with new media and technology.

The third mode of participation is termed as “geeking out” which primarily refers to “an intense commitment or engagement with media or technology, often one particular media property, genre, or a type of technology.”⁵⁵¹ The young generations may “geek out” as fans, bloggers, gamers and media producers devoting to an area of strong interest to them and share their passions and creations with others.⁵⁵² “Geeking out” is an illustration of continued, intensive, and sophisticated interaction and use of new media.

The Digital Youth Research suggests that participation in online activities provides important models of learning and participation that are evolving with changes in technology.⁵⁵³ It recognises “the growth of digital media production as a form of everyday expression and the circulation of media and communication in a context of networked publics enabled by the Internet.”⁵⁵⁴

Online re-creation culture is a new way of learning of young generations. This informal education or peer-based learning⁵⁵⁵ is a process of participation in public life that includes social, recreational and civic engagement. Young re-creators are mastering core

⁵⁴⁹ The term “looking around” encompasses the ways in which kids use search engines and other online information sources to find information. *Ibid* 54.

⁵⁵⁰ “The ability to mess around requires access to media, technology, and social resources that are not always available to youth. Just as in the case of hanging out, messing around is a genre of participation that is driven by young people’s own interests and motivations.” *Ibid* 63.

⁵⁵¹ *Ibid* 66.

⁵⁵² “[I]t is important to note that although “geeking out” describes a particular way of interacting with media and technology, this genre of participation is not necessarily driven by technology. The interests that support and encourage geeking out can vary from offline, nonmediated activities, such as sports, to media-driven interests, such as music, which are larger than the technological component of the interest.” *Ibid* 66.

⁵⁵³ *Ibid* 339-340.

⁵⁵⁴ *Ibid* 340.

⁵⁵⁵ “[G]amers and media creators are often motivated by an autodidactic ethic, rejecting or downplaying the value of formal education and reaching out to online networks to customize their own learning practices.” *Ibid* 340.

social and cultural skills and engaging with esoteric and niche knowledge communities.⁵⁵⁶ From an observation of geeking out groups, “youth engage in the specialized elite vocabularies of gaming and esoteric fan knowledge and develop new experimental genres that make use of the authoring and editing capabilities of digital media. These include personal and amateur media that are being circulated online, such as photos, video blogs, web comics, and podcasts, as well as derivative works such as fan fiction, fan art, mods, mashups, remixes, and fansubbing”.⁵⁵⁷

These expression and digital production are shaping forms of new media literacies.⁵⁵⁸ The so-called new media literacies are a set of social skills and cultural competencies.⁵⁵⁹ The new skills include:

“Appropriation - The ability to meaningfully sample and remix media content.

Multitasking - The ability to scan the environment and shift focus onto salient details.

Distributed cognition - The ability to interact meaningfully with tools that expand mental capacities.

Collective intelligence - The ability to pool knowledge and compare notes with others toward a common goal.

Judgment - The ability to evaluate the reliability and credibility of different information sources.

Transmedia navigation - The ability to follow the flow of stories and information across multiple modalities.

Networking - The ability to search for, synthesize, and disseminate information.

⁵⁵⁶ *Ibid* 347.

⁵⁵⁷ *Ibid* 342.

⁵⁵⁸ *Ibid* 341-345.

⁵⁵⁹ “Participatory culture shifts the focus of literacy from individual expression to community involvement. The new literacies almost all involve social skills developed through collaboration and networking.” (Henry Jenkins, et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press 2009)).

Negotiation - The ability to travel across diverse communities, discerning and respecting multiple perspectives, and grasping and following alternative norms.⁵⁶⁰

Re-creators are also developing technical competencies and media skills by involving with multiple technical or creative communities.⁵⁶¹ These skills are essential in preparing young people for modern workplace and future roles in the arts, politics, and community life.

3.4 Conclusion

This chapter proposes that re-creations and their online culture are beneficial to individuals and the society at large due to the three principles: creativity, freedom of speech and the public interest.

The public interest and copyright are interrelated since the 18th century. The interests of the public in copyright are basically the interest in dissemination of works to the public and the interest in access and use of works by the public which contribute to the advancement of society. In the 21st century, copyright and the public interest are becoming increasingly unbalanced. This is due to several significant factors. Firstly, the internet and technologies have caused a rapid societal and cultural change. Due to the digital environment, the scope and term of copyright protection has been expanded. It has also been extended by strengthening the exclusive rights and enforcement mechanisms (such as notice and take down regime) which have an adverse effect on the online creative activities, free speech and the public interest in access to protected works. Moreover, online re-creations are new forms of creative expression with strong social values. The public interests in the creative culture are similar to those in copyright; they are the interests in creativity, free expression, learning and self-development, and societal and

⁵⁶⁰ *Ibid.*

⁵⁶¹ Mizuko Ito, et al., *Hanging Out, Messing Around, and Geeking Out: Kids Living and Learning with New Media* (MIT Press 2010) 348.

cultural benefits. Though copyright and online re-creations are both beneficial to society, copyright stifles creative re-uses of protected works.

It is vital to balance the conflicting interests; mainly the interests of copyright owners, the public interest in dissemination of works and the public interest in access and use of copyright works. The need to balance these interests was recognised and led to the implementation of limitations and exceptions to copyright protection. Nevertheless, from the above analysis, the benefits of the online re-creation culture are significantly ignored in the current balance. In the next chapter, this thesis will provide a critical analysis of the existing copyright exceptions which are most pertinent to the practice of re-creation. It will then conclude that the exceptions are insufficient to safeguard the rights of the re-creators and the public interest in the digital environment, and therefore fail to achieve a proper reconciliation.

CHAPTER 4 - Insufficient Copyright Exceptions and Limitations

In the 21st century, copyright strives to keep pace with the change of technology and society by significantly expanding its power. The strong copyright protection creates severe constraints on creative re-creations. Since re-creations fundamentally involve copying the original content and the re-creators tend to share works on internet platforms, these online activities potentially infringe the exclusive rights of the original owners particularly the rights to reproduction and communication. Copyright enforcing tools such as the notice and takedown mechanism have an immediate impact on re-creations.⁵⁶² Copyright law that should encourage new creativity and endorse the right to free speech has now restrained creative re-uses of existing works. The exclusive rights of copyright owners, the rights of the online re-creators and the interest of the public are becoming more contradicted.⁵⁶³

In an attempt to balance copyright with the public interest, there are certain defences to copyright infringement to allow limited use of protected work without authorisation of the right holder. Exemptions to the reproduction right are permitted by Article 9(2) of the Berne Convention and Article 13 of the TRIPS agreement. The so-called “three-step test” permits copyright limitations and exceptions⁵⁶⁴ “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.”⁵⁶⁵ A significant copyright exception is for private use allowing a copy of protected works for individual’s personal use. Private use exceptions are important; however, re-creations are usually communicated online to reach the widest audience; in such situation, online re-creators cannot avail themselves of private copying limitations. Among permitted uses of copyright works, this chapter will specifically study some copyright exceptions pertinent

⁵⁶² See chapter 2.

⁵⁶³ See chapter 3.

⁵⁶⁴ The difference between the terms ‘limitations’ and ‘exceptions’ are ambiguous. They are therefore used herein interchangeably to refer to exemptions from infringement under copyright law.

⁵⁶⁵ Article 9(2) of the Berne Convention.

to online creative re-uses in the main jurisdictions studied, i.e., the US fair use doctrine, the UK fair dealing, the German concept of free use, the UGC exception in Canada and parody exceptions in different national laws. It will critically analyse whether the relevant statutory exceptions to copyright have accomplished a proper balance.

4.1 Fair Use Doctrine of the US

*“The fair use model is not a panacea for solving difficult problems resulting from digitization and the internet.”*⁵⁶⁶

The US fair use doctrine⁵⁶⁷ aims to allow the use of copyright protected works that is fair.⁵⁶⁸ It was originally articulated in judicial decisions⁵⁶⁹ before being codified into Section 107 of the US Copyright Act which guarantees “that new ideas, or new expressions of old ideas, would be accessible to the public”.⁵⁷⁰

Section 107 of the US Copyright Act reads as follows:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an

⁵⁶⁶ Barry Sookman and Dan Glover, ‘Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations’ (2009) 22 I.P.J. 29, 30.

⁵⁶⁷ Fair use, as a broad and general concept, also deals with any use of a copyright work that the court considers fair including verbatim copying such as time-shifting, space-shifting, and quotations which beyond the scope of this research.

⁵⁶⁸ The doctrine of fair use “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”. (*Campbell v. Acuff-Rose Music, Inc.*, 510 US 569, 577 (1994) (citing *Stewart v Abend*, 495 U. S. 207, 236 (1990)); See also *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F. 2d 57, 60 (CA2 1980)).

⁵⁶⁹ Justice Story, in *Folsom v Marsh*, 1841, held that “a fair and bona fide abridgment of an original work is not a piracy.” He articulates a test in deciding questions of a use of copyright material that courts should “look to the nature and the objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” (*Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)). These factors formed the heart of fair use.

⁵⁷⁰ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257 (11th Cir. 2001).

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.”

4.1.1 Fair use problem of uncertainty

The first part of the fair use statute illustrates the purposes of the use, though not limitative⁵⁷¹; the second sentence contains the four criteria which must be interpreted together.⁵⁷² The four factors are not exclusive⁵⁷³; they will be evaluated and “weighed together, in light of the purposes of copyright”.⁵⁷⁴

The US Congress explicitly gave a very broad statutory explanation of the doctrine, thus leaving courts free to adapt the fair use principle to particular situations on a case-by-case basis.⁵⁷⁵ Also, due to the lack of judicial consensus on the underlying

⁵⁷¹ Copyright Law Revision (House Report No.94-1476, 1976); *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir., 1997); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

⁵⁷² “[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.” (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (Citing the Senate Report on the Copyright Act of 1976, at 62)).

⁵⁷³ Copyright Law Revision (House Report No.94-1476, 1976).

⁵⁷⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (citing Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1110-1111; William Patry and Shira Perlmutter, ‘Fair Use Misconstrued: Profit, Presumptions, and Parody’ (1993) 11 Cardozo Arts & Ent. L. J. 667, 685-687).

⁵⁷⁵ Fair use is rooted as “an equitable rule of reason” which explains why a more precise definition of the concept has never been possible. (Copyright Law Revision (House Report No.94-1476, 1976)). As an equitable rule of reason, fair use requires careful balancing of multiple factors in light of the purposes of copyright. (*Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394, 1399 (9th Cir., 1997)).

principles, fair use decisions are notoriously difficult to predict.⁵⁷⁶ Madison criticises that fair use is merely “a lottery argument”,⁵⁷⁷ while Lessig marks fair use as “the right to hire a lawyer”⁵⁷⁸ to defend one’s right to create. Lessig is also concerned that a fair use claim “costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim.”⁵⁷⁹ Netanel comments that “[g]iven the doctrine’s open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify as the sort of transformative self-expression that enjoys the [fair use] privilege”.⁵⁸⁰ Though some scholars suggest that fair use is predictable and coherent by an analysis of fair use case law⁵⁸¹, the complex factors

⁵⁷⁶ Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1106; Kate O’Neill, ‘Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication’ (2001) 89 Cal. L. Rev. 369, 377-378 (“Although the courts repeat that fair use disputes cannot be resolved with ‘bright-line rules’ but require case-by-case analysis, the lower courts have drawn the conclusion that precedent has little utility and that every case should be treated as one of first impression.”); David Nimmer, ‘Fairest of Them All and Other Fairy Tales of Fair Use’, (2003) 66 Law & Contemp. Prob. 263, 280 (characterizing the fair use factors as malleable); Tracey Topper Gonzalez, ‘Distinguishing the Derivative from the Transformative: Expanding Market-Based Inquiries in Fair Use Adjudications’ (2003) 21 Cardozo Arts & Ent. L.J. 229, 238; Nicholas Lewis, ‘Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?’ (2005) 55 Am. U. L. Rev. 267, 268; James Gibson, ‘Once and Future Copyright’ (2005) 81 Notre Dame L. Rev. 167, 192 (“[Fair use] is too indeterminate a doctrine to provide a reliable touchstone for future conduct.”); Michael Carroll, ‘Fixing Fair Use’ (2007) 85 N.C.L. Rev. 1087, 1090-1095; Gideon Parchomovsky, et al., ‘Fair Use Harbors’ (2007), 93 Virginia L. Rev. 1483,1484-1486 (“Fair use is at once the most important and most “troublesome” doctrine in copyright law... the case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals. This state of affairs has prompted a leading commentator to conclude that the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile.”); Edward Lee, ‘Warming Up to User-Generated Content’ (2008) U. Ill. L. Rev. 1459, 1468; Thomas Cotter, ‘Fair Use and Copyright Overenforcement’ (2008) 93 Iowa L. Rev. 1271, 1283-1284; Barry Sookman and Dan Glover, ‘Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations’ (2009) 22 I.P.J. 29; Edward Lee, ‘Technological Fair Use’ (2010) 83 S. Cal. L. Rev. 797, 797 (“The key question often turns not on prima facie infringement, but on the defense of fair use, which courts have too often relegated to extremely fact-specific decisions. The downside to this ad hoc adjudication of fair use is that it leads to an uncertainty over what is permissible that may impede innovation in speech technologies.”); Darren Hudson Hick ‘Mystery and Misdirection: Some Problems of Fair Use and Users’ Rights’ (2009) 56 J. Copyright Soc’y U.S.A 485, 500.

⁵⁷⁷ Michael J. Madison, ‘A Pattern-Oriented Approach to Fair Use’ (2004) 45 Wm. & Mary L. Rev. 1525, 1666.

⁵⁷⁸ Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin 2004) 187.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ Neil Netanel, *Copyright’s Paradox* (OUP 2008) 66.

⁵⁸¹ Pamela Samuelson, ‘Unbundling Fair Uses’, (2009) 77 Fordham L Rev 2537; Matthew Sag, ‘Predicting Fair Use’ (2012) 73(1) Ohio St. L.J. 47; In 2005, the Australian Government identified that the fair use system has a number of drawbacks and its uncertainties and unpredictability cause a strong problem. (Australia, ‘Fair Use and Other Copyright Exceptions: Issues Paper’ (May 2005)) However, in the 2013 report, Australia viewed that “fair use is sufficiently certain and predictable, and in any event, no less certain

involved and the influence of the obscure notion of transformativeness still cause uncertainty about what uses are fair and what are not⁵⁸².

Apart from the vagueness of fair use law, the absence of case law concerning online re-creations especially fan works leaves a high uncertainty in this area.⁵⁸³ Due to this legal indeterminacy, re-creators may not be assured that they will succeed in claiming that their use of an original work is fair. As analysed in chapter 2, online re-creations can easily be taken down by the DMCA mechanism; due to the risk of litigation, online re-creators would give up on their re-creations and avoid using protected materials in a way that might in fact be fair than to face a copyright lawsuit in court.⁵⁸⁴

4.1.2 Obscure nature of ‘transformativeness’

In determining the first fair use factor, ‘the purpose and character of the use’, courts take into consideration whether the challenged use was commercial and whether the use was transformative. A use of the original work is less likely to be fair when it has a commercial character. However, the transformative nature of the subsequent work overrides the other factors. The more transformative the work is, the less important the other factors including the commercial nature become. From a number of cases, it can be summarised that if the alleged work has a high transformative value, then such work can

than Australia’s current copyright exceptions.” (Australian Law Reform Commission (ALRC), Copyright and the Digital Economy: Final Report (2013).

⁵⁸² For instance, Richard Prince took a series of Instagram photos by screenshots without warning or permission from the right owners of those pictures then added some peculiar comments on each photo and sold the pictures. Prince’s works were screenshots not paintings; they are verbatim copies of the original work with cryptic remarks added to the comment threads under each photo. (See e.g. Hannah Jane Parkinson, 'Instagram, an artist and the \$100,000 selfies – appropriation in the digital age' (The Guardian, 18 July 2015) <<https://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies>>). Having been successfully claimed for fair use in similar artworks (*Cariou v. Prince* 714 F.3d 694 (2013)), Prince does not seem to care much about possible copyright infringement from making and selling the works. Most interestingly, general people and the owners of the original photos are perplexed whether Prince’s use of those pictures are fair under the US fair use law. The issue on the US fair use uncertainty particularly in regard to commercial parody is discussed further below in chapter 4.4.2.

⁵⁸³ Rebecca Tushnet, ‘Legal fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L. A. Ent. L. J. 651, 664.

⁵⁸⁴ See the empirical data supporting this statement in chapter 5.2.2.

be a fair use regardless of any commercial objective.⁵⁸⁵ The judge-made phrase ‘transformative use’⁵⁸⁶ has therefore become a fundamental and significant constituent of the fair use analysis.⁵⁸⁷

There is no clear definition of what constitutes transformative use.⁵⁸⁸ The “transformative purpose” approach creates even more confusion in an already indeterminate fair use law.⁵⁸⁹ Some guideline of what transformative use is can be found in judicial decisions. From the Supreme Court decision in *Campbell v. Acuff-Rose Music*⁵⁹⁰, a new creation is ‘transformative’ if it does not merely “supersede the objects”⁵⁹¹ of the original work but instead “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”.⁵⁹²

⁵⁸⁵ For instance, the parody version of the song *Oh, Pretty Woman* was decided to be transformative and therefore was found to be fair use in spite of its commercial character. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)). See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998), *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), *Mattel, Inc. v. Pitt*, 229 F. Supp.2d 315 (2002), *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), *Blanch v. Koons*, 467 F.2d 206 (2nd Cir. 2006), *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁵⁸⁶ The term ‘transformative’ was introduced in a commentary, ‘*Toward a Fair Use Standard*’ 1990, by Judge Pierre Leval and was subsequently applied and cited for determining a landmark fair use case in 1994. See Pierre Leval, ‘*Toward a fair use standard*’ (1989) 103 Harv. L. Rev. 1105 and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁸⁷ The concept of transformative seems to be rooted from the very heart of fair use principle articulated by Justice Story. Fair and bona fide abridgment of an original work is not a piracy provided that there is “real, substantial condensation of the materials and intellectual labor and judgment”, not merely an extracts or different arrangement of original works. (*Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)). Transformative use lies “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984)).

⁵⁸⁸ Defining the meaning of transformative use is problematic. (Thomas Cotter, ‘*Transformative Use and Cognizable Harm*’ (2010) 12 Vand. J. Ent. & Tech. L. 701, Part II).

⁵⁸⁹ “[I]nconsistent application of the transformative use test produces conflicting judicial opinions and uncertainty for future litigants.” (Tracey Gonzalez, ‘*Distinguishing the Derivative from the Transformative: Expanding Market-Based Inquiries in Fair Use Adjudications*’ (2003) 21 Cardozo Arts & Ent. L.J. 229, 231); Jisuk Woo, ‘*Redefining the “Transformative Use” of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*’ (2005) 27 Hastings Comm. & Ent. L.J. 51, 64-67; Matthew Banker, ‘*The Song Remains the Same: Transformative Purpose Analysis in Fair Use Law*’ (2010) 87(1) J. & Mass Comm. Q. 170.

⁵⁹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁹¹ Justice Story’s words in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) which were cited by Judge Pierre Leval and recited in the *Campbell* case.

⁵⁹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

In conventional sense, for a work to be transformative, new elements of some form of intellectual expression should be inserted into the new work. At first sight, this looks like a requirement for creativity. However, the meaning of the word ‘transformative’ has been stretched⁵⁹³, beyond creative alteration of the content of an earlier work, to permit some uses despite their non-creative reproduction of the original content.⁵⁹⁴ Nevertheless, notwithstanding its broad boundary, transformativeness is insufficient to permit online recreations. The concept of transformativeness does not concentrate on the creativity of the new work. Instead it rather focuses on the ‘purpose’ of the new work; whether the new work performs a different function or purpose from the original work regardless of the alterations of the content of the original material.⁵⁹⁵

A subsequent work absent creative reworking of the original work can be qualified as transformative if only it has a function or purpose different from the original. For example, in *Nunez v. Caribbean International News Corp*, a use of an entire set of modeling photos on a newspaper without permission of the copyright holders of the photos was found to be fair.⁵⁹⁶ The Appeal Court ruled that such use was transformative giving a reason that “what is important here is that plaintiffs’ photographs were originally intended to appear in modeling portfolios, not in the newspaper...”⁵⁹⁷ The court also disposed of the third fair use factor, amount and substantiality of the use, disregarding the use of the photos in their entirety.⁵⁹⁸ Also, in *Kelly v. Arriba Soft Corporation*⁵⁹⁹ and

⁵⁹³ Thomas Cotter, ‘Transformative Use and Cognizable Harm’ (2010) 12 Vand. J. Ent. & Tech. L. 701.

⁵⁹⁴ See also Rebecca Tushnet, ‘Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It’ (2004) 114 Yale L. J. 535, 560; Pamela Samuelson, ‘Unbundling Fair Uses’, (2009) 77 Fordham L. Rev. 2537, 2555-2556.

⁵⁹⁵ It is noteworthy that ‘transformativeness’ considered for the first factor under the fair use analysis is not the same as the ‘transforming’ characteristic in the definition of derivative work under Section 101 of the U.S. Copyright Act. ‘Transformativeness’ in the fair use context is not necessary the matter of modification in content, but rather it emphasises on the subsequent work’s purpose; whereas the term ‘transforming’ concerns the degree of difference between the original work and the latter work as to whether the second work is a derivative work. Hence a work with high alterations in content (transforming) may not be transformative in the fair use sense if it does not imbue the original with a different purpose. (See also, R. Anthony Reese, ‘Transformativeness and the Derivative Work Right’ (2008) 31 Colum. J. L. & Arts 467; Matthew Sag, ‘Predicting Fair Use’ (2012) 73(1) Ohio St. L. J. 47).

⁵⁹⁶ *Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000).

⁵⁹⁷ *Ibid* 23.

⁵⁹⁸ *Ibid* 24.

⁵⁹⁹ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

*Perfect 10 v. Amazon.com*⁶⁰⁰, the use of thumbnail images, copies of copyrighted images which were modified only by being reduced in both size and resolution by an automated process to facilitate the operation of an image search engine, was considered to be highly transformative. The court found that such use provided “social benefit”⁶⁰¹ by enhancing internet searching techniques. It had illustrative or artistic purposes and did “not supplant the need for the originals”⁶⁰². In these two cases, a search engine did not transform or modify the content of the copyrighted work; however, “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work”⁶⁰³. Thus, in an analysis of transformativeness, courts tend to focus on the transformative purpose of the challenged work rather than on whether the defendant has transformed the actual content of the original work.⁶⁰⁴

The notion of transformativeness is therefore so broad that it may cover a verbatim reproduction of copyright protected work involving none or minimal creativity. In contrast, some works with high level of creativity on the part of the re-creator might not be qualified as a fair use. A subsequent work which involves new creative elements but whose purpose of re-creation does not concern the original underlying work may not be considered as transformative.⁶⁰⁵ In *Dr. Seuss Enterprises v. Penguin Books*, the defendants’ book, *The Cat NOT in the Hat!*, was written and illustrated based on the style of the children’s book by Dr. Seuss, *The Cat in the Hat*, to criticise the O.J. Simpson murder trial, not the underlying work. Despite the transformation of content, the defendant’s use was not “transformative” because the work was a satire (rather than a

⁶⁰⁰ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁶⁰¹ *Ibid* (citing *Campbell*).

⁶⁰² *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

⁶⁰³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

⁶⁰⁴ From an analysis of 31 fair use cases, Reese concludes that courts decided that “the transformativeness inquiry weighed in favor of fair use, regardless of whether the court viewed the defendant as having transformed the actual content of the plaintiffs work in any way” (R. Anthony Reese, ‘Transformativeness and the Derivative Work Right’ (2008) 31 Colum. J. L. & Arts 467, 485).

⁶⁰⁵ Although, comparing to parody, satire usually weighs against fair use, the court may find a satire use fair because of some other reasons such as the aim of copyright right law in promoting the useful arts that original and separate expression in the satire work should be encouraged. (See e.g. *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006)). See chapter 4.4 below.

parody⁶⁰⁶, a critique of the original work).⁶⁰⁷ The distinction between satire and parody for the fair use analysis is discussed further in chapter 4.4.

Comparing the thumbnail image cases with the *Dr. Seuss* case, in terms of creativity level of the new works, the almost exact copy of the original works like thumbnail images were found to be transformative; while satire tends not to be considered as transformative despite its creativity. This demonstrates that a fair use analysis is not required to concentrate on creative re-creation of the new work. Moreover, courts, at their discretion, can take into account additional non-statutory considerations upon a policy concern for a particular situation which could weigh against or in favour of fair use.⁶⁰⁸ This once again renders fair use complicated to predict.

4.1.3 Online re-creations and fair uses

Under the fair use exception, parody is regularly held to amount to fair use⁶⁰⁹, and thus parodic re-creations are likely considered as fair. However, other types of online re-creations are problematic. Since there are various types of online re-creations, each re-creation must be decided on its own facts for a fair use enquiry.

To illustrate, applying the first fair use factors, transformative and commercial nature of the use, an online re-creation is most likely to be transformative if it constitutes a criticism of and comments upon the underlying work by adding new meaning to the original work and conveying new messages.⁶¹⁰ The re-creator may input his originality

⁶⁰⁶“The ‘parody’ branch of the ‘fair use’ doctrine is itself a means of fostering the creativity protected by the copyright law.” (*Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983)). An eminent example of parody case is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); “Parody is ... protected because copyright owners would often refuse to license parodies that nonetheless serve the creative purpose of copyright law.” (Rebecca Tushnet, ‘Legal fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L. A. Ent. L. J. 666, 668).

⁶⁰⁷ *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir., 1997).

⁶⁰⁸ The set of fair use criteria codified in Section 107 is not definitive or determinative in order to “provide some gauge for balancing the equities.” (Copyright Law Revision (House Report No.94-1476, 1976)).

⁶⁰⁹ See chapter 4.4.

⁶¹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

and creativity into the borrowed characters and universe with elaboration and devotion. A transformative re-creation can be a written fan fiction using original fictional characters and/or settings (for example, *Harry Potter* and *Hermione at Hogwarts School*) in a new adventure distinct from the original story. It can also be a video mash-up of two movies to illustrate a fighting scene between the characters from the two different stories with a unique storyline such as a battle in which *Lord Voldemort* was defeated by a *Jedi*. Unlike fan fiction and mash-up, fansubbing and scanlation typically involve little or no creative input and do not convey new messages or meaning different from the incorporated work; thus, they may not be transformative. Regarding commercialism, if an online re-creation has a commercial purpose, this could weigh against fair use. Fan works are primarily non-commercial and not-for-profit.⁶¹¹ However, if the re-creation is found to be highly transformative, it can still be fair use regardless of its commercial nature.⁶¹² With the absence of judicial decisions concerning these re-creations, it is not an easy task to speculate or determine whether a use of an existing work for online re-creation weighs against or in favour of the first fair use factor.

Under the second factor, the nature of copyrighted work, fictional sources have stronger protection than factual works and published stories get more protection than the unpublished.⁶¹³ Since online re-creations (particularly fan works⁶¹⁴ and parody) are almost always created based on popular culture which are published fictional works, the second factor therefore may not be advantages for a re-creation in the fair use enquiry.

As for the third factor, courts should consider the amount and substantiality of original elements that have been used whether the subsequent work copied too much of

⁶¹¹ Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loy. L.A. Ent. L. Rev 651, 664; Leanne Stendell, 'Fanfic and Fan Fact' (2005) 58 S.M.U. L. Rev. 1551, 1568; Rebecca Tushnet, 'User-Generated Discontent' (2008) 31(4) Colum JL & Arts 497.

⁶¹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁶¹³ *Harper & Row v Nation Enterprises*, 471 US 539, 563-564 (1985); *Stewart v. Abend*, 495 US 207, 237 (1990).

⁶¹⁴ Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loy. L.A. Ent. L. Rev 651, 676-677; Leanne Stendell, 'Fanfic and Fan Fact' (2005) 58 S.M.U. L. Rev. 1551, 1568.

the original quantitatively and qualitatively.⁶¹⁵ This factor is problematic for most online re-creations. While fan fiction may borrow merely fictional characters (whose status under copyright is controversial⁶¹⁶) and/or original plots and settings from a popular work without verbatim copying, fanvids and mash-ups usually include literal copying of some scenes from a movie with an entirety of a sound track. Without taking some elements from the original, the works would not be a fan fiction or fanvid⁶¹⁷ and these re-creations would not exist in the cultural and intellectual domains for the benefits of the individuals and society. Besides, drawing a clear bright line of permissible amount of copyrighted work that can be used would never be possible. This factor is therefore very difficult to determine and can be disadvantageous to a plenty of creative re-creations.

Regarding the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, many people think that an online re-creation can yield a positive effect on the market of the original work e.g. it can act as an advertisement for the original work and boost the sale of the original work.⁶¹⁸ Fan fiction, for instance, can be seen as free advertisement and promotion or an enhancement of the market of the official products yielding a positive effect rather than harm.⁶¹⁹ However, there are some concerns that altering the original content e.g. fictional character in such a way that it involves offensive materials and explicit sexual relationship could possibly lower the value of the protected work.⁶²⁰ This depends on the case in question whether an adverse effect upon the original work occurs.

In summary, the second fair use factor would always be disadvantageous for creative re-uses. Apart from parody, fan fiction⁶²¹ seems more likely to be fair than other

⁶¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

⁶¹⁶ See the discussion on the copyrightability of fictional characters in chapter 2.1.1.

⁶¹⁷ Leanne Stendell, 'Fanfic and Fan Fact' (2005) 58 SMU L Rev 1551, 1569.

⁶¹⁸ See chapter 5.2.6.

⁶¹⁹ Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loy. L.A. Ent. L. Rev. 651, 669.

⁶²⁰ See chapter 5.2.6.

⁶²¹ Chatelain comments that the four factors of fair use are in favour of fan fiction. (Michelle Chatelain, 'Comment: Harry Potter and the Prisoner of Copyright Law' (2012) 15 Tul J Tech & Intell Prop 199, 206-212). McKay strongly believes that fan works should be protected under the fair use law. The US Congress

types of re-creations as it usually incorporates non-literal fragments of an original work, involves new story with one's own writing skills that could be in favour of the first and third factors. Typically, video re-creations like fanvid and mash-up include verbatim copy of audio/visual components of original works weighing against the third factor of fair use.

Once again, it should always be noted that a fair use application is subject to a specific-fact case. Although, the US fair use exception aims to allow some uses of copyright protected works for the interest of the public, it has the giant problem of uncertainty of its application⁶²² and does not sufficiently safeguard free expression of online re-creators in using existing materials to produce new creative works.

4.2 Exceptions and Limitations under the EU law

Article 5 of the InfoSoc Directive allows the EU member states to introduce copyright exceptions for limited purposes including private copying of copyright content in return for a fair compensation to the right holders⁶²³ and use for the purpose of caricature, parody or pastiche⁶²⁴. This part of the chapter will study the national laws of two EU member states, the UK and Germany, to provide a critical analysis of the copyright exceptions and limitations pertinent to online re-creation practice in the common law and civil law system.

should therefore clarify that these fan uses are fair by adding “non-commercial and transformative use” to the preamble of the fair use statute. (Patrick McKay, ‘Culture of the Future’ (2011) 24 Regent U.L. Rev. 117).

⁶²² “Depending on one’s viewpoint, ... fan works are protected by fair use if they are transformative enough – or if they do not affect the marketplace. But because each fan work requires an individualized determination through the fair use factors, uncertainty persists. And especially now, whether a work is parody versus satire) or of high quality matters more than ever before.” (Raizel Liebler, ‘Copyright and ownership of fan created works: fanfiction and beyond’ in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (Sage 2015) 396).

⁶²³ Article 5(2)(b) of the InfoSoc Directive.

⁶²⁴ Article 5(3)(k) of the InfoSoc Directive.

4.2.1 UK fair dealing

Under the UK copyright law, fair dealing doctrine provides exceptions or limitations upon the copyright owner's exclusive rights. Fair dealing was first developed by English courts and consequently codified in the UK Copyright Act 1911 providing fair dealing for the purposes of "private study, research, criticism, review, or newspaper summary".⁶²⁵ The Commonwealth countries also adopted the fair dealing model into their copyright laws.⁶²⁶ While many of those countries evolved fair dealing provisions over the past century⁶²⁷, the subsequent UK legislations retained fair dealing without significant amendments until 2014. The UK fair dealing provisions remained antecedent but outdated in the digital age.

In December 2006, the Gowers Review of Intellectual Property⁶²⁸ recommended that the UK should create copyright exceptions for the purposes of private copying and caricature, parody⁶²⁹ or pastiche. The proposed amendments would be in compliance with the EU legislation, Article 5 of the InfoSoc Directive, which allows the EU member states to provide for exceptions and limitations in relation to the use of copyright materials for

⁶²⁵ Section 2(1)(i) of the UK Copyright Act 1911.

⁶²⁶ For instance, Australian Copyright Act 1968 (Sections 103A-112F), Indian Copyright Act 1957 (Section 52) and Canadian Copyright Act 1985 (Sections 29-32).

⁶²⁷ For example, in 1994, India provided fair dealing for the purpose of "private use" in Section 52(a)(i) of its Copyright Act. In 2006, a fair dealing provision for parody and satire was added to the Australian Copyright Act in Section 41A. Canada, in 2012, also inserted new fair dealing exception for the purposes of "education, parody or satire" into section 29 of the Canadian Copyright Act. Notably, fair dealing statutes in some Commonwealth countries have evolved in such a way that they increasingly resemble the US fair use doctrine. For example, Bangladesh has replaced the word "fair dealing" with "fair use" (Bangladesh Copyright Act 2000, Section 72(1)). Canadian courts also interpret fair dealing closely similar to the US fair use interpretation. (See, e.g., Daniel Gervais and Elizabeth Judge, *Intellectual property: the law in Canada* (2nd edn, Carswell 2011) 217-223).

⁶²⁸ Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury, December 2006) Recommendations 8, 9 and 12; Taking up the Gowers recommendations, the UK IPO purposed a fair dealing style exception for parody and considered other issues concerning a parody exception to provide more balance and flexibility to copyright system by enabling access to copyright protected materials without damaging the interests of rights holders. (UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property* (UK IPO, November 2007)).

⁶²⁹ Following the Gowers Review, some scholars provide an assessment on how the parody rules in the UK should be, see, e.g., Darren Meale and Paul England, 'Barry Trotter and the infringement of copyright - parody rules in the UK' (2008) *Managing Intell. Prop.* 34.

the purposes of private use⁶³⁰ and for caricature, parody or pastiche.⁶³¹ The UK Government accepted the Gowers' recommendations⁶³² but did not succeed to adapt them into the copyright framework. Later in May 2011, following the Gowers' Review, the Hargreaves Report states that the UK exceptions failed to keep up with the change of technology and society and there was the need for copyright exceptions for private copying and parody.⁶³³ In regard to limits to copyright, Hargreaves recommended that:

“[The UK] Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving.”⁶³⁴

In the attempt to render the UK's copyright framework conform to the digital world, the new copyright exceptions in the UK finally came into force in October 2014.⁶³⁵ The new exceptions⁶³⁶ include personal copies for private use⁶³⁷, quotation⁶³⁸ and fair dealing for the purposes of caricature, parody or pastiche⁶³⁹. The parody exception in the UK is discussed in detail below in chapter 4.4. However, following a judicial review in June 2015, the High Court quashed the regulations⁶⁴⁰ introducing the private copying

⁶³⁰ The private use exception is allowed on condition that the right holders receive fair compensation. (Article 5(2)(b), InfoSoc Directive).

⁶³¹ Article 5(3)(k), InfoSoc Directive.

⁶³² “The recommendations of the Gowers Review of intellectual property, which the Government has stated its intention to take forward, included amending copyright law to incorporate within it a parody exception, with the aim of encouraging creativity and the value of the creative sector to the UK economy.” (UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property* (UK IPO, November 2007) 77).

⁶³³ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) 41-42.

⁶³⁴ *Ibid* 51.

⁶³⁵ On the 14 of December 2011, the UK government ran the consultation on how it should implement recommendations from the Hargreaves Review on modernizing copyright law. The responses are analysed in HM Government, *Consultation on Copyright: Summary of Responses* (June 2012).

⁶³⁶ For a summary of the changes to copyright exceptions, see Intellectual Property Office, *Exceptions to copyright: An Overview* (2014).

⁶³⁷ Section 28B of the UK CDPA 1988.

⁶³⁸ Section 30 of the UK CDPA 1988.

⁶³⁹ Section 30A of the UK CDPA 1988.

⁶⁴⁰ Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361).

exception due to the lack of fair compensation to rights holders rendering the new provision incompatible with the requirement under the EU InfoSoc Directive, Article 5(2)(b).⁶⁴¹ As a result, acts of private copying still constitute infringements under the UK law.⁶⁴² Regarding online re-creations, even if the private copying exception was viable, it would only legitimise private re-creations but does not allow distribution of that re-creation on the internet.

Apart from parody (and private use), the UK does not recognise the importance to legalise other forms of re-creations. In his independent review of UK intellectual property, Gowers has proposed that it is important to enable creators to rework existing materials for transformative use by making it an exemption.⁶⁴³ Since it is not one of the exceptions and limitations permitted in the InfoSoc Directive, Gowers recommended that the UK government should take steps to create an exception of copyright for transformative work⁶⁴⁴ by seeking to amend the EU InfoSoc Directive to allow such an exception to be adopted in the UK.⁶⁴⁵ Nevertheless, the UK Government and Hargreaves had ignored the Gowers' recommendation concerning transformative works.⁶⁴⁶

⁶⁴¹ The UK Government failed to demonstrate sufficient evidence that permitted use would be *de minimis* harm to rightholders thus compensation is not required. (*British Academy of Songwriters and others v Secretary of State for Business, innovation and skills* [2015] EWHC 1723; [2015] EWHC 2041 by Mr Justice Green.)

⁶⁴² "The Government is not intending to take further action to reintroduce an exception." (UK IPO, 'Quashing of private copying exception' (*Gov.uk*, 20 July 2015) <<https://www.gov.uk/government/news/quashing-of-private-copying-exception>>.

⁶⁴³ Gowers adopts the concept of 'transformativeness' of the fair use doctrine of the US law.

⁶⁴⁴ Gowers defines "transformative works" as "[w]orks that use other works protected by copyright for a purpose such as to comment upon, criticize or parody the copyrighted work". This definition is clearly built on the 'transformative use' analysis of the US fair use.

⁶⁴⁵ Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury, December 2006) Recommendations 11.

⁶⁴⁶ This issue of transformative use exception was not taken up in any of the UK Intellectual Property consultation. See, e.g. UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property* (UK IPO, November 2007); HM Government, *Modernising Copyright: A modern, robust and flexible framework: Government response to consultation on copyright exceptions and clarifying copyright law* (December 2012).

The EU and UK approach for user-generated content

In 2008, the European Commission issued a Green Paper, ‘Copyright in the Knowledge Economy’⁶⁴⁷, opened floor for discussion and debate on copyright exceptions in the context of best dissemination of knowledge in the online environment. The Green Paper explored whether a specific exception for user-created content⁶⁴⁸ should be added to the EU InfoSoc Directive. The 2008 Green Paper was followed by a consultation in 2013 on the review of the EU copyright regime in the digital environment including a possible exception on user-generated content.⁶⁴⁹

In response to the consultation paper, the UK Government rejected the proposed change for a possible user-generated content exception.⁶⁵⁰ It expressed a concern that “such an exception might allow others to use works in a way that the existing rights holders do not approve of and the impact that exceptions in this area might have on remuneration.” It further suggested that improving licensing of copyright material by right holders and creators to enable use of such works online may provide solutions as some success had been shown in negotiating such agreements for example Creative Commons licence for *YouTube* users. Lastly, it stated that “[i]n considering any possible exceptions in this area it is important to consider carefully the potential impact on existing rights holders, in terms of both commercial and non-commercial [user-generated content].” The UK standpoint on this issue is obviously a right holder-centric view. The UK Government gave much weigh on the protection of the exclusive rights of copyright owners while disregarding the interest and expectations of the users and the interest of general public in accessing existing materials and making new creative works.

⁶⁴⁷ Commission of the European Communities, *Copyright in the Knowledge Economy* (Green Paper, Brussels, COM(2008) 466/3).

⁶⁴⁸ The Green Paper adopted the OECD’s definition of ‘user-created content’ as “content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices.” (OECD, ‘Participative Web: User-Created Content’ (Working Party on the Information Economy, 12 April 2007) 4).

⁶⁴⁹ Commission of the European Communities, *Public Consultation on the Review of the EU Copyright Rules* (2013).

⁶⁵⁰ UK Government, *UK Government Response to European Commission's Green Paper - Copyright in the Knowledge Economy* (December 2008).

Besides, leaving the companies and right holders to manage licensing to people to use their works does not convincingly provide a fair solution on the matter. There are practical problems on the current licensing regime as criticised in chapters 2.2 and empirically evidenced in chapter 5.2.2. Predictably only a small number of copyright owners and corporates would agree to such licence as it ultimately depends on their free will. Moreover, the copyright holder party will have a dominant power as the owner of content while users have no negotiating power. Normally, online re-creators cannot afford to pay high royalty fees and transaction costs may make mass-market low value licensing ineffective. As a result, user-generated content remains potentially infringing. Hence the conflict between the exclusive right of use of protected materials and access to such works will not be solved only by the right holders on their own; the public sector and policy makers need to step in.

In 2012, the European Commission communicates its concern on user-generated content that:

“The Commission’s objective is to foster transparency and ensure that end-users have greater clarity on legitimate and non-legitimate uses of protected material, and easier access to legitimate solutions. Content generated by users themselves is often covered by some form of licensing by rights holders, in partnership with certain platforms. However the scale and coverage of such licences is not transparent to the end user. Furthermore, such arrangements create rights and obligations for the contractual partners, but do not necessarily provide legal certainty to the end-users.”⁶⁵¹

It recognised the importance to “identify the extent to which user-generated content is licensed to relevant platforms, and identify how to ensure that end-users are informed about what is legal and illicit use on the internet”⁶⁵² but does not consider whether a specific copyright exception should be implemented.

⁶⁵¹ European Commission, *Communication from the Commission: On content in the Digital Single Market* (Brussels, 18.12.2012 COM (2012) 789 final) 3.

⁶⁵² *Ibid* 4.

Later in 2013, the EU commission has launched a specific Working Group on the issue of user-generated content in the framework of the ‘Licences for Europe’ stakeholder dialogue. Concerning user-generated content discussion, there was no consensus among participating stakeholders. While one suggested that a new exception for UGC is necessary, another disagreed on the ground that licensing schemes are increasingly available.⁶⁵³

As a result of the Working Group discussion, European associations declared that press publishers across Europe are committed to “engaging with readers and improving the user experience, including via the uptake of User Generated Content (UGC) in their online publications and services, giving a voice to users as well as enhancing their professional content offering.”⁶⁵⁴ They also declare the importance of improving the user experience and involvement and of improving information about both what users can do with press publishers’ content and what press publishers can do with users’ content. The declaration seems to lead to a good practice for the interest of both copyright holders and users; however, this would rather succeed in a small area of service (i.e. press publishers) comparing to the current global practice of user-generated content or re-creations in the digital world.

In summary, the UK attempted to amend its copyright law to keep pace with the change in the digital age. It has successfully added some copyright exceptions into its legislation for the benefits of users and society in accessing to protected works for example by implementing a parody exception. Nevertheless, it rejected the possibility to include an exception of copyright concerning other types of online re-creations. The UK standpoint on this matter is passive. The existing copyright exception under the UK law is insufficient to balance the conflicting rights and interests. In regard to the parody

⁶⁵³ ‘Licences for Europe: Ten pledges to bring more content online’ (2013) <http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf>.

⁶⁵⁴ European Publishers Council (EPC), European Newspaper Publishers’ Association (ENPA), and European Magazine Media Association (EMMA), ‘User-generated content, press publishers engaging with their readers: a declaration on improving the user experience’ (2013) <<http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/6-Users-online-press.pdf>>.

exemption, the meaning of parody within the EU and subsequently UK law is too restrictive. This issue is critically analysed below in chapter 4.4.

4.2.2 Free use doctrine in Germany

German copyright law⁶⁵⁵ provides exceptions to authors' economic rights in certain cases such as reproduction for private or personal use⁶⁵⁶, educational use⁶⁵⁷, current events and news reporting⁶⁵⁸, quotations⁶⁵⁹ and free utilisation or free use⁶⁶⁰. In regard to re-creations distributed online, this thesis will specifically examine the free use exception.

Article 24 of the German Copyright Law (*Urheberrechtsgesetz*) labelled "free use"⁶⁶¹ (*freie Benutzung*) provides that "[a]n independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work."⁶⁶² However, it does not apply to "the use of a musical work where a melody has been recognisably borrowed from the work and used as a basis for a new work."⁶⁶³ The "free use" doctrine may allow the creation and exploitation of an entirely

⁶⁵⁵ For a work to enjoy protection under the German copyright law, the work must be a 'personal intellectual creation' having a minimum level of creativity. (Articles 1 and 2 of the German Copyright Act).

⁶⁵⁶ Article 53 of the German Copyright Act 1965.

⁶⁵⁷ Article 46 of the German Copyright Act 1965.

⁶⁵⁸ Articles 49 and 50 of the German Copyright Act 1965.

⁶⁵⁹ Article 51 of the German Copyright Act 1965.

⁶⁶⁰ Article 24 of the German Copyright Act 1965. Although, it is not included under 'Section VI Limitations on Copyright' in the Copyright Act, the free use provision serves as a limitation to copyright. (Adolf Dietz, 'Germany' in Paul Edward Geller, Melville B Nimmer, Lionel Bently (eds.), *International copyright law and practice* (Matthew Bender, updated 2015) para 8[2][b]).

⁶⁶¹ It should be noted that the German "free use" doctrine is distinct from the "fair use" concept of the US law. For interesting comparative analyses between the German concept of free use and the US doctrine of fair use, see Holger Postel, 'The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law' (2006) 5 Chi.-Kent J. Intell. Prop. 142 and Paul Edward Geller, 'A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?' (2010) 57 J. Copyright Soc'y U.S.A. 553.

⁶⁶² Article 24(1) of the German Copyright Law 1965 (translated by the International Bureau of WIPO).

⁶⁶³ Article 24(2) of the German Copyright Law 1965 (translated by the International Bureau of WIPO).

new work inspired by another work, so long as the subsequent work is sufficiently distanced from the protected core of the original work.⁶⁶⁴

In a leading free use decision, *Alcolix* case, the plaintiffs claimed that the defendant's comic, *Wrong play with Alcolix: The parody (Falsches Spiel mit Alcolix. Die Parodie)*, was an unlawful adaptation of the *Asterix* series infringing copyright by transforming the main characters of the *Asterix* series, *Asterix* and *Obelix*, into the main protagonists of the comic named *Alcolix* and *Obenix*. The defendant contended that his work was a parody sufficiently distanced from the used work. The German Federal Supreme Court (*Bundesgerichtshof* or "BGH") laid down the principle that, under article 24 of the German Copyright Act, free use of an earlier work can only be fulfilled where the borrowed personal creative features of the previous work have faded in the new work. This is generally established where the personal creative features of the pre-existing copyrighted work become minimised in the new work to the extent that the personal traits merely appeared as a stimulus for a new, independent creative work.⁶⁶⁵ The Federal Supreme Court remitted the case to the lower court to examine the question whether an infringement of copyright could be established by applying the tests indicated. Since *Alcolix* and *Obenix* appeared visually as the original characters with minimal differences along with numerous details from the *Asterix* series and the District High Court of Munich considered that the pictures and characters from *Asterix* were not portrayed in a ridiculous or satirical way, an infringement of copyright would be found.⁶⁶⁶

The decisive factor for the free use assessment is therefore the difference or distance maintained between the utilised personal features of the work used and the new independent work. The distance can also be achieved by the new work's original, creative

⁶⁶⁴ The German concept of free use is interpreted by the courts in a number of cases discussed below. The core of the "free use" provision is that a work can be freely used to create an individual new work without infringing economic rights of the original owner under certain criteria, for example, that in the subsequent work the characteristic features of the earlier work fade or disappear.

⁶⁶⁵ *Alcolix/Asterix* case, BGH, 11 March 1993; (1994) GRUR 206; (1994) 25 IIC 605.

⁶⁶⁶ See, e.g., Karl H. Pilny, 'Germany: copyright: protection of comic strips under Copyright Law – "Alcolix"/ "Asterix" - parodies' (1995) 17(7) EIPR D198; 'Germany: Copyright Act, Secs. 2, 23, 24 – "Alcolix"' (1994) 15(4) IIC 605; Paul Edward Geller, 'A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?' (2010) 57 J. Copyright Soc'y U.S.A. 553, 558.

content or by personal creative effort of the creator of the new work such that the nature of the new work is considered independent, although the specific features of the earlier work remains recognisable in the new work. Such “inner distance” (*innerer Abstand*) can be attained where the new work argues with the previous work, for instance, in the case of parody. However, the Federal Supreme Court in *Alcolix* has clarified that, to provide space for freedom of artistic expression with regard to article 5(3) of the German Constitution⁶⁶⁷, the boundary of free use provision is not limited to satirical or parodic works but can also include other forms of artistic discourse. Thus, the article 24 of the free use doctrine would not be construed too restrictively.

In a parallel case, *Asterix Parodies*⁶⁶⁸, the German Federal Supreme Court affirmed the decisive criterion of free use assessment that the borrowed peculiar features of the pre-existing copyright work must fade into the background in the new work by personal creative content.⁶⁶⁹ The “fading out” requirement was also applied in the case of *Laras Tochter*.

In *Laras Tochter*⁶⁷⁰, the novel entitled *Laras Tochter* (a German translation of *Lara’s Child*) was an adaptation of the novel *Dr Zhivago* in the form of a sequel. It incorporated a large extent of the fictional world including the characters, storyline, settings and decisive events from *Dr Zhivago*. The Federal Supreme Court held that the

⁶⁶⁷ For an interesting journal article discussing the German Constitution or the German Basic Law and demonstrating that “constitutionalising” intellectual property could represent an effective tool to guarantee an equitable balance of the interests involved in the future, see Christophe Geiger, “Constitutionalising” intellectual property law?: The influence of fundamental rights on intellectual property in the European Union’ (2006) 37(4) IIC 371.

⁶⁶⁸ *Asterix parodies* (“*Isterix*”) case, BGH, 11 March 1993, (1994) GRUR 191.

⁶⁶⁹ “... In any artistic use of an older work, it may be necessary that the work and its peculiarities, in so far as they are the subject matter of the reaction, remain recognizable in the new work. The difference required, in the case of [free use], in relation to the borrowed, peculiar features of the utilized work can also exist – even in case of an obvious appropriation, especially in the formal make up – where the new work, on the basis of original, creative authorship, maintains such an internal distance in relation to the borrowed, peculiar features of the pre-existing work that the new work must be viewed as being independent. In such a case, the borrowed, peculiar features of the pre-existing work also “fade” in the new work, albeit in a broader sense: they become superimposed by the new work’s original, creative content.” (Case Comment, ‘Germany: Copyright Act, Secs. 2, 23, 24; Trademark Act, Sec. 24 – “Asterix parodies”’ (1994) 25 IIC 610, 615).

⁶⁷⁰ *Laras Tochter* case, BGH, April 29, 1999; (2000) 31 IIC 1050; [2000] E.C.C. 355. See also, Case Comment, ‘Copyright law: Germany: Laras Tochter’ IIC 2000, 31(7/8), 1050-1055.

literary material in *Laras Tochter* which appropriated from *Dr. Zhivago* did not fade in the new work; therefore established a copyright infringement. It found that “[t]he borrowings from *Dr Zhivago* go far beyond mere references to characters and events which would be unobjectionable from the copyright viewpoint and are not absorbed in *Lara's Child* as an independent work with an appropriate “inner distance” from its model.”⁶⁷¹

The Court summarised the free use principle that⁶⁷²:

“The question whether a new independent work has been created by the free use of a protected earlier work depends on the distance which the new work keeps from the borrowed personal features of the used work. The criterion to be applied for this purpose must not be too moderate. Therefore free use means that the borrowed personal features of the protected earlier work fade away in view of the originality of the new work. In other words, as a rule the personal features borrowed from the protected earlier work recede in such a way that the new work no longer makes significant use of the earlier, so that the latter appears only to have suggested the creation of a new independent work.”

“The distances to be kept from the borrowed personal features of the used work for the purpose of free use may also be seen, even in the case of clear borrowings, in the fact that the new work keeps such a great “inner distance” from those features that it must be regarded as independent by nature. Even in such a case the borrowed personal features of the earlier work fade away, in a wider sense, in the new one: they are “overlaid” by the original content of the new work.”

Regarding a use of fictional characters in creating a new independent work, the German Federal Supreme Court held that the film, ‘The Man Who Was Sherlock Holmes’ in which *Sherlock Holmes* and *Dr. Watson* acted out different roles in a comic vein was not an infringement but a free utilisation.⁶⁷³ Though a use of an existing copyright work

⁶⁷¹ *Laras Tochter* case, [2000] E.C.C. 355, 364. The Court applied the free use rationales from the following cases: *Sherlock Holmes* 26 BGHZ 52; *Alcolix* 122 BGHZ 53; *Disney Parody* [1971] GRUR 588 and *Asterix Parodies* [1994] GRUR 191.

⁶⁷² *Laras Tochter* case, BGH, April 29, 1999, [2000] E.C.C. 355, 365-366.

⁶⁷³ *Sherlock Holmes* case, BGH, 15 November 1957, (1958) GRUR 354.

for parody has a stronger chance to be free under article 24⁶⁷⁴, taking literary characters from a novel to write a fan fiction may also constitute free utilisation provided that the required conditions are met; for instance, if the characters taken⁶⁷⁵ are merely evoked by names in dissimilar stories distanced from the original universe such that the fan fiction is an independent creative work. Therefore, a mere retelling of the old stories would not constitute a free use.⁶⁷⁶ Whereas in case of fanvid, machinima, mash-up and virtual world in which exact original pictures and videos are used, it would be more difficult to determine whether the features of the materials used have faded in the new works. An inner distance can possibly be identified if the intellectual content of the new work is so creative that it diminishes the personal creative features of the original work. Nevertheless, the free use statute explicitly stated that the doctrine does not apply to “the use of a musical work where a melody has been recognizably borrowed from the work and used as a basis for a new work.”⁶⁷⁷ This would be problematic for viddings, machinimas and other forms of audio-visual re-creations where the re-creators incorporate a song or a soundtrack to the videos.

In conclusion, the German doctrine of free utilisation allows existing copyright works to be freely used if the subsequent work is sufficiently distanced from the personal features of the original work. Though a parodic work is likely to be found as a free use since it argues with the underlying work, the German courts have broadly interpreted the doctrine in accordance with the basic right to freedom of expression under its Constitution to include other types of works depending on the distance between the two works.

⁶⁷⁴ Further discussion on parody work under the German doctrine of free use is in chapter 4.4.

⁶⁷⁵ “Any case involving the use of comic characters will require a highly detailed analysis of the features transferred from the earlier to the later work and of the artistic and intellectual content of the additions made by the author of the later work. While not limited to satire, independent use will usually require more than a simple transfer of comic figures into unusual settings or activities. It will be necessary to find some artistic or intellectual message that clearly distances the later work from the contents and ideas associated with the original character.” (Christian Rohnke, ‘Case Comment, Germany: copyright’ (1994) 5(4) Ent L R E58).

⁶⁷⁶ A use of fragments from *Harry Potter* books was found to be free under the German doctrine where headings, descriptions of characters and paraphrases from the novels were used in cards as teaching materials. In contrast, the Court delineated that retelling the stories of *Harry Potter* in simplified forms would be considered an infringement. (*Harry Potter* case, LG Hamburg, Dec. 12, 2003, 2004 GRUR-RR 65).

⁶⁷⁷ Article 24(2) of the German Copyright Law 1965 (translated by the International Bureau of WIPO).

However, online re-creations other than parody such as fanvid, machinima, mash-up and virtual world may not be qualified as free uses; particularly where the new work incorporated a piece of music protected by copyright.

4.3 UGC Exception and User Rights in Canada

Canadian copyright law is derived from the “copyright” tradition of economic rights inherited from English common law and associated with moral rights with a “*droit d'auteur*” civil law tradition influenced from France.⁶⁷⁸ The Copyright Act of Canada therefore reflects both common law and civil law roots. The Act provides fair dealing exemptions from copyright infringement for those who deal fairly with copyright protected works for the purpose of research, private study, education, parody or satire.⁶⁷⁹ It is also fair to deal with original works for the purpose of criticism, review⁶⁸⁰, or news reporting⁶⁸¹ provided that the source and the name of the original author are mentioned safeguarding the author’s moral right of attribution. Though there is no statutory test for fairness⁶⁸², some factors can be considered for the assessment of fair dealing: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives of the dealing; the nature of the work; and the effect of the dealing on the work.⁶⁸³

⁶⁷⁸ William Hayhurst, ‘Intellectual Property Laws in Canada: The British Tradition, the American Influence and the French Factor’ (1996) 10 I.P.J. 265; *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 at paras. 11-12, 15, 62; Daniel Gervais and Elizabeth Judge, *Intellectual property: the law in Canada* (2nd edn, Carswell 2011) 40.

⁶⁷⁹ Section 29 of the Canada Copyright Act. The allowable purposes for education, parody and satire were added to the fair dealing provision in 2012 by the Copyright Modernization Act.

⁶⁸⁰ Section 29.1, Canada Copyright Act.

⁶⁸¹ Section 29.2, Canada Copyright Act.

⁶⁸² For a fair dealing analysis in Canada see e.g., Barry Sookman, Steven Mason and Daniel Glover, *Intellectual property law in Canada: cases and commentary* (2nd edn, Carswell 2012) 283-299; David Vaver, *Intellectual property law: copyright, patents, trade-marks* (2nd edn, Irwin Law 2011) 233-244; Martin P J Kratz, *Canada’s intellectual property law in a nutshell* (2nd edn, Carswell 2010) 37-41; Lesley Ellen Harris, *Canadian copyright law* (4th edn, Wiley 2014) 163-168. For fair dealing cases and analysis, see e.g. Barry Sookman, Steven Mason and Carys Craig, *Copyright: cases and commentary on the Canadian and international law* (2nd edn, Carswell 2013) ch.8.

⁶⁸³ The court however does not need to apply all factors in each case. The criteria for Canada fair dealing analysis are similar to those of fair use. The significant distinction between the two systems is that fair dealing in Canada adopts close-ended permissible purposes while fair use purposes are more open. For a

4.3.1 Canada's exception for non-commercial user-generated content

The Canadian Copyright Modernization Act or Bill C-11⁶⁸⁴, which came into force on 7 November 2012, made some significant changes⁶⁸⁵ to the Copyright Act including adding fair dealing provision for the purpose of parody and satire⁶⁸⁶ and granting protection for the use copyright protected work for private copying⁶⁸⁷, time shifting⁶⁸⁸, and backup copies⁶⁸⁹. For the purpose of this thesis, the pertinent new exception is Section 29.21, a new exception intended to specifically legalise “non-commercial user-generated content” (UGC), which provides:

“Non-commercial User-generated Content

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

comparison between the two exceptions, see Daniel J Gervais and Elizabeth F Judge, *Intellectual property: the law in Canada* (2nd edn, Carswell 2011) 217-223.

⁶⁸⁴ The attempt to amend the copyright law started with Bill C-60 in 2005, followed by Bill C-61 in 2008, Bill C-32 in 2010 and finalised with Bill C-11 or the Modernization Act in 2012. Many scholars and stakeholders criticised and commented on the copyright reform. The Government of Canada arranged public consultations on copyright which ran from 20 July 2009 to 13 September 2009. The materials related to the 2009 Consultations are archived at Government of Canada, 'Copyright Consultations' (19 November 2010) <copyrightconsultation.gc.ca>. A summary of the 2009 Consultations by the Canadian Government can be found at Government of Canada, 'What We Heard During the 2009 Consultations' (Balanced Copyright, 28 September 2011) <<http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01183.html>>. For an analysis of Bill C-60, see e.g. Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005). For Bill C-32, see e.g. Michael Geist (ed), *From "Radical Extremism" to "Balanced Copyright"* (Irwin Law, 2010); Wendy Serres, 'To Mix or Not to Mix: Bill C-32 "Mash Up" Provision is Getting Attention' (IP Osgoode, 12 February 2011) <<http://www.iposgoode.ca/2011/02/to-mix-or-not-to-mix-bill-c-32/>>.

⁶⁸⁵ One of the main purposes of the amendment is to “give consumers the ability to, among other things, record their favourite TV shows for later viewing, transfer music from a CD to a digital device, and create a mash-up to post via social media.” (Government of Canada, 'Why is the *Copyright Act* being amended?' (*Balanced Copyright*, 29 September 2011) <http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#amend>).

⁶⁸⁶ Section 29 of the Canada Copyright Act.

⁶⁸⁷ Section 29.22 of the Canada Copyright Act.

⁶⁸⁸ Section 29.23 of the Canada Copyright Act.

⁶⁸⁹ Section 29.24 of the Canada Copyright Act.

- (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
- (b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
- (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
- (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.”

Section 29.21 of the Canadian Copyright Act is often referred to as the “mash-up”⁶⁹⁰, “YouTube”⁶⁹¹ or “UGC”⁶⁹² exception; however, these terms are inaccurate. These exact words are not included in the statutory language. The provision allows individuals, under certain requirements, to incorporate existing copyright materials in the creation of new works including but not limited to mash-ups or user-generated videos distributed on *YouTube*, nor limited to online or digital uses. Also, though “user-generated content” or “UGC” is labelled in the sub-heading of the Act, the definition of “UGC” remains ambiguous⁶⁹³. UGC may cover both pure original works and re-creations which are

⁶⁹⁰ Martin PJ Kratz, ‘Canada’ in Neville Cordell (ed), *Intellectual property and the internet: a global guide to protecting intellectual property online* (Globe Law & Business 2014) 61; Wendy Serres, ‘To Mix or Not to Mix: Bill C-32 “Mash Up” Provision is Getting Attention’ (IP Osgoode, 12 February 2011) <<http://www.iposgoode.ca/2011/02/to-mix-or-not-to-mix-bill-c-32/>>.

⁶⁹¹ Mistrale Goudreau, *Intellectual property law in Canada* (Kluwer Law 2013) 48.

⁶⁹² Marian Hebb, ‘UGC and Fan Fiction: Rethinking Section 29.21’ (2014) 26 I.P.J. 237; Teresa Scassa, ‘The UGC Exception: Copyright for the Digital Age’ (*Teresa Scassa*, 7 October 2013) <http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=142:the-ugc-exception-copyright-for-the-digital-age>; Margot Patterson, ‘The Copyright Modernization Act and UGC’ (2012) 21(3) Entertainment, Media & Communications 1.

⁶⁹³ Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 Vand. J. Ent. & Tech. L. 841, 842; Alan N. Braverman & Terri Southwick, ‘The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned’ (2009) 32 Colum. J.L. & Arts 471, 471;

usually created and posted online by internet users.⁶⁹⁴ In this thesis, to avoid misunderstanding and confusion, the Canadian provision will be identified as the “Section 29.21”.

The scope of the Section 29.21 is not clearly determined; thus needs interpretation by the courts. The exception allows a Canadian individual meaning a natural person not a corporate entity to use⁶⁹⁵ publicly available subject-matter to make a new copyright work without infringing copyright of the underlying work. It also permits dissemination of the new work both in offline and online forms. The Canadian Government roughly describes that:

“Examples include making a home video of a friend or family member dancing to a popular song and posting it online, or creating a ‘mash-up’ of video clips. This provision would not permit such activities as simply adding a few lines to an e-book or a brief introduction to a song and then posting the copy for free online, or re-ordering the tracks on an album and selling CDs at a flea market.”⁶⁹⁶

The Section 29.21 exempts copyright liability of an unauthorised use of existing works provided that certain conditions are met:

- a. The original work has been published or otherwise made available to the public.

This can be seen as a requirement to safeguard the right of the original author to control first publication of his work. According to the copyright law of Canada, if the work is unpublished, the copyright holder has the sole right to publish the work.⁶⁹⁷ Since the Canadian copyright law is also influenced by France, this requirement links to the author’s moral right of divulgation right under the French law which provides that “the

Fraser Turnbull, ‘The Morality of Mash-Ups: Moral Rights and Canada’s Non-Commercial User-Generated Content Exception’ (2014) 26 I.P.J. 217.

⁶⁹⁴ For a distinction between UGC and online re-creations see chapter 1.2.1.

⁶⁹⁵ The provision provides that the word “use” means “to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.”

⁶⁹⁶ Government of Canada, ‘What the *Copyright Modernization Act* Means for Consumers’ (*Balanced Copyright*, 3 October 2011) <<http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>>.

⁶⁹⁷ Section 3 of the Canadian Copyright Act.

author alone shall have the right to divulge his work. He shall determine the method of disclosure and shall fix the conditions thereof...⁶⁹⁸

b. The new work has copyright.

The use of existing work must be for the creation of a new work in which copyright subsists. This demonstrates that the new work must have the degree of originality and creative effort required for such protection. To obtain copyright under the law of Canada, a work must be an original literary, dramatic, musical, or artistic work.⁶⁹⁹ For a work to be original, it must be more than a mere copy of another work. It does not need to be novel or unique but must represent a sufficient exercise of “skill and judgment”.⁷⁰⁰ For example, a mash up creator does not merely copy the existing works but select, compile, and arrange clips, test different arrangements and choose the combination of his discretion. It is therefore entitled to copyright protection. The copyright subsistence requirement of the Section 29.21 of Canada is similar to the US fair use doctrine of transformativeness as they both consider the originality and creativity contributed to the new work.

c. The use of the new work is solely for non-commercial purposes.

The meaning of “non-commercial purpose” is not defined in the Copyright Act. This leaves much obscure. For example, would it include gaining revenue from advertisement and donation? Will the non-commercial purpose be judged when the individual first uses the work, or will it be judged each time he uses the work?⁷⁰¹ This

⁶⁹⁸ Article L121-2 of the French Intellectual Property Code.

⁶⁹⁹ Section 5 of the Canadian Copyright Act.

⁷⁰⁰ The Chief Justice in *CCH Canadian* further explained: “By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work.” (*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 para 16).

⁷⁰¹ David Vaver, *Intellectual property law: copyright, patents, trade-marks* (2nd edn, Irwin Law 2011) 233.

requirement differs from the US fair use which allows commercial transformative use of existing works. If a similar situation in the fair use landmark case, *Campbell v. Acuff-Rose Music*, occurs in Canada, the defendants, the makers and sellers of the parody song, *Pretty Woman*, would not be able to avail themselves of the Section 29.21 due to the non-commercial restriction despite the parodic effect of his work.⁷⁰²

Under this exception, an individual can authorise an intermediary⁷⁰³ to disseminate the new work if it is done solely for non-commercial purposes.⁷⁰⁴ Turnbull and Scassa comment that the non-commercial restriction would be interpreted from the perspective of the UGC creator rather than the intermediary's. This interpretation is based on the principle given by the Supreme Court of Canada that copyright exceptions are user's rights⁷⁰⁵ which are not to be interpreted restrictively in order to maintain the proper balance between the rights of a copyright owner and the interest of the users⁷⁰⁶ and the exceptions are to be interpreted from the perspective of the user or consumer's purpose not that of the service providers or distributors.⁷⁰⁷ Turnbull comments that "[t]his interpretation allows disseminators like *YouTube* to make UGC widely available, even if they have a commercial motive. The policy behind this seems to ensure that UGC will have platforms to be widely disseminated on. If the exception required non-commercial

⁷⁰² However, a commercial parody or satire may still be a fair dealing under Section 29 of the Canadian Copyright Act which does not have a non-commercial restriction.

⁷⁰³ The provision provides the definition of "intermediary" as "a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public".

⁷⁰⁴ Hebb comments that the boundary of permitting uses under the Section 29.21 might be broader than intended by the policymakers since it is not limited to digital creation and online distribution of new works and the provision does not prohibit the online intermediaries or offline publishers from making money. Regarding the issue, Hebb suggests that for-profit intermediary should remunerate copyright holders and, in that case, collective societies can be helpful in facilitating payment to the right owners. (Marian Hebb, 'UGC and Fan Fiction: Rethinking Section 29.21' (2014) 26 IPJ 237).

⁷⁰⁵ The concept of "user's rights" in the Canadian copyright law will be further explained in the following part.

⁷⁰⁶ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, para 48.

⁷⁰⁷ Hence, using previews of musical works by an online service provider for commercial purposes was found to be fair dealing for the (non-commercial) research purposes of the consumers. The Supreme Court of Canada decided that "the predominant perspective in this case is that of the ultimate users of the previews, and their purpose in using previews was to help them research and identify musical works for online purchase. While the service providers sell musical downloads, the purpose of providing previews is primarily to facilitate the research purposes of the consumers." (*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para 34).

purposes from major UGC disseminators, the exception would be largely toothless.”⁷⁰⁸ In this regard, Scassa states that “[s]ince advertising is a part of the business model for sites that aggregate and disseminate UGC, this commercial dimension may be tolerated as a necessary evil in order to achieve broad dissemination.”⁷⁰⁹

- d. The source of the original work and the name of the author, performer, maker or broadcaster (if given in the source) are mentioned, if reasonable to include in the new work.

This requirement again reflects the French influence of moral rights. The Canadian Copyright Act explicitly grants the moral right to be recognised as the author of the work⁷¹⁰ or the attribution right, where reasonable in the circumstances. The Canadian copyright law also imposes this requirement for some copyright exceptions such as fair dealing for the purpose of criticism or review⁷¹¹ and for the purpose of news reporting⁷¹².

Interestingly, Section 29 of the Copyright Act allowing fair dealing for the purposes of “research, private study, education, parody or satire” does not require a mention of the source or the name of the author. As a result, an individual does not need to cite the source of the existing work to claim for a fair dealing but need to do so if he wants to use the Section 29.21 as a shield against infringement.

- e. The individual had reasonable grounds to believe that the original work is not itself infringing copyright.

⁷⁰⁸ Fraser Turnbull, ‘The Morality of Mash-Ups: Moral Rights and Canada’s Non-Commercial User-Generated Content Exception’ (2014) 26 IPJ 217, 223.

⁷⁰⁹ Teresa Scassa, ‘The UGC Exception: Copyright for the Digital Age’ (*Teresa Scassa*, 7 October 2013) <http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=142:the-ugc-exception-copyright-for-the-digital-age>; “[T]he ‘noncommercial’ status of UGC is assessed from the point of view of the user and not the disseminator. This will be so even if the disseminator is a major corporation with a business model that profits directly from the supply of UGC to a broader audience. Thus, so long as the creator of UGC makes a non-commercial use of it, it does not appear to matter that the disseminator is a for-profit company.” (Teresa Scassa, ‘Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law’ in Michael Geist (ed), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)).

⁷¹⁰ Section 14.1 of the Canadian Copyright Act.

⁷¹¹ Section 29.1 of the Canadian Copyright Act.

⁷¹² Section 29.2 of the Canadian Copyright Act.

- f. The use of the new work has no substantial adverse effect, financial or otherwise on the current and future exploitation of, or market for, the original work.

Not merely existing market of the original work, the new work must not cause a substantial adverse effect upon the ‘potential market’ of the original. There is a need for the definition and contour of the terminology ‘potential market’ as well as an explanation of what the law means by ‘substantial adverse effect’.

- g. The new work is not a substitute for the original one.

The condition that the new work must not be a substitute for the original might be developed from an analysis of ‘transformativeness’ under the US fair use doctrine. According to the US law, the market harm under the fourth factor of fair use occurs when the second work substitutes or supersedes the use of the original.⁷¹³ In the example of a parody work, since the original work and parody of the work normally serve different market functions, it is less likely that the new work will be a substitute of the market or will impair the sales of the original.⁷¹⁴ Similarly, fan fictions are unlikely to serve as a market substitute for the original stories they are based on.⁷¹⁵ For example, fan fiction for *Harry Potter* series cannot replace the original *Harry Potter* novels; reading a *Harry Potter* fan fiction will not decrease the demands for the original the same way that an encyclopaedia of a popular work will not substitute the original work.⁷¹⁶

⁷¹³ Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1125; The court in *Fisher v Dees* stated that “the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it *fulfills the demand* for the original.” (*Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

⁷¹⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) and *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1274 (11th Cir. 2001).

⁷¹⁵ Rebecca Tushnet, ‘User-Generated Discontent’ (2008) 31 Colum JL & Arts 497, 672; Patrick McKay, ‘Culture of the Future’ (2011) 24 Regent U L Rev 117, 121-122.

⁷¹⁶ The court in *Warner Bros. Entertainment Inc. v. RDR Books* considered that the *Harry Potter Lexicon* is unlikely to act as a market substitution and harm the market of the Harry Potter books because “reading the Lexicon cannot serve as a substitute for reading the original novels; they are enjoyed for different purposes”. (*Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (2008)).

Applying all the above criteria, the Canadian provision would likely render lawful most non-commercial online re-creations such as mash-ups, fan fiction, machinima, fanvids music sampling and remix. An analysis of the Section 29.21 would be helpful to specify what need to be considered when examining other alternative solutions as well as to form guidance for the most appropriate approach to the problem. The requirements set out in the exception are reasonable; however some issues need to be addressed and relevant terminologies need to be defined.

Many scholars express concerns that the Section 29.21 may not be in conformity with Canada's international obligations⁷¹⁷ particularly of the three-step test under the Berne Convention⁷¹⁸ which requires any copyright exception to be restricted to "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."⁷¹⁹ The exception for UGC is doubtfully a limited "special case" since it encompasses a wide range of content generated by users. Besides, the "legitimate interests of the author" include both economic interests and moral rights.⁷²⁰ As described above, the exception sufficiently and explicitly safeguard the author's moral right of attribution. However, there is a concern that, under the Section 29.21, the interests of authors might not be sufficiently

⁷¹⁷ For an explanation of Canada's international copyright obligations, see, Myra Tawfik, 'International Copyright Law: W[h]ither User Rights?' in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) ch.3.

⁷¹⁸ Margot Patterson, 'The Copyright Modernization Act and UGC' (2012) 21(3) *Entertainment, Media & Communications* 1; Peter K. Yu, 'Can the Canadian UGC Exception Be Transplanted Abroad?' (2014) 26 *I.P.J.* 175; Barry Sookman, 'Is the UGC Exception in Conformity with International Treaty Standards?' (User Generated Content under Canadian Copyright Law Symposium, Osgoode Hall Law School, York University, Canada, 10 October 2013); see also, David Bowden, 'International Aspects of the New User-Generated Content Exception in the Copyright Act' (IP Osgoode, 17 October 2013) <<http://www.iposgoode.ca/2013/10/international-aspects-of-the-new-user-generated-content-exception-in-the-copyright-act/>> and Osgoode Hall Law School, 'IP Osgoode User Generated Content Oct 10 2013 S5' (Online Video, 29 October 2013) <<https://www.youtube.com/watch?v=gMzNpViq5QY>>.

⁷¹⁹ Article 9(2) of the Berne Convention.

⁷²⁰ Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, 23-27 June 2003).

protected by their moral right of integrity⁷²¹ when a modification of the existing work can prejudice the reputation or honour of the original creator.⁷²²

4.3.2 User's rights in Canada

In *Théberge* (2002), the Supreme Court of Canada described copyright as “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”.⁷²³ It further stated that the proper balance “lies not only in recognizing the creator’s rights but in giving due weight to their limited nature”.⁷²⁴ Two years later, in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Federal Court of Appeal⁷²⁵ and the Supreme Court rejected the trial judge’s decision that the fair dealing exception should be strictly construed. The Supreme Court of Canada in *CCH* characterised statutory exceptions to copyright infringement as “user’s rights” which must not be interpreted restrictively in order to maintain a proper balance of rights between copyright owners and users.⁷²⁶ The Court referred to Vaver’s statement that “[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”⁷²⁷ Amongst academics, *CCH* has been regarded as a landmark case

⁷²¹ Though the Section 29.21 does not include the integrity right within the statutory provision, the author of the original work would always be entitled to the moral right under section 14.1 (1) that “[t]he author of a work has... the right to the integrity of the work”. Besides, comparing to the fair use statute, the moral rights to integrity and attribution are not included in the provision since moral rights have little recognition under the US law.

⁷²² Marian Hebb, ‘UGC and Fan Fiction: Rethinking Section 29.21’ (2014) 26 IPJ 237; Teresa Scassa, ‘The UGC Exception: Copyright for the Digital Age’ (*Teresa Scassa*, 7 October 2013) <http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=142:the-ugc-exception-copyright-for-the-digital-age>.

⁷²³ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, 2002 SCC 34, para 30.

⁷²⁴ *Ibid.*, para 31.

⁷²⁵ According to the Court of Appeal, “an overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners' rights with legitimate public interests.” *CCH Canadian Ltd. v. Law Society of Upper Canada* (C.A.), 2002 FCA 187, [2002] 4 F.C. 213, para 126.

⁷²⁶ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13, para 48.

⁷²⁷ David Vaver, *Copyright Law* (Irwin Law 2000) 171.

recognising a balance between the interests of users and rights of copyright owners and reframing the conception of copyright exceptions.⁷²⁸

On 12 July 2012, the Supreme Court of Canada issued decisions on five cases in one day, unequivocally reaffirmed *Théberge* and *CCH* that copyright exceptions such as fair dealing are to be treated as users' rights and are to be interpreted broadly from the perspective of the user, not copyright holders.⁷²⁹ The Supreme Court recognised that "users' rights are an essential part of furthering the public interest objectives of the Copyright Act."⁷³⁰ These cases involve such issues as royalties for music previews on services such as *iTunes*⁷³¹, music in downloaded videogames,⁷³² streaming music⁷³³, photocopying textbook for instructional purposes⁷³⁴ and payment for music accompanying a cinematographic work.⁷³⁵

⁷²⁸ The Supreme Court decision in *CCH* is said to be "rightly and widely regarded as bringing forth a truly fundamental shift in the way Canadian copyright law is to be understood and practiced." (Abraham Drassinower, 'Taking User Rights Seriously' in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 462); This approach can be seen as the "reconceptualization" of fair dealing as an integral part of Canadian copyright policy which "flowed from an acknowledgement of the public as an intended beneficiary of the copyright system" in *Théberge*. (Carys Craig, 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform' in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 449).

⁷²⁹ For an analysis of the so-called "copyright pentalogy" by some of leading copyright scholars in Canada, see Michael Geist (ed), *The copyright pentalogy : how the Supreme Court of Canada shook the foundations of Canadian copyright law* (University of Ottawa Press, 2013); Michael Geist, 'How the Supreme Court of Canada Doubled Down on Users' Rights in Copyright' (*Michael Geist*, 23 July 2012) <<http://www.michaelgeist.ca/2012/07/scc-on-user-rights/>>; Teresa Scassa, 'Creators' and Users' Rights in Balance: New Copyright Decisions from the Supreme Court of Canada' (Teresa Scassa, 16 July 2012) <http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=108:creators%E2%80%99-and-users%E2%80%99-rights-in-balance-new-copyright-decisions-from-the-supreme-court-of-canada&Itemid=83>.

⁷³⁰ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para 11.

⁷³¹ *Ibid.*

⁷³² *Entertainment Software Association (ESA) v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 SCC 34.

⁷³³ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 SCC 35.

⁷³⁴ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

⁷³⁵ *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38.

The rulings in the five cases prove that the language “user rights”⁷³⁶ is not a mere metaphor used by the court.⁷³⁷ The court confirmed that this approach is “a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace.”⁷³⁸ As a result of the fair balancing of rights, the court has rightly rejected⁷³⁹ the idea that restricted acts of users are just exceptions to the rights of copyright holders.⁷⁴⁰

This Canadian approach contrasts with the standpoint of other jurisdictions. In the UK, the permitted acts under the CDPA are specified as exceptions to copyright infringement, not rights.⁷⁴¹ The French courts in *Mulholland Drive*⁷⁴² and *Warner Music*⁷⁴³ had ruled that a copyright exception to authors’ rights particularly private copying in these cases is not a right but a mere statutory exception which cannot constitute

⁷³⁶ Vaver proposes that user rights can be viewed as human rights. User rights are supported by the international human right laws e.g. the Universal Declaration of Human Rights of 1948 (Article 27) and the International Covenant on Economic, Social and Cultural Rights of 1966 as they prioritize access to intellectual property (“the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”) before its protection (“the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”). (David Vaver, ‘User rights’ (2013) 25 IPJ 105, 109-110).

⁷³⁷ “Publisher and creator groups had urged the Court to retreat from its user rights approach, claiming it was merely a metaphor, yet the Court used these cases to re-emphasize the importance of users’ rights.” Michael Geist (ed), *The copyright pentology: how the Supreme Court of Canada shook the foundations of Canadian copyright law* (University of Ottawa Press, 2013) iii.

⁷³⁸ *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell Canada*, 2012 SCC 36 para 9.

⁷³⁹ “[T]he fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence.” (*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13, para 48.

⁷⁴⁰ David Vaver, ‘User rights’ (2013) 25 IPJ 105, 109.

⁷⁴¹ Section 28(1) of the UK CDPA 1988 provides: “The provisions of this Chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; *they relate only to the question of infringement of copyright* and do not affect any other right or obligation restricting the doing of any of the specified acts.” (*emphasis added*).

⁷⁴² The French Cour de Cassation overruled the Court of Appeal’s decision that the application of TPMs on the DVDs of the movie, ‘Mulholland Drive’, limited the rights of the consumers from making a private copy. (*Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Cour de Cassation, 1st civil section, 28 February 2006, case N° 549, Bull. 2006 I N° 126 p. 115 overruling *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Paris Court of Appeal, 22 April 2005).

⁷⁴³ The Court of Appeal reversed the order of the Tribunal of first instance and ruled that the private copying exception was a defence not a right to initiate a claim for the right holder (Warner Music France) to remove TPMs from the CDs for consumers to make private copies of the digital music. (*Christophe R., UFC Que Choisir / Warner Music France, Fnac*, Tribunal of first instance 5ieme Paris, 10 January 2006; *Fnac Paris / UFC Que Choisir et autres*, Paris Court of Appeal, 20 June 2007).

the basis of a legal claim. The same in Belgium, the court in *Test Achats* stated that the exception for private copying does not establish an enforceable right.⁷⁴⁴ Also, the European Commission clearly states in its preliminary report on the application of the InfoSoc Directive that Article 5(2)(b) of the Directive “does not provide for a right to private copying”.⁷⁴⁵

In conclusion, Canada is apparently the first and only country that recognises copyright exceptions as user rights. Nevertheless, the scope and nature of the user rights are ambiguous.⁷⁴⁶ The role and effect of the user rights framework remains to be seen. It would need a declaratory judgment on such as whether an exception would give rise to a legal claim and whether it is mandatory or can be exempted with respect to standard end-user agreements.

4.4 Parody Exceptions

Many countries all over the world have allowed the use of existing protected materials for making parodies. Copyright tends to give more protection for parodies than for other types of online re-creations. This is not surprising as parody is often viewed as a strong instrument for freedom of speech (criticism and review) and a means of fostering new creativity.⁷⁴⁷

⁷⁴⁴ *Test Achats v EMI Recorded Music Belgium et al.*, Brussels Court of Appeal, 9 September 2005, case 2004/AR/1649.

⁷⁴⁵ Commission of the European Communities, *Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC* (Commission Staff Working Document, Brussels, 30.11.2007, SEC(2007) 1556) 4.

⁷⁴⁶ For an analysis of the nature of user rights, see Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 IPJ 1.

⁷⁴⁷ "The 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law." (*Warner Bros v American Broadcasting* 720 F. 2d 231, 242 (2d Cir. 1983)). See also, Dinusha Mendis and Martin Kretschmer, 'The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles' (UK IPO, January 2013).

While in some jurisdictions there are statutory exceptions concerning the use of copyright work specifically for the purpose of parody⁷⁴⁸; there are no such statutory exceptions in some others⁷⁴⁹. Although copyright exceptions for parody are often parts of other provisions such as the US fair use, the Canadian exception for non-commercial user-generated content and the German doctrine of free use as discussed the previous parts, copyright exceptions related to parody is separately analysed in this section. Many countries are aware of the importance of allowing a use of an old work for parody and similar works i.e. pastiche, caricature and satire. However most of their implemented exceptions are insufficient to safeguard the rights of the users or re-creators and the general interest of the public; while some legislation unduly affects the rights of the copyright holders. Having the same objective of balancing copyright with competing rights (particularly freedom of expression) by legalising parody works, their approaches are similar in some countries and different in the others. As a result, these exceptions of various national laws could yield similar or different outcomes under the same circumstance. The existing parody exceptions therefore deserve a separate discussion for a critical comparative analysis as to identify the problems of these provisions and their interpretation.

From an analysis of relevant provisions for parody in the main jurisdictions, i.e., the US, the UK, Canada and Germany, most of the existing parody related exceptions are inadequate to protect the rights of the re-creators and some of them would be unfair for copyright owners of the original work used as criticised below.

⁷⁴⁸ The UK (Section 30A of the UK CDPA 1998), Canada (Section 29 of the Canadian Copyright Act 1985), Australia (Section 41A of the Australian Copyright Act 1968), Netherlands (Article 18b of the Dutch Copyright Act 1912), France (Section L 122-5 of the French Intellectual Property Code 1992), Belgium (Article 22(1)(6) of the Belgium Law on Copyright and Neighboring Rights 1994), Portugal (Article 2(1)(n) of the Code of Copyright and Related Rights 1985).

⁷⁴⁹ In some jurisdictions such as Greece and Hungary, there is no statutory parody exception with an absence of judicial guidance on the matter. While Austria, Denmark and Finland do not provide an express statutory exception for parody; however, under the copyright laws of these countries, parodies generally do not infringe copyright in the original work. See also, Guido Westkamp, 'Part II - Implementation of Directive 2001/29/EC in the Member States' (Brussels, European Commission, February 2007).

4.4.1 Limited scope of parody exceptions

4.4.1.1 The distinction of parody and satire in the US

The US courts make a distinction between parody and satire⁷⁵⁰ for the fair use analysis. Under the US copyright law, parody is a subsequent work that mocks the style and expression of the underlying work and “must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable”⁷⁵¹; whereas satire borrows an existing work to criticise or ridicule someone or something that does not concern the borrowed work⁷⁵², a far weaker justification to use the original.⁷⁵³ Although both parody and satire are new creative works with a free speech element in the valued forms of criticism⁷⁵⁴ and they are highly potential to be transformative use, parody is more likely to avail a fair use defence than a satire is.⁷⁵⁵

As discussed above, the crucial factor for the US fair use scrutiny is whether the subsequent work is transformative. Parody serves as the type of criticism or comment that traditionally has had a claim to fair use protection as transformative work.⁷⁵⁶ Parody is most likely to be found as a fair use. The landmark fair use decision is a parody case. In

⁷⁵⁰ The terms “parody” and “satire” are judicially articulated specifically for fair use transformativeness scrutiny. The literary meanings of the terminology under other laws may differ from the meaning developed by the US court.

⁷⁵¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

⁷⁵² Satire can also be referred to as a type of parody called “weapon parody”. See below for further discussion on “weapon parody”.

⁷⁵³ For example, a sculpture, *String of Puppies*, based on a photograph to criticise society at large, not the original work, was not a parody because “the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work”. (*Rogers v. Koons*, 960 F.2d 301, 310 (2nd Cir. 1992)).

⁷⁵⁴ “[P]arody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.” (*Rogers v. Koons*, 960 F.2d 301, 310(2nd Cir. 1992) (citing *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983)).

⁷⁵⁵ “For the kinds of copyrighted works for which it can be useful - typically expressive works with artistic “meaning” the concept of transformativeness should be expanded to include uses of copyrighted works, such as satire, that are not now seen as transformative.” (Laura A. Heymann, ‘Everything Is Transformative: Fair Use and Reader Response’ (2008) 31 Colum JL & Arts 445, 448).

⁷⁵⁶ *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 C.A.Cal., 1978; *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231 (2d Cir. 1983); *Rogers v. Koons*, 960 F.2d 301(2nd Cir. 1992; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

Campbell v Acuff-Rose, the defendants composed a parody song, *Pretty Woman* based on Roy Orbison's song, *Oh, Pretty Woman*. The court held that such a parodic purpose of the use has an obvious claim to transformative value⁷⁵⁷ and represents humorous form of criticism which "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."⁷⁵⁸ The parody version of the classic song was found transformative and thus the use was fair despite the fact the parody song was made for commercial exploitation.⁷⁵⁹

Parody under the US fair use does not need to be amusing.⁷⁶⁰ Besides, parody needs to copy sufficient amount of the original work to be able to place the parodied work into the mind of the audience. However, a parodist cannot take more of the original work than is necessary to "recall or conjure up" the object of his critique.⁷⁶¹

Comparing to parody, satire which borrows the original underlying work to comment on or ridicule an object other than the original work is more difficult to be considered as transformative. As illustrated above, the book, *The Cat NOT in the Hat!*, using the elements from the Dr. Seuss' book, *The Cat in the Hat*, to create a satirical story

⁷⁵⁷ In line with parody cases prior to *Campbell* in 1994, for instance, *Walt Disney Productions v Air Pirates* 581 F. 2d 751 (C.A. Cal.1978); *Warner Bros v American Broadcasting Cos* 720 F. 2d 231 (2d Cir. 1983); *Rogers v Koons* 960 F. 2d 301(2d Cir.1992), parody serves the same purpose as "other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works" (*Campbell v Acuff-Rose* 510 U.S. 569, 583 (1994)).

⁷⁵⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) 579.

⁷⁵⁹ *Ibid* 584.

⁷⁶⁰ For instance, in *Suntrust v. Houghton Mifflin*, the author of a novel, *the Wind Done Gone* (TWDG), appropriated the characters, plot and major scenes from the international best-selling novel *Gone with the Wind* (GWTW) into its first half.⁷⁶⁰ She successfully claimed that her novel criticised GWTW's depiction of slavery and the Civil-War era American South.⁷⁶⁰ The court found that the author of the subsequent work could not have specifically commented upon or criticised the original book without relying heavily upon elements of that original novel; TWDG was therefore a parody that reflected transformative value. (*Suntrust v Houghton Mifflin* 268 F. 3d 1257, 1271 (11th Cir. 2001) (citing *Campbell*)).

⁷⁶¹ In *Walt Disney Productions v Air Pirates*, the court held that the defendants' use of the plaintiff's cartoon characters in *Air Pirates Funnies* the adult counter-culture comic books was not fair because "the amount of defendant's copying exceeded permissible levels." The court did not allow taking a component part of the original work more than was necessary to conjure up the original. Moreover, making the "best parody" was not permissible since such reproduction would be beyond what was necessary. (*Walt Disney v Air Pirates* 581 F. 2d 751 (1978)).

about a murder trial, was a satire not a parody. As a result, the court found that the satirical book was not transformative; as a result, not a fair use.⁷⁶²

In another satire case, a sculpture called *String of Puppies* was created based on Roger's black-and-white photograph of a man and a woman with arms full of puppies.⁷⁶³ Jeff Koons, the artist of the sculpture claimed that his work was a satire or parody of society at large but not specifically criticising Rogers's work. The Court of Appeal recognised that "parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law."⁷⁶⁴ Agreeing with the district court, it found that the sculpture was not a parody of the original work⁷⁶⁵ because "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."⁷⁶⁶

Although, comparing to parody, satire usually weighs against fair use, the court may find a satire use fair due to other reasons such as the aim of copyright law in promoting the useful arts, and thus find that original and separate expression in the satire work should be encouraged. In 2006, Jeff Koons the same artist in the aforementioned case incorporated some fragmentary images into a collage painting named *Niagara* with the background of Niagara Falls.⁷⁶⁷ *Niagara* depicted four pairs of women's feet and lower legs including a picture of a pair of legs appropriated from Blanch's photograph called *Silk Sandals*. Koons' painting was intended to comment on the social and aesthetic consequences of mass media. His work was characterised as satire because its message aimed at the genre of which *Silk Sandals* was typical, rather than the appropriated photograph itself. In this case, the court proposed that the *Campbell* principle was not

⁷⁶² *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir. 1997)

⁷⁶³ *Rogers v Koons* 960 F. 2d 301 (2d Cir. 1992). This case was decided in 1992 before the landmark case *Campbell*.

⁷⁶⁴ *Ibid*, 310.

⁷⁶⁵ "By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody." (*Rogers v Koons* 960 F. 2d 301, 310 (2d Cir. 1992)).

⁷⁶⁶ *Rogers v Koons* 960 F. 2d 301, 310 (2d Cir. 1992).

⁷⁶⁷ *Blanch v Koons*, 467 F.2d 206 (2nd Cir. 2006).

limited to parody. The court found that Koons merely copied the part of the picture that was necessary and reasonable to provoke a certain style of mass communication to achieve the purpose of the work.⁷⁶⁸ Applying *Campbell*, the use of *Silk Sandals* communicating an entirely different purpose and meaning was held to be transformative. The court considered that the copyright law's goal of "promoting the Progress of Science and useful Arts"⁷⁶⁹ would be better served by allowing such use than by preventing it and eventually concluded that Koons' use of *Silk Sandals* was fair.⁷⁷⁰

This case demonstrates that a satire work can also be considered as a fair use when taking into account the aim of copyright law that original and separate expression should be encouraged. However, the fair use defence under the US copyright law would not normally allow satire as for example in *Dr. Seuss* case notwithstanding the creative elements in the satirical work. Satire is also a valuable form of criticism and discussion. To produce a successful critique, commenting upon the targeted object merely by using fragments of such object would restrict people's freedom of speech and freedom of choice in choosing materials of their discretion to make creative expression. The parody and satire distinction would narrow permissible use of existing works. The distinction is not necessary; instead there are other factors that should be taken in account when balancing the rights of the original creator and re-creators and the interest of the public such as the creative levels in the new work and non-profit nature of the work. Liebler comments that the parody and satire distinction under the US copyright law is problematic for fan works:

"This definition [of fair use's parody and satire] seems very straightforward, but real world examples show how difficult it is to work within the distinction between parody and satire. For example, with many mash-up videos created by fans, there can be two or more fandoms and original works at issue. What happens to the analysis when a fan work is a parody of

⁷⁶⁸ *Ibid*, 258.

⁷⁶⁹ *Ibid* (citing US Const., art.I, §8, cl.8).

⁷⁷⁰ *Ibid*, 259.

one work, a satire of two more, using elements from a couple more, and uses the music from yet another?”⁷⁷¹

4.4.1.2 Narrow definition of “parody” in the UK and EU

In 2014, the UK government amended the CDPA by adding some copyright exceptions including a fair dealing provision for the purposes of caricature, parody or pastiche.⁷⁷² The new fair dealing exception is provided in Section 30A of the UK CDPA in order to “allow people to make some limited, reasonable use of creative content protected by copyright, for the purpose of caricature, parody or pastiche, without having to obtain the permission of the rights holder.”⁷⁷³

The parody provision has been implemented as a ‘fair dealing’ exception. Whether certain use constitutes fair dealing under the UK copyright law will be determined by various factors such as the quantity and quality of the work that has been taken⁷⁷⁴, objective of the dealing⁷⁷⁵, the nature of the use in question⁷⁷⁶ and the commercial

⁷⁷¹ Raizel Liebler, ‘Copyright and Ownership of Fan Created Works: Fanfiction and Beyond’ in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (SAGE 2014) 396.

⁷⁷² The new parody exception is in compliance with the EU legislation, Article 5(3)(k) of the InfoSoc Directive, which allows the EU member states to provide for exceptions and limitations in relation to the use of copyright materials for the purposes of caricature, parody or pastiche. For an article considering the impact of the new UK copyright exceptions including the parody exception, see Alec Cameron, ‘Copyright exceptions for the digital age: new rights of private copying, parody and quotation’ (2014) 9(12) *Journal of Intellectual Property Law & Practice* 1002.

⁷⁷³ Intellectual Property Office, *Exceptions to copyright: An Overview* (2014) 3. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375948/An_Overview.pdf>.

⁷⁷⁴ In *Hubbard v Vosper*, a case involving a consideration of what amount to fair dealing of a literary work, the court said that fair dealing is a question of degree; it “must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair?”. (*Hubbard v Vosper* [1972] 2 Q.B. 84, 94); As a fair dealing exception which applies only to the extent that the use is fair and proportionate, the UK court would consider ‘the amount’ of original work that has been used when applying the parody exception. The UK government briefly explained that the new exception for parody, caricature and pastiche “permits people to use limited amounts of copyright material without the owner’s permission.” (UK Government, ‘Intellectual property – guidance: Exceptions to copyright’ (*Gov.uk*, updated 18 November 2014). <<https://www.gov.uk/exceptions-to-copyright#parody-caricature-and-pastiche>>).

⁷⁷⁵ “[T]he court had to judge the fairness of the dealing by the objective standard of whether a fair-minded and honest person would have dealt with the copyright work in the manner” in question. (*Hyde Park Residence v Yelland* [2000] E.M.L.R. 363, 365).

⁷⁷⁶ It is likely that a commercial use of the original would not be considered as fair. Lord Justice Chadwick said that “a dealing by a person with copyright work for his own commercial advantage—and to the actual

competition upon the market of the original work⁷⁷⁷. Therefore, for a subsequent work to be allowed by the parody exception, such work must be satisfied as fair dealing.

From an independent report commissioned by the UK IPO of an empirical study concerning parody video creation and its potential impact on the market for original works by collecting a significant amount of data about parody audiences and creators on the *YouTube* video-sharing platform, the researchers concluded that parody is a highly significant consumer activity.⁷⁷⁸ The majority of the samples are ‘target parody’ (works directed at the original artist or work) and ‘weapon parody’ (a critique of a third party issue rather than the original work). The researchers also found other types of parody namely ‘self-parody’ (a critique focusing on the parodists themselves rather than the original work or a third party) and other amateur parodies called ‘mislabelled (such as “karaoke, choreography, remix, mashup or machinima”).⁷⁷⁹

The empirical study also demonstrates that there is no evidence that parody causes economic harm from substitution and the scope of reputational harm caused by negative

or potential commercial disadvantage of the copyright owner—is not to be regarded as a “fair dealing” unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner.” (*Newspaper Licensing Agency Ltd v Marks & Spencer* [2000] E.C.D.R. 381, 403).

⁷⁷⁷ “[W]hether the alleged offending work is “in competition” with the original work... may be a useful test [for fair dealing].” (*Hubbard v Vosper* [1972] 2 Q.B. 84, 88); With regard to the new parody exception, the UK IPO commented that “[i]n the case of a parody exception this means that the parody work should not be substitutable for the original work, nor damage the commercial exploitation of the original work.” (UK IPO, ‘Impact Assessment No: BIS 1057: Copyright exception For Parody’ (13 December 2012) <http://www.legislation.gov.uk/ukia/2014/165/pdfs/ukia_20140165_en.pdf>).

⁷⁷⁸ Kris Erickson, Martin Kretschmer and Dinusha Mendis, ‘Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options’ (UK IPO, January 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf>.

⁷⁷⁹ The traditional categories of ‘target parody’ accounted for 35% of the total sample while ‘weapon parody’ made up of 31%. The minority are ‘self-parody’ with approximately 21% of the total sample and mislabelled accounted for about 13%. (Kris Erickson, Martin Kretschmer and Dinusha Mendis, ‘Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options’ (UK IPO, January 2013) 9 ‘Figure 1.1: Parody sample by type’ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf>).

treatment of an original work is limited.⁷⁸⁰ The researcher further observed that there is evidence of a significant degree of new creative input in the parody videos studied.⁷⁸¹

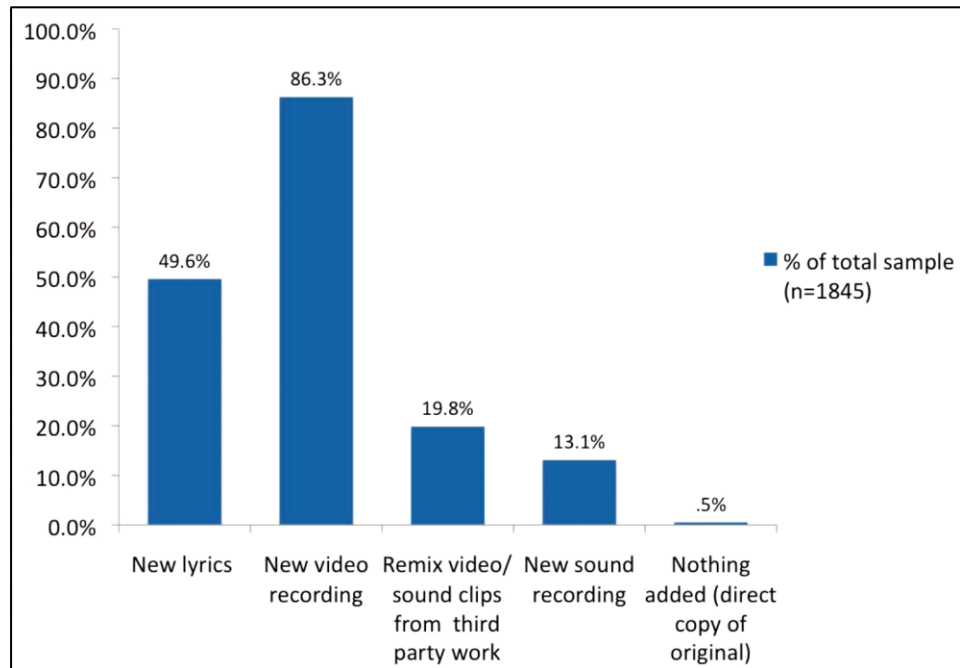


Figure 2 - “New creative elements added by parodist”⁷⁸²

⁷⁸⁰ The researchers of the study concluded that “it appears to be more advantageous for a commercial video on YouTube to attract parodies, even if highly negative, than to have no parodies at all.” (Kris Erickson, Martin Kretschmer and Dinusha Mendis, ‘Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options’ (UK IPO, January 2013) 11 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf>).

⁷⁸¹ “The majority of music video parodists on YouTube (77%) copied the original sound recording in their work; however, some 50% of the sample added new original lyrics to the parody, while 86% of creators added a new original video recording. ... In 78% of all cases, the parodist appeared on camera, which highlights the presence of creative labour while also diminishing the possibility of confusion in the minds of viewers between parody content and original works.” (Kris Erickson, Martin Kretschmer and Dinusha Mendis, ‘Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options’ (UK IPO, January 2013) 11 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf>).

⁷⁸² Kris Erickson, Martin Kretschmer and Dinusha Mendis, ‘Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options’ (UK IPO, January 2013) ‘Figure 1.3’, 12 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf>.

Despite its consideration of the above report, the UK IPO commented that “videos consisting of an entirely unchanged soundtrack (i.e. unchanged lyrics and music) accompanying a replacement video” would fall outside the scope of the new fair dealing exception since such parody videos could act as a substitute for the original work, in turn, harm the commercial exploitation of the original work.⁷⁸³ It considered that a ‘fair dealing’ limitation would ensure that the exception is not misused and that the permitted uses do not unfairly affect the legitimate interests of the copyright holder. This would still outlaw numerous parodies on *YouTube* and other video-sharing platforms which involve creative content in the part of visual works but incorporate original audio works without any modification, for example, the parodies of many popular music videos in which re-creators make their own video clips to criticise or ridicule the original music videos but need to use the entire original music as necessary to succeed their parodic objective.⁷⁸⁴ Therefore adhering to the requirement that parody use of an existing work be ‘fair dealing’ would unduly restrict creative expression of the public.

The terms “caricature, parody and pastiche” are not defined by the new UK exception⁷⁸⁵ nor by the InfoSoc Directive. The UK IPO explained that:

“The words ‘caricature, parody or pastiche’ have their usual meaning in everyday language, but also take account of the context and purpose of the copyright exceptions. In broad terms: parody imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably

⁷⁸³ The UK IPO was concerned that “such a work, while possibly humorous if enjoyed as intended, could also act as a substitute for the original sound recording if a user merely listens to the audio and does not view the video (the converse situation would also be problematic).” (UK IPO, ‘Impact Assessment No: BIS 1057: Copyright exception For Parody’ (13 December 2012) <http://www.legislation.gov.uk/ukia/2014/165/pdfs/ukia_20140165_en.pdf>).

⁷⁸⁴ Examples of videos of such type also include the numerous parodies of the Hitler's famous bunker scene from the movie *Downfall* in which original soundtrack and film subsist with parody subtitles in various subjects and languages.

⁷⁸⁵ The UK IPO has roughly given the examples of caricature, parody or pastiche:

“Many works of caricature, parody or pastiche – songs, films, artworks and so on - especially in this age of digital creation and re-mixing, involve some level of copying from another work. The new exception allows use of someone else’s copyright material for these purposes – but only if the use is fair and proportionate. For example, the use of a few lines of song for a parody sketch is likely to be considered fair, whereas use of a whole song would not be and would continue to require a licence.” (Intellectual Property Office, *Exceptions to copyright: An Overview* (2014) 3).

different from it. Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.”⁷⁸⁶

Just before the UK exception came into force, the CJEU decision in *Deckmyn* has clarified that the notion of parody must be regarded as “an autonomous concept of EU law and interpreted uniformly throughout the EU”.⁷⁸⁷ The CJEU elaborated that the essential characteristics of parody are “to evoke an existing work while being noticeably different from it” and “to constitute an expression of humour or mockery”.⁷⁸⁸ It further explained that the parody should display an original character of its own and could reasonably be directed to an object unrelated to the author of the original work itself, allowing the so-called ‘weapon parodies’.⁷⁸⁹

Both the UK IPO and the CJEU interpreted the meaning of parody as an expression of humour or mockery. The requirement that parody imitates a work for humorous effect would significantly restrict the scope of parody works. Indeed a parody

⁷⁸⁶ Intellectual Property Office, *Exceptions to copyright: Guidance for creators and copyright owners* (October 2014) 7<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375953/Guidance_for_creators_and_copyright_owners.pdf>.

⁷⁸⁷ *Deckmyn v Vandersteen* (C- 201/ 13) European Court of Justice (Grand Chamber) [2014] Bus. L.R. 1368; [2014] E.C.D.R. 21. For critical comments on the *Deckmyn* decision, see Juliane Althoff, ‘Case Comment: The parody exception: seeing the funny side of it’ (2014) 25(7) Ent LR 265; Sophie Arrowsmith, ‘Case Comment: What is a parody? *Deckmyn v Vandersteen* (C-201/13)’ (2015) 37(1) EIPR 55; Ed Baden-Powell and Juliane Althoff, ‘Case Comment: The parody exception: having the last laugh’ (2015) 26(1) Ent LR 16; Jonathan Griffiths, Christophe Geiger, Martin Senffleben, Raquel Xalabarder and Lionel Bently, ‘Case Comment: The European Copyright Society's Opinion on the judgment of the CJEU in Case C- 201/ 13 *Deckmyn*’ (2015) 37(3) EIPR 127; European Copyright Society, ‘Case Comment: Limitations and exceptions as key elements of the legal framework for copyright in the European Union - opinion on the judgment of the CJEU in Case C- 201/ 13 *Deckmyn*’ (2015) 37(3) EIPR129; Sabine Jacques, ‘Are national courts required to have an (exceptional) European sense of humour?’ (2015) 37(3) EIPR 134.

⁷⁸⁸ *Deckmyn v Vandersteen* (C- 201/ 13) European Court of Justice (Grand Chamber) [2014] Bus. L.R. 1368; [2014] E.C.D.R. 21.

⁷⁸⁹ The UK IPO also provides guidance that the new exception allows parody attributed to a person or a work other than the original work itself. “Whilst parody does involve an expression of humour or mockery, it does not have to comment on the original work or its author. It can be used to comment on any theme or target.” (UK IPO, *Exceptions to copyright: Guidance for creators and copyright owners* (October 2014) 7<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375953/Guidance_for_creators_and_copyright_owners.pdf>).

should not need to be funny but what important is the critical elements in it. Besides, a humorous effect is very difficult to define and a sense of humour is certainly different from people to people and from one society to another. Such restriction would affect the rights and interests of the re-creators and the general public.

4.4.1.3 Restricted by the law in Germany

Germany has not implemented a particular statutory defence for parody, pastiche and caricature as permitted by the article 5(3)(k) of the EU InfoSoc Directive. However, a parody of an existing work is most likely considered as a legal free use under the German copyright law. As delineated above in chapter 4.2.2, according to article 24 of the Copyright Act, a parody (and other use) of pre-existing copyright work would not be an infringement but a free use provided that there is a transformative inner distance (*innerer Abstand*) between the original and the parody work. An inner distance can be found where the appropriated features of the work used have faded in comparison with the individual creative character of the new work.⁷⁹⁰

Regarding parody and free use, the *Disney-Parodie* case in 1971⁷⁹¹ invoked a question of ‘necessity of copying’, deciding that a parody would only be considered free use if the materials taken from the original work were necessary to achieve a successful parody. The Federal Supreme Court in that case construed that only this could prevent a misuse of the provision of free use. The case involved a satirical cartoon in which Walt Disney was shown to create angels and biblical figures in heaven. The comic had been published some months after the death of Walt Disney, the creator of cartoon characters *Mickey Mouse*, *Goofy* and *Donald Duck*. Later in 2000, the Federal Supreme Court elaborated that ‘necessity’ is not the prerequisite for free use recognising that such a

⁷⁹⁰ See e.g., the landmark case, *Alcolix/Asterix case (Asterix/ Falsches Spiel mit Alcolix. Die Parodie)*, BGH, March 11, 1993; (1994) 25 IIC 605.

⁷⁹¹ *Disney-parody* or *Disney-Parodie* case, BGH, 26 March 1971, (Case I ZR 77/69), (1971) GRUR 588.

requirement would not serve the artistic discourse.⁷⁹² The decisive criterion is that the work used should only serve as inspiration for new individual creativity where the borrowed characteristics of the earlier work must pale by comparison with the new work's individuality.⁷⁹³ A free utilisation need not be a parody in which the critique is directed towards the underlying work⁷⁹⁴ but it can be directed elsewhere, for instance, to the thematic context (*thematisches Umfeld*).⁷⁹⁵ The German courts have increasingly construed an appropriate scope of free use to be in accordance with the freedom of expression and freedom of the arts, science and education⁷⁹⁶ under the German Constitution or the German Basic Law⁷⁹⁷; free use can therefore be new independent works not limited to 'target parodies' but also included other types of creative and transformative works such as 'weapon parodies' and caricature. For example, in 2003, there was a free use case concerning a political caricature of the figure of an eagle, the so-

⁷⁹² Also, in *Mattscheibe*, the judge discarded the criterion of necessity. *Mattscheibe*, BGH, 2000, GRUR; Christian Rutz, 'Parody: a missed opportunity?' (2004) 3 I.P.Q 284, 302-303.

⁷⁹³ *Freiburger Holbein-Pferd* [1997] GRUR 364; See also, Elizabeth Adeney, 'Authors' rights in works of public sculpture: a German/Australian comparison' (2002) 33(2) IIC 164.

⁷⁹⁴ In regard to the German free use doctrine and parody, the Federal Supreme Court in *Laras Tochter* case stated:

"An original parody is undoubtedly the most frequent case of this kind. However, it is possible for personal elements from one work to be borrowed in a different way for the purpose of probing that work and its subject-matter in a creative way. In that case, however, a strict assessment is required to determine whether the new work, by its own original achievement, has gained an "inner distance" from the borrowed personal features to such an extent that it can be said to be an independent work." (*Laras Tochter* case, BGH, April 29, 1999, [2000] E.C.C. 355, 366. Cited *Alcolix* case)

⁷⁹⁵ *Bild-Kunst v Focus* or *Gies-Adler* case, BGH, 20 July 2003 (Case I ZR 117/00); [2005] E.C.D.R. 6; [2004] 35 IIC 984.

⁷⁹⁶ Article 5 'Freedom of expression' of the Basic Law for the Federal Republic of Germany (Grundgesetz) 1949:

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."

⁷⁹⁷ See e.g., the landmark case, *Alcolix/Asterix* case (*Asterix/ Falsches Spiel mit Alcolix. Die Parodie*), BGH, March 11, 1993; (1994) 25 IIC 605 (The court in this case interpreted free use in the light of artistic freedom); *Bild-Kunst v Focus* or *Gies-Adler* case, BGH, 20 July 2003 (Case I ZR 117/00); [2005] E.C.D.R. 6 (The presiding judge considered the freedom of the press.). See also, Dinusha Mendis and Martin Kretschmer, 'The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles' (Independent Report, UK IPO, January 2013) Germany.

called *Gies-Adler* ('Gies-Eagle'), which is the German national symbol created by the artist Gies in the 1950s.⁷⁹⁸ The defendant published a photograph of a similar eagle on the cover of a magazine with features criticising national policy on taxation. The Federal Supreme Court found no infringement on the ground that, in spite of the external connection between the two works, the caricature expressed a clear 'inner distance' generally through an 'anti-thematic' treatment (*antithematische Behandlung*). The Court not merely allowed a parody and caricature only if the original work itself is targeted, but also if its topic and surrounding is criticised. In this case, the Court interpreted the law in the light of constitutional protection of freedom of expression⁷⁹⁹ weighing up interests between the freedom of the press and the property interest of the copyright owner.

Nevertheless, for a parody (and other new works) to be satisfied as a free use it must not involve a musical work where a melody has been recognisably borrowed from the work and used as the basis for a new work.⁸⁰⁰ As a result, a significant number of music parodies and video parodies would not be categorised as free uses notwithstanding the alteration of the lyrics in the underlying audio and the combined creative visual clips. Take the *Campbell* case as an example, the parody song, *Pretty Woman*, was found transformative and considered fair under the US fair use law. However, if the *Campbell* case was brought up before the German court, the parody music would not be found as free use, regardless of the transformative lyrics, because it incorporated the music of the original song as a basis of the new work.

In conclusion, the free use doctrine, as interpreted in conformity with the freedom of expression norms of the German Constitution (article 5) by the Federal Supreme Court, is not limited to parody with critical features directed at the appropriated work but also includes caricature not attributed to the older work. Despite the broad interpretation of the

⁷⁹⁸ *Bild-Kunst v Focus or Gies-Adler* case, BGH, 20 July 2003 (Case I ZR 117/00); [2005] E.C.D.R. 6. See also, Christian Rutz, Case comment, 'Germany: copyright - caricature as fair use' (2004) 26(6) EIPR N89; Case Comment, 'Germany: Copyright Act, Secs. 23, 24(1), 45 et seq.; Basic Law, Art. 5(1), first sentence - "Gies Eagle"' (2004) 35(8) IIC 984.

⁷⁹⁹ Article 5(1) of the German Constitution.

⁸⁰⁰ Article 24(2) of the German Copyright Law 1965.

free use doctrine, the German free use provision, article 24(2) of the Copyright Act, deters use of a musical work which in effect restricts the scope of free use.

4.4.1.4 Conclusion

The notion of parody in the US fair use is too narrow by excluding satire (or ‘weapon parodies’ as categorised in some other jurisdictions) and the US courts give more protection for parody but not much leeway for satire. Lots of critiques not attributing to the original works would therefore have a weaker case for being fair use. As for the concept of parody in the EU and UK, though parodies include ‘target parody’ and ‘weapon parody’, the requirement that a parody must be an expression of humour significantly restricts critical re-creations. Besides, a sense of humour surely differs from one person to another even in the same culture and society. Furthermore, under the UK parody exception, a video parody would not be considered as fair dealing if it consists of an entirely unchanged audio track. Regarding this, the German free use law also does not allow a use of a musical work in a re-creation despite its new creativity. This again limits possible application of the exception for video parodies. These existing parody exceptions are therefore insufficient to protect the rights of the parodists and other re-creators and the interests of the public.

4.4.2 Commercialising parody

Under the UK fair dealing, some criteria can be considered for the assessment of fair dealing including the purpose and the character of the dealing⁸⁰¹; it is likely that a commercial use of the original would not be considered as fair.⁸⁰² Similarly, under the

⁸⁰¹ Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 202-207.

⁸⁰² “[A] dealing by a person with copyright work for his own commercial advantage—and to the actual or potential commercial disadvantage of the copyright owner—is not to be regarded as a “fair dealing” unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner.” (*Newspaper Licensing Agency Ltd v Marks & Spencer* [2000] E.C.D.R. 381, 403).

Canadian fair dealing exceptions⁸⁰³, a dealing of an existing work for commercial purposes may be less fair than a dealing done for charitable purposes.⁸⁰⁴ While the fair dealing provisions might not allow parodists to commercially benefit for making a parody of an existing work, the US fair use doctrine permits transformative use to be made for sale.

In *Campbell*, the US court held that the parody song, *Pretty Woman*, was a fair use albeit nearly a quarter of a million copies of the recording had been sold.⁸⁰⁵ The Supreme Court in this case rejected the Court of Appeal's decision that the commercial nature of the parody song rendered it presumptively unfair. The Court found that the alleged work had a parodic purpose by commenting on and criticising the original. It consequently disregarded the commercial nature of the parody and concluded that the use of the original romantic song was fair. The fair use doctrine also allows commercial use for satirical work as seen in *Blanch v Koons*.⁸⁰⁶ The defendant in this case, Jeff Koons, is known for making sculptures based on an existing work and incorporating materials from popular media and consumer advertising into his artwork objects and images. Koons made a substantial profit from selling the collage painting named *Niagara* in which a picture of a pair of legs appropriated from Blanch's photograph *Silk Sandals*. The Court again ignored the commercial exploitation of the original picture and decided that Koons' work is not an infringement under the fair use defence.

In 2013, there was a US landmark court decision concerning fair use and appropriation art, *Cariou v. Prince*⁸⁰⁷. In this case, Richard Prince a well-known appropriation artist incorporated and altered Patrick Cariou's *Yes Rasta*, a series of

⁸⁰³ It should be noted that under the Canadian copyright law, if a parody work is not qualified as fair and thus not a fair dealing under the specific parody exception (Article 29 of the Copyright Act as amended in 2012), such parody work may still be allowed under the Article 29.21 for non-commercial user-generated content provided that it satisfies all compulsory criteria including that the new work must be non-commercial.

⁸⁰⁴ See e.g., Barry Sookman, Steven Mason and Daniel Glover, *Intellectual property law in Canada: cases and commentary* (2nd edn, Carswell 2012) 287; Martin P J Kratz, *Canada's intellectual property law in a nutshell* (2nd edn, Carswell 2010) 39.

⁸⁰⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸⁰⁶ *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006).

⁸⁰⁷ *Cariou v. Prince* 714 F.3d 694 (2013).

Rastafarians' portraits and landscape photographs, into his paintings and collages named *Canal Zone*. The Court of Appeal held that "the law does not require that a secondary use comment on the original artist or work, or popular culture"⁸⁰⁸ but the law requires it to add something new and have a character different from the original. The court decided that twenty-five of *Canal Zone* artworks were not infringing because they sufficiently differ from Cariou's photographs.⁸⁰⁹ However, it was uncertain whether the remaining five artworks of Prince with minimal alterations of the Cariou's original works present a "new expression, meaning, or message".⁸¹⁰ This may seem to be a sensible decision. However, the Appeal Court overlooked the fact that Prince's artworks are commercially successful with the sales of more than two million dollars.

Allowing a commercial use of someone else's work without the original owner's permission would create an unfair situation for the right holders. A person may see this fair use commercial loophole as an opportunity to make a new work by using someone else's work without authorisation and sell it without remuneration. From the previous Koons' cases⁸¹¹ and Prince's case, one can learn that, to make an artwork, the appropriated work should be modified (even minimally) by criticising the underlying work (or less preferably commenting on other objects) such that the new work would be considered transformative and fair; then he can legally benefit from the sale of such work.

In 2015, Richard Prince again produced a more controversial art collection known as *New Portraits* primarily consists of pictures of women in various poses.⁸¹² Prince took a series of *Instagram* photos by screenshots without warning or permission from the right owners of those pictures. He added some peculiar comments on each photo from the

⁸⁰⁸ *Ibid*, 698.

⁸⁰⁹ The Court found that those works "manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative." *Ibid*, 706.

⁸¹⁰ *Ibid*, 711 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

⁸¹¹ *Rogers v Koons* 960 F. 2d 301 (2d Cir. 1992); *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006).

⁸¹² Jessica Contrera, 'A reminder that your Instagram photos aren't really yours: Someone else can sell them for \$90,000' (Washington Post, 25 May 2015) <<http://www.washingtonpost.com/blogs/style-blog/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/>>.

account ‘richardprince1234’, jet-printed on six-foot canvas and displayed them as a part of the Frieze Art Fair in New York. Nearly every picture was sold for \$90,000 each.⁸¹³ Prince’s works were screenshots not paintings; they are verbatim copies of the original work with cryptic remarks added to the comment threads under each photo. Having been successfully claimed for fair use in similar artworks, Prince does not seem to care much about possible copyright infringement from making and selling the works. In addition, the original owners of the pictures used are not interested in bringing the case to court.⁸¹⁴ One reason for that might be because they are individuals not a company with lawyers or legal counsel resources. In the mind of general people this might not be as “fair” as the court (at least according to the previous cases) may think.⁸¹⁵ One of the problems is that the concept of ‘transformative’ is essential but confusing. Furthermore, the fair use system opens door for commercial use of copyright work without sharing the profit with copyright owners.

In summary, the fair use doctrine should not be seen as an opportunity for free-riding. It seems unfair to allow someone to use someone else’s original expression without their permission for sale and without compensation for possible commercial licence.⁸¹⁶ An unauthorised use of an existing work is reasonably acceptable so long as some criteria are

⁸¹³ Nate Freeman, ‘Welcome to a Very Instagrammable Frieze!’ (*Vulture*, 14 May 2015) <<http://www.vulture.com/2015/05/welcome-to-frieze.html>>.

⁸¹⁴ One of the owners of the pictures merely reacted by posting a caption: “Figured I might as well post this since everyone is texting me. Yes, my portrait is currently displayed at the Frieze Gallery in NYC. Yes, it’s just a screenshot (not a painting) of my original post. No, I did not give my permission and yes, the controversial artist Richard Prince put it up anyway. It’s already sold (\$90K I’ve been told) during the VIP preview. No, I’m not gonna go after him. And nope, I have no idea who ended up with it! #lifeisstrange #modernart #wannabuyaninstagrampicture” (Jack Smith, ‘This Artist Took Someone Else’s Instagram Photo — And Sold It for \$90,000’ (*Mic.com*, 26 May 2015) <<http://mic.com/articles/119322/an-artist-took-someone-s-instagram-photo-and-sold-it-for-90-000>>; Another reacted (or retaliated) by offering prints of her Instagram post (the one used by Prince) for \$90. (Alex Needham, ‘Richard Prince v Suicide Girls in an Instagram price war’ (*The Guardian*, 27 May 2015) <<http://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram>>.

⁸¹⁵ For a reaction to Prince’s deed, many people called him as a ‘thief’ rather than an ‘artist’ on his twitter pages - <<https://twitter.com/RichardPrince4>> (accessed 19 May 2015).

⁸¹⁶ From the empirical data analysis in chapter 5, all stakeholders consider that re-creators should not gain money by selling their re-creations without permission or reasonable profit sharing with the owners of the works used.

satisfied including that the re-creator does not commercially profit from a copyright protected work.

4.5 Drawbacks of copyright exceptions

In an attempt to balance copyright with the public interest including creativity and free speech, there are certain defences to copyright infringement. However, as analysed above, some of the existing copyright exceptions are too limited and inadequate to safeguard the rights of the re-creators and the interest of the public in accessing and reworking from copyright protected works while an uncertain and broad exception could be unfair for the owners of the original works used. More importantly, none of the copyright limitations provide a clear guideline for ordinary citizens to understand whether their use of existing works are infringing or not. Due to the uncertainty, online re-creators would be reluctant to avail themselves of the provided exceptions and thus risk being sued.

This situation is made worse by the unbalanced regime of copyright which grants the right holder a strong position to control his exclusive rights, while an online re-creator merely has an excuse provided by the copyright law itself carving out from the rights of the copyright owners. To claim for non-infringement, the re-creator has the burden of proof that the alleged re-creation is not an infringement but falls within the scope of a copyright exemption. Copyright holders therefore have the dominant power, while re-creators are often viewed as not having a positive right but certain exceptions or permitted acts granted by the law of copyright. In such a lower position, most of the online re-creators tend to respond to cease and desist letters with obeisance.⁸¹⁷ They would comply with the copyright holders' requests by deleting and removing their online re-creations without objection. The uncertainty of copyright exceptions and the unbalanced positions give a chilling effect that creative re-use of existing works would be suppressed and

⁸¹⁷ See chapter 5.2.2.

treated as illegal activity despite its advantages for society and the prejudice against the interests of the re-creators.

To solve this, we first need to move away from an author-centric view towards a more re-creator-centric view. Online re-creators should be granted a positive right to use protected works without infringing copyright provided that certain conditions are satisfied. The proposed right in chapter 6 would provide a better balance between the two sides: copyright owners would be more careful to claim an infringement where there is a stronger and clearer defence for creative reworking of existing works and online re-creators would be more encouraged to challenge a copyright claim. The significance and rationale behind the conditions of the proposed positive right are supported by the perspectives of the stakeholders i.e. original authors of works and online re-creators. The empirical research on the norms was undertaken in 2014-2015 and the analyses of the qualitative data are provided in chapter 5 below.

CHAPTER 5 - Analysing the Empirical Research Findings: Social Norms of Online Re-creations

5.1 Introduction

An original qualitative research was conducted to evaluate perspectives of the stakeholders towards online re-creations. This chapter analyses the empirical data collected from the interviews undertaken between October 2014 and September 2015. The analysis of the empirical research findings contributes to the support of the proposal in chapter 6.

5.1.1 The purposes of the empirical study

The interview was designed to discover the normative expectations concerning online re-creations and relevant activities from the perspectives of the participated original creators of works and online re-creators.

The questions asked in the interviews aimed to fundamentally evaluate four issues. Firstly, general attitude towards the attribution right of original creator to be named as the creator of their work. Secondly, opinions of whether an online re-creator should ask permission from an original creator before using the original work. Thirdly, what the participants think about commercial online re-creations. And fourthly, their perspective towards payment or compensation to the original creator or copyright holder of the work used in re-creation. The few remaining questions for interviewing original creators differed from those for interviewing online re-creators as necessary and relevant to this thesis. The analysis of data obtained from the fieldwork will contribute to the proposal to achieve a just and reasonable reconciliation between the rights of copyright holders, the rights of online re-creators and the public interest in the next chapter.

5.1.2 The overview of the empirical study

The qualitative data were collected between October 2014 and August 2015. As introduced above, interview was chosen as a means of data-gathering specifically for original creators of works and online re-creators for their views on activities relevant to online re-creation.

The majority of the empirical data were collected at popular culture conventions. I attended three popular culture conventions in London and one convention in Washington, the US: London Film and Comic Con 2014 and MCM London Comic Con 2014 in October 2014, MCM London Comic Con 2015 in May 2015 and the World Science Fiction Convention 2015 in August 2015.

A total of fourteen participants from the original creators' side were interviewed. They consisted of two literary agents of an original author who produced a well-known series of fantasy novel and twelve original writers and/or producers. Roughly, more than half of them are science fiction and fantasy writers who make a living by producing literary works. Two participants were interviewed in person at their office in London while one interview was conducted on the phone and another undertaken by written questionnaire; the other ten participants were interviewed face-to-face at the world science fiction convention in the US in 2015.

From the online re-creators' side, nine participants identified as online re-creators were interviewed: there were six fan fiction writers, one filker and parodist, one AMVs maker and one scanlationer. Most of them are students who re-create works as a hobby. All interviews with the re-creators were conducted face-to-face. The online re-creators were recruited at the popular culture conventions in the UK and the US in 2014 and 2015.

The interview participants were all anonymised. All participants in this empirical study were over eighteen years of age. There was no selection for gender and ethnical backgrounds, or limitation to online re-creators or original creators.

5.1.3 Limits of the empirical study

It is noteworthy that many interviews were conducted at the popular culture conventions in London in which most of the participants were from the UK and other countries in Europe and at the World Science Fiction Convention 2015 in the US in which the majority of participants were from the US. Consequently the studied participants do not represent the whole population in the global society. Nevertheless, since empirical work on the subject matter is sadly lacking in the legal academy, the research findings are genuinely original and ground-breaking and will contribute to useful analyses on social expectations of online re-creation.

5.2 Evaluating the empirical research data

The empirical data obtained from the interviews are assessed below. An analysis of the empirical research findings is set out in the following issues.

5.2.1 Overall culture of online re-creations

Concerning the incentives of re-creators⁸²⁴, the interviewed online re-creators produced their re-creations in various forms ranging from written (fan fiction), visual (scanlation), musical (filk) to audio-visual works (AMVs). Their primary incentives of re-creations are enjoyment and fun. All interviewees state that they make and share re-creations online because they enjoy doing it and think that it is a fun thing to do. One interviewee said, “I love writing and enjoy doing it, also, I love the original books so much so combining the two things makes me and my readers who like [a particular

⁸²⁴ See also, chapter 3.3.3.1.

popular work] happy.” Another said, “the works that I borrowed are the ones that inspired me.” An interviewee commented that “when people do [re-creations], they are not trying to make money... they’re doing it because they love the stuff” and that “people spend a lot of time and money on these [online re-creations] and they are not looking to get reimbursed.” Regarding financial gain, two online re-creators participated in the interview gained small money from distributing their re-creations; one of them gained money merely sufficient for maintaining the website. One noted that “I would do more to gain money if I was more worried about the money.”

5.2.2 Asking for permission

In the interviews, from the perspective of the original authors, online re-creators should ask for their permission and original authors should maintain control over the use of their works. Many original creators would consider approving online re-creations on a case by case basis and grant permission with some conditions; for example, some of the original writers would allow online fan fiction of his original characters if it is not involving money. Another original creator viewed that there is no need to ask permission for writing something out of his story and have it at home or show it to friends but if someone wants to publish it online or sell it, they would need permission with agreement of profit share if it is done for commercial.

However, some writers raised the point that it would be difficult in practice when a lot of people, sometimes, thousands or millions of people, contact the original creator asking for permission to use the work for re-creations. In that case, it is difficult to deal with “a flood of emails”. Thus it is better to draw a clear boundary of what can be done and what cannot be by articulating rules or a code of action so that the majority of people can enjoy that freedom but if they want to cross the boundary then they need to get permission.

One original author participated in the interview commented that he would prefer to grant permission or license to a professional company for example to make a film based

on his book rather than to an amateur fan film. Another interviewed original writer stated that if an original creator asks for his permission to re-create his works, he said he would legally have to decline the request in order to shield himself from possible problems. It is therefore better not to ask, he said: “if they don’t ask, then I don’t know about it.”

Similarly, from the interviews, most online re-creators think that online re-creators should ask permission from an original creator before using the original work. However, in practice, none of the sample re-creators has ever asked permission. Some noted that they could not easily communicate with original creators and some of the interviewees claimed that their fan fictions were allowed by a blanket statement provided by the original authors. One online re-creator commented that a licensing scheme would not allow him to alter the original content even for parody purposes. Another online re-creator remarked that if the re-creation is transformative (such as parody and fan fiction) and it is not for money there is no need to ask for permission to do such work. Nevertheless, all re-creators participated in the interview agree that they would take down their re-creations if the original creator requests them to delete or stop sharing their re-creations due to a copyright claim saying for example:

- “I’ll stop because they’re the original creators.”
- “I would talk to them about it. If I could not convince them, I would stop.”

5.2.3 Giving the name of the original creator

Most online re-creators who participated in the interviews think that an original creator should be acknowledged by name when his or her work is used for online re-creations. Some online re-creators think that a disclaimer that the appropriated work belongs to the original author not their own helps protect them from copyright liability. Only one online re-creator commented that recognizing the name of the original creator is not necessary since she made it clear that her re-creations are not made by the original author.

The attitude of the interviewed original creators toward this matter is consistent. They all think that the name of the original creator of the work used for online re-creation should be acknowledged. Some commented that the name of the original work should also be advertised. Some of them agree that re-creators should always name the original creators for the elements taken from them and it should be very clear that it is not an authorised product or in any way associated with the original creators or copyright holders in order to protect the original authors. Moreover, it is not only being polite to recognise the names of the original work and author but it also shows the intent of the online re-creator and helps promoting the original product and its creator despite the fact that merely putting the name of the original creator does not free the re-creator from infringement.

5.2.4 Gaining money from online re-creation

The specific empirical questions in the interviews strive to discover what the stakeholders think if online re-creators gain money from their online re-creations in two means: directly by selling the work and indirectly by donation and advertising.

5.2.4.1 Gaining money from selling online re-creation

In the interviews, the original authors think that without their permission and benefit sharing, online re-creator must not make money by selling their re-creations. From their perspective, commercial re-creation is not acceptable and it is a violation of right. One original author thinks that online re-creation is fine “as long as there is no money involved” while another original creator commented: “If a person wants to pay homage to the work, without trying monetize it, great. But they should not ever be allowed to make money off another’s hard work and originality without a proper license and permission.” Most of the interviewed re-creators agree with original creators that an online re-creator

should not gain money by selling the work if the original creator does not give permission to do so. One re-creator has an opinion that selling online re-creation is acceptable if it is only a small gain.

5.2.4.2 Gaining money from donation

From the interviews, the attitude of the original creators concerning “commercial” re-creation is relatively strong. Most of the sample original creators viewed that gaining money from donations is within the meaning of being “commercial” or being paid because it is a means of accepting money for making and/or sharing online re-creations. They all do not think it is acceptable that re-creators gain money from donation even though it is not for profit without their permission. The interviewed original creators remarked that:

- “... that’s not differentiate between them simply offering it for sale [or] raising money to do it. They’re raising money; at that point they ought to have my permission.”
- “I’m not very happy with that. I don’t think that they should be making money out of it even if it’s for their expenses – and what if they get a million dollars of the donation? They’re actually making money out of my work...”
- “If they don’t ask for permission, and they don’t pay the original creator, then they are really making money off someone else’s work.”
- “They are still stealing the author’s or artist’s original creation and trying to capitalize on it. Those characters/worlds belong to the creator, not the copycat.”

Not surprisingly, the perspective of the interviewed re-creators toward this issue is more lenient. Most of the online re-creators think that donations to support re-creation are acceptable. Some of them have an opinion that this activity of raising fund should be for a small amount of money. In the interviews, one online re-creator noted that “a lot of these things would not be possible without getting help for the crowd”, while another said “I think that’s a good idea and it doesn’t even need permission from the original creator.”

5.2.4.3 Gaining money from advertising

In the interviews, most online re-creators think that gaining advertising revenue from online re-creation is acceptable if the amount of money is trivial. On the contrary, from the eyes of the interviewed original creators, gaining advertising revenue is not acceptable because it is a way of financially benefiting from the incorporated original content. Interestingly, from the interview, only one original author thinks that he would not object the activity saying:

- “Well, I guess I wouldn’t sue them for doing it... I personally would not make them take down the advertisements because they are not gonna make pretty much money out of it anyway. I like to encourage the fandom and the excitement and everything so I don’t wanna make it look like I’m, ah, like, a real jerk and then they turn around and decide to stop reading my books. It’s the balance.”

Some original creators noted that the activity of posting online re-creation on a website and gain advertising revenue generated from that content lies within the meaning of being “commercial” which should not be done without permission of the right holder. Hence, it can be concluded that from the original creators’ point of view, it is not acceptable if online re-creators gain money from their re-creations by any means either directly by selling the re-creations or indirectly by donations or advertising. An original creator commented that it becomes unacceptable as soon as the online re-creator starts earning money based on the original materials they post.

5.2.5 Payment to original creator

This part assesses the opinions of the participants whether they think that an online re-creator should pay for using parts of someone else’s work in two different scenarios: by copying it directly in an online re-creation and by using it as inspiration without copying parts directly. This is to evaluate the attitude of the stakeholders concerning the issue of payment and compensation to the original creator or copyright holder taking into account the nature of re-creations which is roughly divided into two broad categories: those re-creations involving verbatim copying of original content and those without direct copying.

In the interviews, the participated online re-creators primarily think that an online re-creator should not pay for using parts of original work if the re-creation is not made for money especially when the original material is not directly taken. Interestingly, when considering this question, original authors participated in the interviews give much weight to the commerciality of the re-creation rather than the nature of the work. As to the different kind of work, they consider fan fiction to be more acceptable than other types of re-creations provided that it is not made for money. In conclusion, original creators think that online re-creator who benefits financially from using parts of their works either directly or indirectly need to ask for their permission and negotiate licensing fee. The opinions of the interviewed original creators are for example:

- “Actually yes, they should pay for it because they are using someone else’s material which has copyright in it. But then again, the intent of the re-creator is important - whether they are doing it for commercial or just for fun. I don’t want to be harsh on someone who loves my works. But yes, if they are for money, then they have to pay.”
- “For writing fan fiction, no - commercial use, yes.”
- “If they are not selling it – then I don’t care [about payment]”
- “If somebody wants to set a story in my universe, I would be fine with that again as long as it’s not commercial.”
- “For fanfiction, I would say no, I would say – go ahead. I just felt that it kind of builds up a community it can get people more interested in your work – so there is like a benefit there that they don’t necessarily have to pay...”
- “When it comes to getting money, yes, they would have to pay for it.”

5.2.6 The effect of online re-creations

Even though the effect of online re-creations upon the original work is not easily anticipated, the interview question asked participant to state their opinions on this issue to discover their attitude towards online re-creations.

In the interviews, some original creators recognise the benefits of online re-creations particularly for building a fan community to support the consumer base of their

works and prefer to have a friendly relationship with their fans and re-creators of their works:

- "... personally for me I like to encourage the fans because they're the ones that keep the interest in the series alive."
- "Original creators surely want to have fans and if they are enjoy it that's positive – so if they re-create things creatively and appropriately - that's great."
- "It's wonderful to express a love of a particular work. Expressing joy and enthusiasm in [an original work] is good - for personal use and pleasure is totally fine. Personally I don't have an issue with sharing so long as it's for free, no sense of commercial business."

Nonetheless most original creators express their concerns about online re-creations.

One of their major concerns is the content of online re-creations. Many original creators disapprove alteration of their original content e.g. fictional characters in such a way that it involved offensive materials and sexual relationship especially between characters of the same sex or the so-called "slash"⁸⁴⁵ fiction. An original writer participated in the interview remarked that:

- "I love the enthusiasm displayed by fans who want to dive deeper into someone's world, but I am uncomfortable when people try to appropriate the characters and turn them into something they're not, like making [a main character] gay or something. The least you can do, if you really like the characters so much, is to be true to them in your own imaginings."

Harmful contents that they are worried about are for example pornography, erotica or something bad for children if the audience of the original work are children because:

- (i) They do not want their readers to be exposed to the kind of content they disapprove of. Some original authors would like to control the use of their work such that their works would not involve materials they dislike.

⁸⁴⁵ See chapter 2.3 for a discussion on slash fiction concerning integrity right.

- (ii) One original creator said: “It should not be inappropriate for children.” Many creators are concerned that sometimes most readers or consumers of their works are children who are not ready to be exposed to adult materials.
- (iii) it could harm the reputation of the original work and creator, and
- (iv) people may confuse the association of online re-creation with their official products and brands.

Another concern is the effect on the potential markets of the original work.

Most original creators think that a written fan fiction is more acceptable than other types of work provided that some conditions are met: e.g. the fan fiction is transformative and does not involve earning money. When it comes to a type of re-creation for which original creators might license the right to a commercial entity to produce an official work, the original creators are reluctant to allow a fan or re-creator to make such work. This is due to the following reasons. First, they are afraid that having granted a licence to someone else would affect their ability to license for potential markets. They are concerned that licensing or allowing a person for free to make use of their work such as making a film (e.g. fan film) will affect the right to sell such right to another to produce the work officially especially when the re-creation is of professional quality even if it is non-commercial. They think that it would discourage either publishers or film makers to buy the rights from them, particularly the right to make a movie based on their original story. Besides, they also want to protect the integrity of the brand they create and the reputation of the work. An original writer said “when you write a fan fiction... it’s clearly a fan story... it’s not the way I write or speak but when you put out a film that has my book’s name on it and my characters, you don’t know my level of involvement with the film but you have to assume that I said yes.” Many original creators also want to remain in control of the use of their work and prefer professional film makers to make a movie of their works. Also, they think that a professional quality re-creation may compete with the future official products, again especially if the online re-creation is professionally made and consumed by a lot of people.

5.2.7 Summary

Original creators significantly consider commercial nature of online re-creation to be an important issue in answering a lot of questions. They also think that any kind of earning money accounted for being commercial which is not acceptable. Whereas, regarding this commercial issue, online re-creators tend to think that indirect money gained from re-creations are acceptable so long as the original creators do not lose any profit and the online re-creator arrange a profit sharing with the original creator of the work used to re-create

From the analysis in this chapter, some critical factors need to be considered in order to be able to determine whether an online re-creation is reasonable and acceptable. From the empirical research findings, the important factors that need to be taken into account are as follows:

- The character of the re-creation: whether the online re-creation is transformative and provides value of any kind;
- Attribution of the work: whether the name of the original creator and work used in re-creation have been acknowledged;
- Commerciality: whether the online re-creator gains any money from their re-creation; and
- The effect of the re-creation: whether the online re-creation causes a negative effect on the original work and/or creator.

These factors and the evaluation of the findings are crucial and therefore will contribute to the proposal articulated in the next chapter.

CHAPTER 6 - Proposal and Conclusion

6.1 Introduction

It all starts with the internet and technologies.

The internet and digital technologies make it possible for anyone to easily re-create a new work by copying, editing and remixing existing works. These earlier works are usually under copyright protection.⁸⁴⁶ The new works created based on copyright materials are termed as “online re-creations”⁸⁴⁷. While various forms of online re-creations have widely been created and distributed on the internet and become part of the culture of the 21st century, copyright law strives to keep pace with the rapid technological and societal change by expanding copyright protection i.e. the breadth of copyright subject matter, the scope of protection and the length of protection.⁸⁴⁸

Existing copyright law makes it very difficult for a re-creation to be produced lawfully.

Copyright law of the digital age affects online re-creations in several ways.⁸⁴⁹ First, copyright limits and prohibits most of the activities involved in making and sharing online re-creations.⁸⁵⁰ An online re-creation potentially infringes copyright when it incorporates protected elements of a work without authorisation of the copyright owner. However, it is usually extremely difficult to obtain permission from copyright holders

⁸⁴⁶ Copyrightability in fictional characters incorporated in written fan fiction is ambiguous. See chapter 2.1.1.3.

⁸⁴⁷ See chapter 1.2.

⁸⁴⁸ See e.g. chapter 3.3.2.2.

⁸⁴⁹ See chapter 2.

⁸⁵⁰ See chapter 2.1.

concerning online re-creations.⁸⁵¹ Moreover, the current copyright law does not provide limitations and exceptions which are designed for creative reworking of existing work, and existing exceptions are narrow.⁸⁵² Lastly, copyright and its enforcing tools especially notice and take-down procedures create a threat of litigation and enforcement even where a use of an existing work might be lawful under certain copyright exception.⁸⁵³ The current copyright law therefore makes it difficult for online re-creations to be made and shared lawfully.

Expansion of copyright invokes debates over the conflict of the interests: interests of copyright owners, the public interest in dissemination of works and the public interest in access and use of copyright works.⁸⁵⁴ The need to balance these interests was recognised and led to the implementation of limitations and exceptions to copyright protection. Nevertheless, existing copyright exceptions are not sufficient. In many cases, they do not permit re-creation. While in some cases exceptions are available for some re-creations, such exceptions are not practically usable due to their uncertainty and fear of litigation.⁸⁵⁵

In chapter 4, this thesis has provided a critical analysis of some pertinent existing copyright exceptions, i.e., the US doctrine of fair use⁸⁵⁶, the fair dealing exception under the UK law⁸⁵⁷, the free use doctrine in Germany⁸⁵⁸, the Section 29.21 or the UGC exception in Canada⁸⁵⁹ and parody exceptions in different jurisdictions⁸⁶⁰. The scrutinised copyright exceptions are inadequate to provide a proper balance between the conflicting rights and interests. Some of the existing copyright exceptions are too limited and insufficient to protect the rights of the re-creators and the interest of the public in

⁸⁵¹ See chapters 2.2 and 5.2.2.

⁸⁵² See chapter 4.

⁸⁵³ See chapter 2.5.

⁸⁵⁴ See chapter 3.3.2.2.

⁸⁵⁵ See chapter 4.

⁸⁵⁶ See chapter 4.1.

⁸⁵⁷ See chapter 4.2.1.

⁸⁵⁸ See chapter 4.2.2.

⁸⁵⁹ See chapter 4.3.

⁸⁶⁰ See chapter 4.4.

accessing and reworking from copyright protected works while an uncertain and broad exception could be unfair for the right holders of the borrowed works. More importantly, none of the copyright limitations provide a clear guideline for ordinary citizens to understand whether their uses of existing works are infringing or not. Due to the obscurity and uncertainty, creative re-users would be reluctant to avail themselves of the provided exceptions and thus risk being sued.

This situation is made worse by the unbalanced regime of copyright which grants the right owner a strong position to control his exclusive rights, while an online re-creator merely has an excuse carving out from the rights of the copyright owners which is provided by the copyright law itself. Thus the re-creator has the burden of proof that the alleged re-creation is not an infringement but falls within the scope of a copyright exception. Copyright holders therefore have the dominant power while re-creators are often viewed as not having a positive right but certain exceptions or permitted acts granted by the law of copyright. In such a lower position, most of the online re-creators tend to obediently comply with cease and desist letters by deleting and removing their online re-creations without objection.⁸⁶¹ The uncertainty of copyright exemptions and the unbalanced positions give a chilling effect that creative remakes of existing works would be suppressed and treated as illegal activity despite its advantages for society and the prejudice to the interests of the creative re-users.

Traditional copyright licensing regime is incompetent.

Under the current copyright law, the traditional licensing regime is prohibitive for online re-creations because obtaining a licence to make a re-creation is practically impossible. Without permission from the right holder of the original work used in re-creation, problems concerning copyright infringement typically arise. From the empirical research findings in chapter 5, the majority of the interviewees believe that an online re-

⁸⁶¹ See chapter 5.2.2.

creator should ask for permission from an original creator before using the original work.⁸⁶² However, the traditional model of obtaining permission or copyright licence from the right holders to use a certain protected work for online re-creation is ineffective. As discussed in chapter 2 and chapter 5, it is almost impossible for an online re-creator to obtain permission from the right owner to incorporate the copyright work into an online re-creation.⁸⁶³ This is because:

- (i) It is difficult to address the right holders of a work.

First, it can be difficult to identify and locate the proper owners of copyright especially when copyright interests in a work (such as sound recording and musical composition) can be split between multiple parties. It is a tremendous hurdle to obtain licences from a number of copyright holders.

- (ii) Existing collective licensing schemes do not normally cover re-creations.

Copyright owners prefer to grant their licence to professional users, but do not easily give authorisation to individual amateur re-creators.⁸⁶⁴ Normal licensing schemes are designed for transactions between professionals or companies, not amateur individuals. Besides, most licensing fee is based on revenue sharing: right holders have little economic incentive to license online re-creations since they do not normally produce revenue to share. Moreover, collective administration, a system that enables licensing from numerous owners to multiple users, is for non-altering uses rather than for re-creation of works or derivative works.⁸⁶⁵

⁸⁶² From the perspective of the interviewed original creators, it is polite that online re-creators ask for their permission before using their works in re-creation and original creators should maintain control over the use of their works. Similarly, most online re-creators in the interviews think that online re-creators should ask permission from an original creator before using the original work. However, in practice, none of the sample re-creators has ever asked permission noted that they could not easily communicate with original creators. Nevertheless, they all agree that they would comply with the original creator's request to delete or stop sharing their re-creations due to a copyright claim. See chapter 5.2.2.

⁸⁶³ See chapter 5.2.2.

⁸⁶⁴ Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 Vand. J. Ent. & Tech. L. 841, 848-849.

⁸⁶⁵ *Ibid*, 848. See also chapter 5.2.2.

(iii) Individual negotiation is not practicable.

There is no guarantee that the right owners will grant licences for use of re-creation. Although some right holders might consider granting permission to re-create, it is more likely that copyright owners will refuse to authorise re-creation of their works. As criticised above, original owners of works tend to be less interested in licensing amateur re-users who could yield them trivial or no revenue. Hence, there is no economic incentive for copyright owners to grant rights for non-commercial use. Besides, there is an uncertainty on the part of rights owners about risks in granting a licence. From a perspective of one original creator interviewed, he comments that he would legally have to decline the request in order to shield himself from possible problems.⁸⁶⁶

Furthermore, it is not practical to get or give permission for re-using a popular work because of the volume of online re-creations it generates, thus it is not practical for an owner of such original work to individually grant permission to each re-creation.⁸⁶⁷ It is therefore better to contemplate a clear boundary of what can be done and what cannot be by articulating rules so that the majority of people can enjoy that freedom but if they want to go beyond such boundary then they need to get permission.

From the perspective of the interviewed original creators analysed in chapter 5.2.2, online re-creators should ask for their permission before using their works in re-creation and original creators should maintain control over the use of their works. Even when the permission is given, original creators of works want to retain their right to stop the re-creation and dissemination of their works if they do not approve of the new work. From empirical data findings in chapter 5, many original creators interviewed would consider approving online re-creations on a case by case basis and grant permission with some conditions, for instance, about the alteration and content of re-creation, re-presentation of their work and reputation management; some of them even prefer to have full control over

⁸⁶⁶ See chapter 5.2.2.

⁸⁶⁷ See chapter 5.2.2.

any re-creation of their work. Nevertheless, allowing re-creation but maintaining much control leaves too narrow scope of permitted activities; as a result, suppressing freedom of expression of creative re-users. Negotiating a deal to authorise a use of their works for re-creations would therefore be extremely difficult.

Lastly, high licensing fees is another obstacle.⁸⁶⁸ Even if the right holders are identifiable and agreeable to permit re-creation, licensing fees for a use of their content can potentially be cost-prohibitive.⁸⁶⁹ The re-creators typically do not have sufficient fund to pay for licensing fee like professional companies could invest because they normally disseminate re-creations without charge. This is inextricably linked to the valuable asset approach of right holders.

Due to the above reasons, online re-creations are usually created without permission and consequently often infringe. However, copyright licensing system dissuades online re-creations.⁸⁷⁰ To always need to ask for permission⁸⁷¹ is therefore not efficient and not sufficient to safeguard the rights and interests of the creative re-user of existing works and the members of the public in general. In conclusion, licensing regime is not a viable solution.

⁸⁶⁸ Paradoxically, low fees can also be cost-prohibitive i.e. it may not worth the costs of collecting the small fees; but making them high enough to be cost-effective would then deter people from re-using protected work. Thus, the current copyright licensing system may not be suitable to lead a desirable behaviour of people to obtain permission and make a licensing payment particularly in relation to online re-creations.

⁸⁶⁹ See chapter 2.2 and chapter 5.2.2.

⁸⁷⁰ See e.g., Urs Gasser and Silke Ernst, 'From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age' (2006) Berkman Center Research Publication 1, 13.

⁸⁷¹ "The always-license model inevitably entails pervasive suppression of expression, further threats to privacy and to the individual and social benefits of noncommercialized communities, and constrained competition." (Rebecca Tushnet, 'All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing' (2014) 29 Berkeley Tech. L.J. 1447, 1482-1483).

It causes the conflict of rights and interests.

As stated above, the existing copyright law makes re-creations unlawful; but there is a public interest in the making of re-creations. In theory existing copyright law acknowledges that interest.⁸⁷² However, the current creator-centred approach demonstrates that in fact the interest is ignored.

Copyright and the culture of online re-creation both provide benefits to society.⁸⁷³ Copyright encourages new creative works and endorse the right to free speech.⁸⁷⁴ The public interests in copyright are basically the interest in dissemination of works to the public and the interest in access and use of works by the public which contribute to the advancement of society.⁸⁷⁵ The public interests in the online re-creation culture are similar to those in copyright; they are interests in dissemination of works to the public, creativity, freedom of speech, societal and cultural benefits and learning.⁸⁷⁶ Online re-creators are also entitled to the fundamental human rights to freedom of speech and to participate in cultural life. Though copyright and online re-creations are both beneficial to society, copyright suppresses the freedom of the people to re-use protected materials to make unauthorised creations to communicate with one another in the age of the internet.

In the digital era, copyright and the public interest are becoming unbalanced due to the changes of technologies and society as well as forms of speech and public interest, expansion of copyright and the emergence of online re-creation culture. Hence, it is vital to balance the conflicting interests; between the exclusive rights of the copyright owners and the public interest in copyright on the one hand, and the rights of re-creators and the public interest in online re-creation culture on the other.

⁸⁷² See chapter 3.3.

⁸⁷³ See chapter 3.

⁸⁷⁴ See chapter 3.3.2.

⁸⁷⁵ See chapter 3.3.2.

⁸⁷⁶ See chapter 3.3.3.

We need to find a proper and sensible balance.

Therefore, there is a need to change the current copyright law regime to cope with this defect. To seek a better balance, we need to move away from an author-centric view towards a view which recognises the interests of the re-creator. Online re-creators should be granted a positive right to use protected works without infringing copyright provided that certain conditions are satisfied. By the proposed right, copyright owners would be less likely to claim an infringement when there is a stronger and clearer justification for creative re-use of existing works and online re-creators would be more encouraged to resist a copyright claim. Certainly reasonable conditions must be applied to provide sensible solutions. The significance and rationale behind the conditions of the proposed positive right are supported by the perspectives of the stakeholders i.e. original authors of works and online re-creators which are analysed in chapter 5. The social norm findings together with the analyses in previous chapters contribute to the proposed solutions in this final chapter.

6.2 The Proposal

The current copyright law regime takes a copyright owner centric view rather than a user's point of view. To provide a better balance, the copyright rules should include more user-centred view by considering problems from both sides.⁸⁷⁷ The approach that this thesis proposes derives the critical analyses in all previous chapters: the status quo and copyright issues in chapters 1 and 2, the benefits of both copyright and online re-creation culture in chapter 3, analyses of pertinent copyright exceptions in chapter 4 and the social norm from empirical data findings in chapter 5.

⁸⁷⁷ Some scholars suggest or consider a “paradigm shift” or “structural shift” between a creator-centred approach and a user-centred approach. See e.g., Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005); Urs Gasser & Silke Ernst, ‘From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age’ (2006) Berkman Center for Internet & Society; David Vaver, ‘User rights’ (2013) 25 IPJ 105, 109-110); David Vaver, ‘Harmless Copying’ (2012) 25 IPJ 19.

6.2.1 The Proposal: Right to Re-create

This thesis proposes that, for a fair and reasonable balance between the conflicting interests, everyone should have a right to use existing works in making a creative re-use of such works. Such re-use therefore would not infringe copyright. The positive right, the “right to re-create”, should be granted to an online re-creator whose re-creation meets all specified criteria. All requirements must be satisfied in order to avail of the right. The new positive right is not a limitation of copyright within the body of copyright law but the right to re-create is only available to qualified re-creations, and the re-creator’s right to exploit those re-creations is limited: the entitled re-creator attains limited rights of utilisation in relation to his re-creation.

To qualify for the right to make lawful re-creation, the re-creation must (1) have creativity input and (2) the existing materials used in re-creation must be legally acquired. Once the re-creator has the right to make the re-creation, he can exploit the new work under three conditions: (A) the source and the name of the originator of the existing work are reasonably acknowledged; (B) the new work must not harm the market of the original work; and (C) the exploitation of such work is not for direct financial gain. The acquisition and scope of the positive right are delineated below.

The copyright problems of the online re-creation culture are global. The approach of implementing the new right is not particularly designed for a specific jurisdiction. This proposal should act as a universal recommendation of the best approach to achieve a fair balance between the interests of the copyright owners and/or original creators, the interests of the re-creators, and the public interest. Any country can adopt and adapt this proposal for the best of its jurisdiction as applicable to their own national laws. Hence, the concept, scope and criteria of this re-creation right can be seen as guidance for all nations.

6.2.2 Acquirement of the right to re-create

The criteria to obtain the right⁸⁷⁸ aim at a reasonable reconciliation between the rights and interests of all stakeholders, developed by the critical analysis of copyright exceptions in chapter 4 and contributed by the social norm in regard to online re-creation culture analysed in chapter 5. This proposed positive right would also provide a clear scope of what an eligible re-creator can do and cannot do. The criteria and scope of the right are discussed in detail below.

To qualify for the right to re-create, an online re-creation must satisfy two conditions: first, the re-creation has creativity input; and second, the materials used in re-creation are legally acquired.

6.2.2.1 Creativity input

The online re-creation must be a new work which involves creativity on the part of the re-creator. The new work must be different in content and convey different message or meaning such that the new work does not supersede the original work. This creativity requirement would exclude pure copying of an original work without creative element. Examples of mere copies of original works in whole or in part that do not involve new objectives and creative alteration or addition are a copy of a part of a movie or a reproduction of a picture without meaningful alteration or addition.

Human creative process involves building a new work on cumulative creativity: new works always imitate some aspects of pre-existing creations either by taking them as inspiration or including parts of them in a new creation.⁸⁷⁹ As discussed in chapter 3, creativity is beneficial to individuals and society as a whole.⁸⁸⁰ New creative works, even

⁸⁷⁸ The criteria for the acquirement of the re-creation right are set out below.

⁸⁷⁹ See chapter 3.1.1.

⁸⁸⁰ See chapters 3.1 and 3.3.

those involving parts of someone else's materials, should reasonably be protected and should not be suppressed by copyright. This requirement does not only protect human creativity but also safeguards the right to free speech of individuals for the interest of the public.⁸⁸¹ Many creative or artistic expressions are valuable for individuals and for society. Freedom of expression is an aspect of autonomy and self-fulfilment. As human beings, we are cognitive and communicative by nature. The ability to formulate and express our thoughts is valuable in self-determination and autonomy. The constraints on such ability adversely affect our individual personality and its growth. Digital speech in online re-creation also triggers debates and discussion for societal benefits.

This factor of creativity input is therefore designed to protect creativity and free speech for the benefits of individuals and society; at the same time, prevent pure copies for the interest of copyright owners of original works.

The concept of creativity input

Under copyright law, a minimum degree of creativity is required for a work to be protected.⁸⁸² In many jurisdictions, it requires merely that the work must be originated from its author: this standard adopts a very low threshold of originality to obtain copyright protection.⁸⁸³ Since the right to re-create aims to protect beneficial but unauthorised re-use

⁸⁸¹ See chapters 3.2 and 3.3.

⁸⁸² See chapter 3.1.2.1.

⁸⁸³ This level of originality only emphasises the independence from existing works such as 'sweat of the brow' under the UK copyright law (See e.g., Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 194). Copyright law of the US adopts a slightly higher level of originality (i.e. not only being independently created, the work must also involve at least some minimal degree of creativity. (*Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). The strictest standard of originality can be found in the author's rights countries where the author's effort or investment is not sufficient, but the work to be protected must be, for instance, a 'work of the mind' or a 'personal intellectual creation' where there is a personal input of creative element. In German law, a copyright work must be a "personal individual creation" or "*einpersönliche geistige Schöpfung*" (see German Law on Copyright and Neighbouring Rights 1965, Articles 2(2) (as amended July 16, 1998). The copyright law of France protects "a work of the mind" or "*œuvre de l'esprit*" (French Intellectual Property Code 1992, Articles L111-1; see also Article L112-1 "The provisions of this Code shall protect the rights of authors in all works of the mind...") All translations are from WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=5563>>.

of pre-existing works, the level of creativity for this right should be higher than those required under copyright law in some countries.⁸⁸⁴

To obtain a right to re-create, a re-creator must insert a minimum level of creativity in making the new work. The standard of the creativity level for this new right is that:

- (a) the original materials used must be ‘substantially transformed’⁸⁸⁵. The meaning *and* the content of the original work must be transformed which could be done by adding something new (e.g. new expression or some creative elements) to the original work
- (b) in a way that the re-creation is perceived by a reasonable person that it is a new work and different from the original work so that the new work does not substitute⁸⁸⁶ for the original work.⁸⁸⁷

Different countries could construe the notion of ‘substantial transformation’ and the meaning of ‘new and different work’ differently.⁸⁸⁸ For instance, Germany might

⁸⁸⁴ See *ibid.*

⁸⁸⁵ This adopts a higher level of transformation of original materials comparing to the US transformative doctrine: i.e. both meaning and content of the original must be modified. This issue is explained further below.

⁸⁸⁶ The notion of ‘substitution’ may be understood by the concept of ‘substitution in the market’ which developed in the EU competition law. See e.g. Case 27/76 *United Brands v Commission of the European Communities* [1978] ECLI:EU:C:1978:22.

⁸⁸⁷ This requirement gives weight on creativity of the new work. It is inspired by the notion of transformativeness under the US fair use doctrine; an aspect of the free use exception under German copyright law that a utilisation of an existing work can be allowed if the subsequent work is sufficiently distanced from the protected core of the original work; and the analyses of a factor of the Canadian UGC exception requiring that the second work must be new work in which copyright subsists (see chapters 4.1, 4.2.2 and 4.3). In relation to creativity input, Sag has proposed that, amongst other variables, ‘Creativity Shift’ makes a finding of fair use more likely. Creativity Shift is “an asymmetry between the works of the plaintiff and the defendant such that one is more creative and the other is more informational”. By this he means that the defendant created a new work in a different category where such shift changes the purpose of the use. The implication of the ‘Creativity Shift’ is that if the level of creativity in the latter work is higher than the former, it is more likely to be fair use. Though such an approach seems to be reasonable, problems remain on how to assess and compare the level of creativity in both works.” (Matthew Sag, ‘Predicting Fair Use’ (2012) 73(1) *Ohio St. L.J.* 47).

⁸⁸⁸ Differing national approaches to this concept are acceptable given that re-creations are made available online, and thus globally. This is due to the following reasons: (i) a detailed understanding of this concept can only be built up through case law; (ii) countries will find this easiest to achieve if they can build on existing national understandings; (iii) although this will create national differences, but because original creators are likely to bring actions under their national law then a re-creator will be able to identify which differences are relevant to their proposed re-creation; and (iv) inevitably national courts will be influenced

adopt an approach built from its free use doctrine concerning the sufficient distance from the original work used while the US might look at its transformativeness concept in the fair use defence.

It is noteworthy that the concept of creativity input for the right to re-create is not analogous to the notion of transformative nature under the fair use doctrine. The term ‘transformative use’ is a fundamental and significant constituent of fair use analysis.⁸⁸⁹ As discussed in chapter 4.1, to determine the first factor of the US fair use provision, ‘the purpose and character of the use’, courts take into consideration whether the challenged use was commercial and whether the use was transformative. A use of the original work is highly likely to be fair when it has a transformative character.⁸⁹⁰ If the subsequent work has a high transformative value, then such work can be a fair use regardless of any commercial objective.⁸⁹¹

Despite the lack of a clear definition, it can be concluded from judicial decisions that a new work is transformative if it does not merely “supersede the objects”⁸⁹² of the original work but instead “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”.⁸⁹³ The notion of ‘transformative’ may, however, permit some uses despite their non-creative reproduction of the original content.⁸⁹⁴ It does not concentrate on the creativity of the new work; instead

by decisions of other countries, which is likely to lead to a convergence of understanding over time. (I am grateful to Professor Chris Reed for this suggestion.)

⁸⁸⁹ See chapter 4.1.

⁸⁹⁰ See chapter 4.1.2.

⁸⁹¹ For instance, the parody version of the song *Oh, Pretty Woman* was decided to be transformative and therefore was found to be fair use in spite of its commercial character. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)). See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998), *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), *Mattel, Inc. v. Pitt*, 229 F. Supp.2d 315 (2002), *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), *Mattel Inc. v. Walking Mountain Productions*, 353 F. 3d 792 (9th Cir. 2003), *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006), *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). (See chapter 4.1.2).

⁸⁹² Justice Story’s words in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) which were cited by Judge Pierre Leval and recited in the *Campbell* case.

⁸⁹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁸⁹⁴ See also Rebecca Tushnet, ‘Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It’ (2004) 114 Yale L J 535, 560; Pamela Samuelson, ‘Unbundling Fair Uses’, (2009) 77 Fordham L Rev 2537, 2555-2556.

it rather focuses on the ‘purpose’ of the new work⁸⁹⁵; whether the new work performs a different function or purpose from the original work regardless of the alterations of the content of the original material. As a result, a subsequent work absent creative reworking of the original work can be qualified as transformative only if it has a function or purpose different from the original. In conclusion, “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work”⁸⁹⁶.

Thus, in an analysis of transformativeness, courts tend to focus on the transformative purpose of the challenged work rather than on whether the defendant has transformed the actual content of the original work.⁸⁹⁷ The notion of transformativeness is therefore so broad that it may cover a verbatim reproduction of copyright work involving none or minimal creativity; while some works with high level of creativity on the part of the re-creator might not be qualified as a fair use. To illustrate, the almost exact copy of the original works like thumbnail images were found to be transformative⁸⁹⁸; while satire tends not to be considered as transformative despite its creativity.⁸⁹⁹ This demonstrates that a fair use analysis is not required to concentrate on creative re-creation of the new work.

The requirement of ‘substantial transformation’ therefore differs from the concept of ‘transformative’ under the US fair use. Concerning the creativity input of the right to re-create, the re-creator must creatively modify the original content or add something to

⁸⁹⁵ This consideration might arise from the fair use origin as “an equitable rule of reason” to provide a flexible tool to allow use of existing work in the light of the purposes of copyright and fairness. (Copyright Law Revision (House Report No.94-1476, 1976)). That is why exact reproduction such as time shifting and space shifting can be fair use.

⁸⁹⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

⁸⁹⁷ From an analysis of 31 fair use cases, Reese summarises that courts decided that “the transformativeness inquiry weighed in favor of fair use, regardless of whether the court viewed the defendant as having transformed the actual content of the plaintiffs work in any way” (R. Anthony Reese, ‘Transformativeness and the Derivative Work Right’ (2008) 31 Colum. J.L. & Arts 467, 485).

⁸⁹⁸ Non-creative reproduction of photos only by reducing size and resolution by an automated process could be considered to be highly transformative if the court sees that it could provide benefits for society. See, e.g., *Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). See chapter 4.1.2.

⁸⁹⁹ A subsequent work which involves new creative elements but whose purpose of re-creation does not concern the original underlying work may not be considered as transformative. See chapter 4.4.1.1 for a fair use discussion on parody and satire distinction. (See e.g. *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006) and *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir., 1997)).

the original materials in such a way that it would change the object, meaning or message of the original work; merely transforming the purpose of the use would not be sufficient to pass this first factor and obtain the re-create right. In conclusion, this creativity criterion is narrower than the fair use transformativeness as the concept of ‘transformative purpose’ in the US law does not ‘strictly’ require ‘alteration of the content’. For instance, with regard to the creativity requirement, adding subtitles or dubbing a scene of a movie with new storylines or messages different from the underlying work in order to criticise the underlying movie or other objects may have sufficient creative input even though part of the movie is verbatim incorporated.⁹⁰⁰

With respect to the quantity of the work used, the amount of work that has been taken does not play an important role here⁹⁰¹; instead, the court should rather focus on the level of creativity as delineated above. This would justify a number of creative selections of movie scenes in making a video displaying a distinctive underlying story and creative AMVs, mashups and fanvids involving an entirety of a song.⁹⁰² Many re-creators do not merely copy the existing works but select, compile, and arrange clips, test different arrangements and choose the combination of his discretion in order to make new and different works with creativity input.

To illustrate, a written fan fiction based on some protected elements (e.g., using the names of the characters such as *Doctor Who* and *Harry Potter* and original fictional planets like *Tatooine* and *Jakku* from *Star Wars*) can pass this creativity criterion if the fan fiction retells a unique adventure in such a way that it differs from the original story. As

⁹⁰⁰ For example, a number of subtitled videos of the so-called ‘Hitler gets angry’ scene from the movie ‘Downfall’ (2004), are uploaded on *YouTube*. In general, these subtitled videos reproduce the actual scene from the movie with its soundtrack in German. The re-creators made subtitles of the scene in different languages dealing with vast topics of discussion including music, celebrities, games, movies, television series, politics, education, technological devices and food which are different from the original story. See e.g. a *YouTube* video of the scene with English subtitles entitled, ‘Hitler’s angry reaction to the iPad’, which discusses the functions of the iPad < https://www.youtube.com/watch?v=9_EcybyLJS8>.

⁹⁰¹ This differs from the US fair use doctrine that courts should take into account the third fair use factor namely “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” (see chapter 4.1).

⁹⁰² Those re-creations involved musical work would not be qualified as free use under the German exception (see chapter 4.2.2).

discussed in chapter 4.1 the third fair use factor assesses the amount and substantiality of original elements that have been used, and whether the subsequent work copied too much of the original quantitatively and qualitatively. While fan fiction may borrow merely fictional characters (whose status under copyright is controversial⁹⁰³) and/or original plots and settings from a popular work without verbatim copying, fanvids and mash-ups usually include literal copying of some scenes from a movie usually with an entirety of a sound track. However, without taking some elements from the original, the works would not be a fan fiction or fanvid and these re-creations would not exist in the cultural and intellectual domains for the benefits of the individuals and society.⁹⁰⁴ Besides, drawing a clear bright line of permissible amount of copyright work that can be used would never be possible. The permissible amount of the original work that has been taken is therefore very difficult to determine and a quantitative test might disqualify many creative re-creations. Thus, it is reasonable to discard the consideration of the amount of the work incorporated in the re-creation but take into account the amount of the creative elements contributed in the new creation.

Regarding parody, fanvids, and mashup videos, the re-creations normally provide new storylines distinct from the incorporated copyright protected work: a parody uses the underlying work for critical purposes, a fanvid involves selection and rearrangement of some audio and/or visual scenes to retell an aspect or a different aspect of the original movie/anime, and a mashup combines one or two popular works to display a unique story. Hence these re-creations are likely to be creative and qualified for this factor.

Applying the requirement of creativity input, fansub and fandub which typically involve reproducing the entirety of the original comics or anime are not likely to pass the creative criterion. This is not because of the amount of the original work that has been taken, but due to the absence of the creativity elements in the new work in such a way that the content of the original work is substantially transformed and the subsequent creation provides new meaning or messages. Typically, fansub and fandub involve automatic

⁹⁰³ See the discussion on the copyrightability of fictional characters in chapter 2.1.1.

⁹⁰⁴ See chapter 3.3.3.

and/or digital translation of the story of the protected work without meaningful alteration of the content of the original work. As a result, fansub and fandub are not ‘substantially transformed’ and would not constitute a ‘new and different work’, and consequently do not pass the creativity input factor. Also, these re-creations would probably supplant or substitute for the original in those countries which use the language involved.

Regarding the quality of the re-creation, whether the new work is of professional creation or just an amateur creatively engaged with the original materials and technology is not relevant to the re-creation right acquirement.⁹⁰⁵ What matters for this discussion is the creative elements in the new work by altering the content and meaning of the original work, but not the quality. In short, amateur speech is as important as professional speech.

In summary, creativity, for the purposes of the new right, means that the original work used in re-creation is substantially transformed in such a way that the re-creation is a new and different work distinct from the original work so that the new work does not substitute for the original work. Certainly, this criterion is not sufficient on its own; we need to take into account other factors which are discussed below.

6.2.2.2 The existing work is legally acquired.

The second factor is that the existing work used in re-creation must be acquired lawfully. This requirement is designed to protect the economic interest of copyright owner. It is derived from a factor of the Canadian exception, Section 29.21 (1)(c), which

⁹⁰⁵ The distinction between amateur/professional re-creation is not an issue here. I do not consider it fair to restrain the new creative works by their quality. From the empirical analysis in chapter 5, some original authors are afraid that if a re-creation is of professional quality then the new work might affect the market of the original products (see e.g., chapter 5.2.6). We can reasonably control this by the ‘non-commercial’ and ‘effect upon the market’ factors (discussed in detail below). If a re-creation is of professional quality but if it is for a non-profit use and does not cause any adverse effect upon the market of the underlying work, the new creation should not be hindered by the copyright law. For example, there is no reasonable ground to prohibit a father (who professionally works in a graphic studio) to create a video of his child in a supernatural adventure by re-creating some elements from action/superheroes movies. The video can be of a professional standard but it was not made for commercial, instead it was for other purposes possibly for the boy to feel special and sharing it online for other people to see the kid’s adventure. See e.g., a *YouTube* video uploaded by ‘Action Movie Kid’ <<https://www.youtube.com/watch?v=PHjvySrshVI>>.

imposes that the subsequent creator must have “reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright”. The burden of proof regarding this factor should be on the re-creator as he must be able to show that the existing works used in his re-creation are acquired without infringing copyright and it would also be difficult for the original owner to prove otherwise.

To illustrate, re-creators of mash-ups or parody videos must legally obtain the pre-existing works, for instance, by buying an official DVD of the movies, not an infringing copy. Then, they can make interim copies of the movies by ripping it onto their computers (digitally shifting format of the original materials) so that they can produce the re-creations. That ripping is legal in some countries under private copying or private uses exceptions but is an infringement of copyright in some others. Fundamentally, making copies of existing materials in order to produce a re-creation should be lawful under copyright law, as long as the starting material is legally acquired, otherwise re-creations would always be infringing.

6.2.3 The limits of the exploitation of the right to re-create

Once a re-creation satisfies the two factors delineated above, the re-creator will have the right to re-create without infringing copyright of the underlying original works. The right granted is limited in scope. The re-creator will have the right to re-create and exploit his new work without infringing copyright of the underlying work provided that three conditions are met: (i) the source and the name of the originator of the existing work are reasonably acknowledged; (ii) the exploitation does not harm the market of the original work; and (iii) the exploitation of the re-creation is not for direct financial gain.

6.2.3.1 The source and the name of the originator of the existing work are reasonably acknowledged.

The source (i.e. the name of the existing work used for re-creation) and the name of the originator (i.e. the author, performer, maker, broadcaster or copyright owner⁹⁰⁶) of the work used are mentioned where reasonable in the circumstances.⁹⁰⁷ For example, if a re-creation is made based on a book, the title and the author of the book must be acknowledged. However, if the re-creation used protected materials from a film and there are multiple creators of the film, copyright owner of the film must be recognised. Where the incorporated film involves multiple authors with complex copyright ownership structures, the re-creator should be able to identify and acknowledge the name of a producer, publisher, or broadcaster of the film.

This requirement safeguards the author's moral right to attribution, the right to be named as the original creator of the work.⁹⁰⁸ It also prevents confusion as to who the creator of the original work is and who re-creates the work. This factor helps the audience of the re-creation to be able to distinguish an online re-creation from an original work and recognise that the subsequent work does not associate with the original owner and/or original products.⁹⁰⁹ Moreover, this requirement helps promoting and advertising the original creations.⁹¹⁰

⁹⁰⁶ This factor states that, when the source is given, it is sufficient to mention the name of the original author *or* the name of the copyright holder as the originator of the work used. This is due to the concern that, some original works are co-created by a number of people but owned by one big company, in that case, the name of the copyright owner of the existing work would be easier to discover while the names of the original creators could be an ordeal to identify.

⁹⁰⁷ The Canadian exception, Section 29.21, also requires that “the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so”. (See Section 29.21(1)(b) of the Canadian Copyright Act.) The Canadian Copyright Act grants statutory protection for the right to attribution (Section 14.1 of the Canadian Copyright Act) reflecting the French influence of moral rights in Canadian law.

⁹⁰⁸ See chapter 2.3.

⁹⁰⁹ There are some concerns from the original creators' side that people may be confused as to who re-create the re-creation (see chapters 5.2.3 and 5.2.6).

⁹¹⁰ This is for the economic benefit of the original authors and copyright owners of the work used in re-creation.

This factor is coherent with the social norm found in the previous chapter. As seen in chapter 5.2.3, most of the original authors and online re-creators participated in the interviews think that an original creator should be acknowledged by name when his or her work is used for online re-creations. Some participants gave their views that, not only crediting the original creator, online re-creator should also help advertise the original work e.g. by recognising the name of the original work or putting reference or link to the original product. It should also be very clear that the re-creation is an unauthorised product or is not associated with the original creator or copyright holder in order to protect the original creator. Lastly, acknowledging the name of the original author also shows the intent of the online re-creator that they are not trying to pass off the original product as their own.

It is reasonable to protect the attribution right. This requirement would be consistent with national law of some countries where protection for moral rights is crucial such as Germany and France, while it might not be as important in another such as in the US. In that case, that country may opt to discard this requirement. However, it is recommended that any jurisdiction adopts this factor since it does not merely protect the moral right but also prevent confusion as to the source of the re-creation and help advertise the original work.

6.2.3.2 The exploitation of the re-creation does not harm the market of the original work.

The second condition of the exploitation of the right is that the new creation must not be exploited in a way that it causes an adverse economic impact on the antecedent work. This requirement significantly protects the economic interest of the copyright owner. It is also reasonable to allow an unauthorised use of a protected work if the subsequent work does not harm the market of the antecedent work.

To restrict copyright power, the interests of the copyright owner need to be reasonably protected. This factor provides reasonable protection of the economic interests

of copyright holders in the balance of the conflicting rights and interests. It is therefore important to examine some important legal concepts with respect to the protection of the interests of copyright holders specifically economic interests: the three-step test provision of the TRIPS agreement and the fourth factor of the US fair use defence.

To prevent unreasonable harm on the market of the original work, it is useful to study the so-called three-step test⁹¹² under the international standard: Berne Convention, TRIPS Agreement, WCT and WPPT Treaties. Under the international obligation, limitations or exceptions to exclusive rights must be in accordance with the so-called three-step test that “[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”⁹¹³.

Relating to the protection of an original work, the second requirement of the three-step test states that a limitation or an exception must “not conflict with a normal exploitation of the work”. The WTO dispute settlement panel has held that a use of a work conflicts with a normal exploitation of that original work if uses of the work pursuant to the limitation or exception “enter into economic competition with the ways that right holders normally extract economic value from that right ... and thereby deprive them of significant or tangible commercial gains.”⁹¹⁴ This implies that ‘normal exploitation of the work’ may arise from actual or present market and potential or future market if the right holder may *normally* license the work and make *significant* commercially gains from it.

With respect to another condition that limitations or exceptions must not “unreasonably prejudice the legitimate interests of the right holder”, the WTO panel did

⁹¹² There is very little guidance to interpret this provision and there is only one WTO dispute which required the interpretation of the article. The WTO case was concerning two copyright provisions of the US law which permitted radio and television broadcasts in public places (e.g. shops, bars, and restaurants) under certain conditions without royalty fee payment. The dispute concentrated on the compatibility of the exemptions with Article 13 of the TRIPS Agreement. To reach its conclusion, the WTO dispute settlement panel set out some guidance for the three-step test interpretation which is discussed herein. See WTO Panel decision (2000), case WT/DS160.

⁹¹³ The language of the Article 13 of the TRIPS Agreement is substantially similar to the term used in Article 9(2) of the Berne Convention (1971) which only applies in regard to the right to reproduction.

⁹¹⁴ WTO Panel decision (2000), case WT/DS160 para 6.182.

not clearly define its scope. From the WTO decision, the notion of the term ‘interests’ covers economic and non-economic advantage or detriment.⁹¹⁵ Furthermore, the panel provides that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”⁹¹⁶

Another pertinent concept of law protecting the interests of copyright holders is the fourth factor under the US fair use doctrine, “the effect of the use upon the potential market for or value of the copyrighted work”⁹¹⁷. This fair use factor⁹¹⁸ seems to be in accordance with the above mentioned conditions of the three-step test.

According to the US law, the market harm under the fourth factor of fair use occurs when the second work substitutes or supersedes the use of the original.⁹¹⁹ For this statutory factor of the US, courts must consider “not only the primary market for the copyrighted work, but [also] the current and potential market for derivative works”⁹²⁰. If the subsequent use causes substantially adverse impact on potential market for the original work, the fair use test, the effect of the use upon the potential market for or value of the copyrighted work, would weighed against such use.⁹²¹ The ‘potential market’⁹²² considered for this fair use factor must be the market that a reasonable copyright holder

⁹¹⁵ *Ibid* para 6.223.

⁹¹⁶ *Ibid* para 6.229.

⁹¹⁷ Section 107 of the U.S. Copyright Act (1976).

⁹¹⁸ This factor is important to protect the rights of the copyright owner though it “must almost always be judged in conjunction with the other three criteria [of fair use]” (H.R. Rep. No. 83, 90th Cong., 1st Sess. 33, 35 (1967)). Indeed, all fair use criteria “are to be explored, and the results weighed together, in light of the purposes of copyright” (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

⁹¹⁹ Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1125; The court in *Fisher v Dees* stated that “the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it *fulfills the demand* for the original.” (*Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

⁹²⁰ *Twin Peaks Productions v Publications Intern.*, 996 F. 2d 1366, 1377 (2nd Cir., 1993). See also, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

⁹²¹ *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 569 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

⁹²² The Canadian exception, Section 29.21 of the Canadian Copyright Act, also requires that the new work must not have “a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market”. However, the definition and contour of the term ‘potential market’ as well as an explanation of what the law means by the ‘a substantial adverse effect’ are not given. (See Chapter 4).

would normally enter or develop for licensing their original work.⁹²³ Importantly, the fact that the re-creator has not paid royalty fee should not be considered a significant economic effect; otherwise it would hinder the utilisation of the fair use defence and this factor would always be in favour of the copyright holder.⁹²⁴ For instance, in the *Harry Potter Lexicon* case⁹²⁵, the defendants attempted to publish a reference guide to the *Harry Potter* fictional universe called the *Harry Potter Lexicon*. The Lexicon involved a number of portions of the original *Harry Potter*'s books written by JK Rowling which were not consistently transformative. Consequently, the court found that that the Lexicon was infringing and its publication was deterred. Nevertheless, the court commented that the Lexicon was unlikely to serve as a market substitute and therefore not likely to impair sales of the *Harry Potter* series because “reading the Lexicon cannot serve as a substitute for reading the original novels; they are enjoyed for different purposes”.⁹²⁶

In 2013, there was a fair use case concerning copyright infringement and appropriation art, *Cariou v. Prince*⁹²⁷. The plaintiff, Patrick Cariou claimed that a well-known appropriation artist, Richard Prince, infringed his copyrights in a series of Rastafarians' portraits and landscape photographs named “Yes Rasta”. Prince made a series of paintings and collages, known as “Canal Zone” which incorporated and altered Cariou's photographs. Prince argued that his use of Cariou's Yes Rasta was

⁹²³ The fourth factor of the fair use doctrine will favour the defendants if they can “show a ‘traditional, reasonable, or likely to be developed’ market for licensing [their] work”. (*Ringgold v. Black Entertainment Television, Inc.*, 126 F. 3d 70, 81 (2nd Cir., 1997)); “The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.” (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994)); Clearly, the US fair use law recognises that a ‘potential market’ also exists for the licensing of the derivative work. (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 568 (1985) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417, 451 (1984))).

⁹²⁴ William Fisher, ‘Reconstructing the Fair Use Doctrine’ (1988) 101 Harv. L. Rev. 1659, 1670-1672; Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1124.

⁹²⁵ *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (2008).

⁹²⁶ The court also noted that the market for reference guides to the *Harry Potter* novels is not exclusively for JK Rowling to exploit or license regardless of the commercial success of the original books “because a reference guide to the *Harry Potter* works is not a derivative work; competing with Rowling's planned encyclopedia is therefore permissible” and that “[t]he market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one.” (*Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (2008)).

⁹²⁷ *Cariou v. Prince*, 714 F. 3d 694 (2nd Cir., 2013).

transformative and entitled to fair use defence. The Appeal Court reached a conclusion that most of Prince's artworks were not infringing.⁹²⁸ For the fair use analysis, the economic impact of Prince's artworks on Cariou's photographs is interestingly analysed by the Appeal Court. The court decided that Prince's artworks do not "usurp"⁹²⁹ the market of Cariou's photographs because "Prince's audience is very different from Cariou's, and there is no evidence that Prince's work ever touched – much less usurped – either the primary or derivative market for Cariou's work." The fact that the subsequent works were economically successful with the sales of more than two million dollars was irrelevant to the market harm analysis. The court concluded that there is a lack of evidence demonstrating that anyone will not purchase Cariou's original works after Prince's artworks entered the market. Hence, the Prince's Canal Zone artworks did not cause harm to the potential market of Cariou's works. Notably, the more creative the new work is, the less likelihood that it substitutes the original and thus usurps the market of the original.

The concept of 'market harm' for the right to re-create

From the above analysis and to achieve the balance for the purpose of this thesis, the harmful impact upon the economic interests of the copyright holders can be conceptualised that the new work must not enter into economic competition with the original work in the market that the original owner normally extract economic value and as a result deprive them of significant financial gains or cause an unreasonable loss of income. The 'normal market' means current and potential market in which the right holder may normally license the work and significantly commercially benefits from it.

⁹²⁸ The Appeal Court found that twenty-five of Prince's works were not infringing because they "manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative." However, the court decided that Prince's remaining five artworks were not adequately different from Cariou's original works, but was uncertain whether they present a "new expression, meaning, or message". (*Ibid*, 706-711 (2nd Cir., 2013) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

⁹²⁹ *Ibid* (citing *Blanch v Koons*, 467 F.2d 206, 258 (2nd Cir, 2006) and *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004)).

The interpretation and consideration of the impact on the economic interests of the copyright owners should take into account the balance between the conflicting parties – not concentrating on the copyright side. For instance, as previously stated, the fact that the right holder does not gain royalties from the re-creator should not be considered as a *significant* or *unreasonable* economic loss; otherwise, this second factor of the right to re-create would make the right worthless as it would always be in favour of the copyright holder.

An online re-creation should not be prohibited if there is no harm or competition to the normal market of the original work.⁹³⁰ This market harm condition is crucially related to the first factor to qualify for the right to re-create, creativity input. If the re-creation in dispute is creative and different from the original work such that it does not substitute or supersede the original work, it is less likely that the subsequent work will compete in the market of the original.

Market harm: Parody and creative fan works

In the example of a parody and satirical work, these works of criticism doubtfully supplants or supersedes the original and harm the potential market for the original if they differ in content and purpose from the incorporated materials; besides, the market of the re-creations are not the same as the original products.⁹³¹ However, an original author might claim that some parody or negative criticism may diminish the market value of the original work or cause loss of income to the right holder. Even if such criticism is well-

⁹³⁰ See also, David Vaver, 'Harmless Copying' (2012) 25 I.P.J. 19.

⁹³¹ Regarding to the US fair use analysis, transformative work such as parody is less likely to cause harm on the potential market of the original products since they are not likely to supplant or supersede the original. Thus, the right holders cannot restrict others from entering into the market of transformative uses of their works. (*Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000), (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994)); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 567-69 (1985); *Castle Rock Entertainment v. Carol Publishing Group*, 150 F. 3d 132, 145 n.11 (2nd Cir., 1998); *Ty, Inc. v. Publications Intern. Ltd.*, 292 F. 3d 512, 521(7th Cir., 2002); *Twin Peaks Productions v. Publications Intern.*, 996 F. 2d 1366, 1377 (2nd Cir., 1993); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1274 (11th Cir. 2001).).

founded, this type of market harm should not be considered as an obstruction to the right to re-create.⁹³² Regarding this matter, it is worth noting that:

“‘Destructive’ parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author. By contrast, alleged ‘parodies’ that merely displace the market for original works create economic disincentives that frustrate the purpose of copyright law.”⁹³³

In a parody case, the US court in *Fisher v Dees* stated that:

“[T]he economic effect of a parody... is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.”⁹³⁴

In summary, the normal market of the original should only be considered to be impaired when the exploitation of the re-creation substitutes or supersedes the original use. Any concerns of the original creators that alterations to original work could damage their reputation would be dealt separately by moral right protection. This issue is explained below in part 6.2.4.

Similar to parody, fan fictions are unlikely to serve as a market substitute for the original stories they are based on.⁹³⁵ For example, *Harry Potter* fan fiction cannot replace the original *Harry Potter* novels and reading a fan fiction story involving *Harry Potter*

⁹³² Pierre Leval, ‘Toward a fair use standard’ (1989) 103 Harv. L. Rev. 1105, 1125.

⁹³³ Note, ‘The Parody Defense to Copyright Infringement: Productive Fair Use after *Betamax*’ (1984) 97 Harv L Rev 1395, 1411-1412 (citation omitted).

⁹³⁴ *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

⁹³⁵ Rebecca Tushnet, ‘User-Generated Discontent’ (2008) 31 Colum. J.L. & Arts 497, 672; Patrick McKay, ‘Culture of the Future’ (2011) 24 Regent U L Rev 117, 121-122.

universe will not decrease the demands for the original products the same way that an encyclopaedia of a popular work will not be a substitute for the original work.⁹³⁶

In this regard, Reynolds commented that:

“It is likely... that very few transformative works will compete, at all, with the market for the original work. Individuals looking to buy one of the games in the Halo series to play will not, instead, purchase DVDs of machinima set in the Halo world. Someone who wants to read the original Harry Potter books will not be satisfied with one of the myriad Harry Potter fan fiction creations.”⁹³⁷

With respect to fan-based creation and market harm, Liebler nicely puts that:

“By using multiple properties, the fan creator is more and more likely to have at least one of the copyright owners object, but the multitude of different influences is more likely to make the work transformative and less likely to serve as a market substitution for any of the starting works.”⁹³⁸

Besides, as stated above, a fan author must make clear that his re-creation (e.g. fan fiction, fanvid and fan film) is not made by the original author but is a fan-made version such that the audience of the original work and the fan work would not be confused as to who produced the subsequent work. Nevertheless, the re-creator cannot exploit his re-creation if (a) the original owners of the work used can prove that the subsequent work acts as a substitute of the original product: for example, if the original creator can prove that the fan version becomes so popular that the audience prefers it, and due to that, does not purchase the one produced by the original writer; or (b) if the original owner can also

⁹³⁶ The court in *Warner Bros. Entertainment Inc. v. RDR Books* considered that the Harry Potter Lexicon is unlikely to act as a market substitution and harm the market of the Harry Potter books because “reading the Lexicon cannot serve as a substitute for reading the original novels; they are enjoyed for different purposes”. (*Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (2008)).

⁹³⁷ Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”*: *Canadian Copyright and the Digital Agenda* (Irwin Law 2010) 409.

⁹³⁸ Raizel Liebler, ‘Copyright and ownership of fan created works: fanfiction and beyond’ in Matthew David and Debora Halbert (eds), *The Sage Handbook of Intellectual Property* (SAGE 2015) 396.

prove that the re-creation deprives him of significant monetary gains or cause unreasonable loss of income.

Market harm: Fansubs, fandubs and scanlation

Fansubbs, fandubs and scanlation typically involve copying or reproducing a whole episode of an anime or manga or an entire movie with an absence of a meaningful creative input. These re-creations are likely to replace the original work and consequently cause a negative impact on the normal market of the earlier work. Even if the original product has not been introduced in that certain country but the market of that product already exists and these re-creations could impair the sales of the original work. To illustrate, a person who has already read a scanlation version of a manga may be less interested in buying the official production once come to the market in that country, a scanlation version of a manga or a fansub of an anime could be seen as a replica or counterfeiting product, not a creative re-creation that should be protected for free speech and for the benefits of society.

Possible market endorsement, not harm

In some cases, instead of harm to the market, a creative re-creation may cause positive economic effect on the market of the underlying original work.⁹³⁹ Some original creators interviewed recognise the benefits of online re-creations particularly for building fan community to support the consumer base of their works. In addition, most original creators think that written fan fictions are acceptable provided that some conditions are met: e.g. those fan fictions are transformative and do not involve financial gains.

⁹³⁹ In *Suntrust*, a fair use case, the US court decided that the parody novel, *the Wind Done Gone (TWDG)* was not likely to cause economic harm to the market of the underlying original book, *Gone with the Wind (GWTW)*.⁹³⁹ The court found that the evidence showing that the alleged infringing work was not a market substitute for the original best-selling novel and the publication of the parody novel was most likely to boost the sales of the original work. (*Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1275 (11th Cir. 2001)).

Some scholars find that some re-creations could cause a positive effect upon the market of the original creation. Fan fiction and other fan works are good examples of endorsement, not detriment to the original work.

Regarding doujinshi or Japanese fan-made comics⁹⁴¹, Foster suggests that:

“[D]oujinshi do not necessarily steal profits from the original, but enhance the market for the original by causing customers and fans that enjoy the parodies to seek out the original. It is perhaps for this reason that copyright holders and the authors of the original works have generally let doujinshi authors continue.”⁹⁴²

Liebler recognises that:

“As stewards of texts, fans see their interests as sometimes superseding the interests of authors and owners to keep works alive. Authors and owners do decide to permanently or temporarily end works, usually for reasons of commercial viability; fan works help to keep interest going for official releases that often have pauses – either temporary or permanent.”⁹⁴³

Similarly, as Tushnet puts it:

“Fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.”⁹⁴⁴

However, even if an online re-creation is not actually causing harm to the market of the original work, some companies are actively prohibiting creative re-use of their materials.⁹⁴⁵ This second factor would therefore also provide a reasonable protection for

⁹⁴¹ Doujinshi are often produced by amateurs. Mehra describes doujinshi as “Japanese manga (roughly, comic books or graphic novels) written by authors using the well-known characters of another, more famous, author”. (Salil Mehra, ‘Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?’ (2002) 55 Rutgers L. Rev. 155, 156).

⁹⁴² Mariko Foster, ‘Parody’s Precarious Place: The Need to Legally Recognize Parody as Japan’s Cultural Property’, (2013) 23(2) *Seton Hall Journal of Sports & Entertainment Law* 313, 315.

⁹⁴³ Raizel Liebler, ‘Copyright and ownership of fan created works: fanfiction and beyond’ in Matthew David and Debora Halbert (eds), *The Sage Handbook of Intellectual Property* (SAGE 2015) 393-394.

⁹⁴⁴ Rebecca Tushnet, ‘Legal Fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L.A. Ent. L. Rev 651, 669 (citation omitted).

⁹⁴⁵ Regarding this, Tushnet interestingly comments that:

re-creations that are not harmful to the economic interests of the copyright holder. Together with other criteria, non-harmful re-creations should be encouraged.

In conclusion, to achieve a fair balance, this factor of economic impact is essential. To obtain the right to re-create, the re-creation in question must not enter into economic competition with the original work in the normal market where the original owner normally gain financial interests, and consequently, the new work must not deprive the copyright holder of significant monetary gains or cause unreasonable loss of income. This economic impact factor closely links to the first factor of sufficient creative input; the more creative the re-creation is, the less likelihood that it supplants the original and the less harm on the normal market of the original work becomes.

6.2.3.3 Exploitation of the re-creation is not for direct financial gain.⁹⁴⁶

From the social norm analysed in chapter 5.2.4, the original authors and online re-creators participated in the interviews think that an online re-creator should not gain money by selling his re-creation without permission from the owner of the original work and benefit sharing or royalty payment. However, if a direct money gain from a re-creation is allowed under condition that any profit must be shared with the original author, this does not seem fair for the original owner as he would lose his control over an economic exploitation of his intellectual work and it could cause a loophole for free riders to financially benefit from someone else's work particularly when the original creator

“If fan fiction has no measurable adverse market effect, and may strengthen fan commitments, why would a corporation seek to restrict its production? Corporations that attack fan fiction may have confused copyright law with trademark law. These corporations mistakenly fear that failure to contest any use of their creations would weaken their claims against possible commercial appropriation. Although others may believe fan fiction causes economic harm, the most likely reason corporations have attacked fan fiction is almost certainly a desire to control how their characters are portrayed.” (Rebecca Tushnet, ‘Legal Fictions: Copyright, Fan Fiction, and a New Common Law’ (1997) 17 Loy. L.A. Ent. L. Rev. 651, 674 (citations omitted)).

⁹⁴⁶ This requirement is not a prerequisite to obtain the right because the commercial character of an online re-creation can be changed: for example, when a re-creation is first made it may not be made for sale, but later, it may be sold, and vice versa.

does not have sufficient resources to claim for a profit sharing. Therefore, it seems fair and reasonable to allow creative re-working of existing materials if the copyright owner does not lose anything substantially and the re-creator does not directly gain from the copyright work financially.

The re-creator has the right to re-create against any person and against the copyright owners of the incorporated original works, and so making the new work does not infringe. However, any exploitation which involves making direct financial gain will constitute a copyright infringement. In other words, a re-creator does not have the right to make money directly from the re-creation unless he asks for permission or obtains a licence from the copyright owner through the normal licensing scheme.

In a brief summary, since the re-creation involves someone else's materials without permission and compensation, the re-creator should not be granted a right to gain financial benefits directly from his re-creation.

Financial gain

Some countries adopt copyright exceptions to allow fair utilisation of protected works imposing that such use should not or must not be commercial in nature.⁹⁴⁷ Nevertheless, the terms 'commercial use' and 'non-commercial use' are not clearly defined especially in the online context.⁹⁴⁸ Creative Commons attempted to explore understandings of the two terms among internet users when used in the context of online content.⁹⁴⁹ However, the Creative Commons' study could not find a consensus of what constitutes 'non-commercial use'⁹⁵⁰: both online creators and users tend to consider uses

⁹⁴⁷ See e.g., the US fair use doctrine and the Canadian exception for user-generated content in chapters 4.1 and 4.3.

⁹⁴⁸ See e.g., Stavroula Karapapa, *Private Copying* (Routledge 2014).

⁹⁴⁹ Creative Commons, 'Defining Noncommercial' (*Creative Commons*, 26 April 2014) <https://wiki.creativecommons.org/wiki/Defining_Noncommercial#From_the_Executive_Summary>.

⁹⁵⁰ The study report concludes that "...perceptions of the many use cases measured in this study suggests there is more uncertainty than clarity around whether uses of online content are commercial or noncommercial in nature." and that "[t]his study is the first known empirical investigation of perception of

that gain money or involve online advertising to be commercial, while uses for charitable purposes are less commercial but not decidedly non-commercial.⁹⁵¹ Since people tend to perceive the concept of ‘commercial’/‘non-commercial’ differently, the empirical questions designed for this thesis (as seen in chapter 5) therefore avoid using those terms.

From the study in chapter 5, most interview participants do not think it is acceptable for an online re-creator to make money directly by selling their re-creation without asking for permission and/or benefits sharing. Direct income from a re-creation in exchange of allowing someone to consume the re-creation by selling the re-creation can easily be considered as making gain from the incorporated materials. This is not acceptable according to the social norm as previously stated. This right therefore does not allow such monetary gain in order to prevent free-riding and for-profit exploitation of others’ works without permission and fair compensation.

The case of making money from selling the work is rather straightforward. Indirect financial gains from re-creations such as by donation and advertising, on the other hand, are more complicated. Most of the original creators viewed that earning money from

the meaning of ‘noncommercial use.’ As such it is best seen as a jumping off point for further research rather than the end of the inquiry.” (Creative Commons, ‘Defining “Noncommercial”: A Study of How the Online Population Understands “Noncommercial Use”’ (14 September 2009) <http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf>.

⁹⁵¹ Interestingly, the study finds that:

“More than a three-quarter majority of [online creators and users] agrees that it is ‘definitely’ a commercial use if money is made from the use of a work in some way, including directly from the sale of a copy of a work, or from online advertising around or in connection with the work, where the user makes money from the ads. Further, 6 in 10 of all respondents evaluate uses in connection with online advertising as ‘definitely’ commercial, even if only enough money would be made to cover the cost of website hosting. More than 6 in 10 creators and users also consider use by a not-for-profit organization ‘definitely’ commercial.

...

Creators and users also tend to agree that use for a charitable purpose or to promote a social or public good is noncommercial, unless the use is by a for profit organization. However, of all the specific use scenarios measured in this study, both creators and users demonstrate the least amount of agreement on this one. Not even charitable use by a not-for-profit organization is rated “definitely” noncommercial by a majority of either group.” (Creative Commons, ‘Defining “Noncommercial”: A Study of How the Online Population Understands “Noncommercial Use”’ (14 September 2009) <http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf> 74-75).

donations and from advertising are not acceptable because they are means of gaining financial benefit from the incorporated original content. The perspectives of the online re-creators toward indirect gain are more lenient than those of the original authors. Most of the re-creators think that an online re-creator can gain money from donations to support re-creation. Their points of view seem to be that earning money from donation is more acceptable than financial gain from advertising: gaining advertising revenue from online re-creations should involve remuneration to the original owner of existing work.

This finding suggests that the right to re-create should allow limited indirect financial gain (e.g. donation and advertising). How much to allow is more difficult to assess.

An online re-creation does not need a monetary incentive.⁹⁵² Generally people re-create due to their inner drives not for financial interests. Thus paying or reimbursing for re-creators' time investment is not necessary. However, in the re-creation process, re-creators may need money to finance the cost of re-creations. Since the culture of online re-creation is beneficial and should be reasonably supported and protected⁹⁵³, the law should permit indirect financial gains from re-creation. This is to allow some re-creators to raise a reasonable amount of funding so that they can be able to make creative new works such as virtual worlds and fan films which usually require monetary investment. Besides, online advertising has become today's normal internet marketing. It is also predictable that this practice of online marketing will be developed in the future. Prohibiting re-creations for such indirect income will outlaw most creative re-creations distributed online. Moreover, the limit of the exploitation of the re-creation right that the new work must not adversely affect the market of the original work sufficiently safeguards the economic interests of the copyright owner. Deterring others from using an existing work without any harmful interest is not fair. It is therefore reasonable if online re-creators gain money by donation

⁹⁵² The general purposes of re-creation are not for financial benefits but for free expression, self-fulfilment and criticism as stated in chapter 3.3.3.1 and evidenced by the empirical data analyses in chapter 5.2.1. Thus there is no need to encourage re-creation by commercial interests.

⁹⁵³ See chapter 3.3.3.

or advertising from their re-creation to certain extent provided that it does not exceed the costs of making the re-creation.⁹⁵⁴

Therefore, for the interest of society and re-creators, indirect gain from re-creations should therefore be allowed if the gain is less than the cost of re-creation. Where indirect financial gain such as by donation and advertising revenue exceeds that amount, the re-creator should share its gains or make payment to the copyright owner of the original by asking for permission or through normal licensing scheme, or should cease accepting donations or advertising.

6.2.4 Moral right concern: protection of the original author's reputation

One major concern raised by the original authors in the empirical research in chapter 5 is the content of re-creations. Many original creators disapprove of any alteration of their original content e.g. using their fictional characters in a way that involves offensive materials, for example sexual content or something unpleasant for children if the audience of the original work are children. Many of them also are concerned about 'slash' fictions which can be in any forms of materials including written works, videos, and virtual worlds that involve explicit sexual relationships between fictional characters usually of the same sex because they worry that 'slash' can give a bad image to the original work and author and may harm the audience of the original work who consume such re-creations.⁹⁵⁵

⁹⁵⁴ Indirectly minimal earnings or financial gain sufficient to recover the cost of running a website or making a re-creation by advertising or donation should be allowed. However, such cost does not include time investment.

⁹⁵⁵ From chapter 5, many original creators participated in the interviewed disapprove of any modification of their original elements such as fictional characters in such a way that they involve offensive materials and sexual relationship especially between characters of the same sex. Harmful contents that they are worried about are for example pornography, erotica or something bad for children (if the audience of the original work is children) because:

- (i) They do not want their readers to be exposed to the kind of content they disapprove of.
- (ii) Many creators are concerned that sometimes most readers or consumers of their works are children who are not ready to be exposed to adult materials.
- (iii) it could harm the reputation of the original work and creator, and

This issue is relevant to the protection of the moral right to integrity.⁹⁵⁶ The integrity right allows the author to object to any distortion, mutilation or modification of his work which would prejudice the author's honour or reputation. Generally, following the Berne formulation, the author must demonstrate that the claimed distortion is prejudicial to his honour or reputation. The formulation and application of the integrity right vary in national laws. The protection in this matter should therefore be subject to national law of each country. In the countries that grant integrity right to the authors such as the UK⁹⁵⁷ and Germany⁹⁵⁸, the author of the original work can exercise his right to integrity according to the internal laws without restriction by the right to re-create.

Nevertheless, in considering an infringement of integrity right regarding a re-creation, this thesis strongly suggests that the court should balance the protection of the author's reputation with the right to free expression of the re-creator and the wider public interests. If an original author was to use the integrity right to prevent re-creations such as a parody work, free speech of the parodist and the interest of the public in benefiting from that parody would be affected: as a result, strict and strong integrity right protection could easily obstruct the utilisation of the right to re-create. To fairly balance the conflicting rights and interests, this thesis therefore recommends that the question whether the use of original work in question is derogatory to the author's honour or reputation should not be depending on the opinion of the author himself; instead, the question should be considered by the reasonable person whether the re-creation was prejudicial to the reputation of the author, not from the author's view.

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- (iv) people may confuse the association of online re-creation with their official products and brands.

⁹⁵⁶ Article 6bis of the Berne Convention safeguards two moral rights: attribution and integrity rights (see chapter 2). The right to attribution is reasonably protected within the limited scope of the exploitation of the right to re-create (see chapter 6.2.3).

⁹⁵⁷ See section 80 of the UK CDPA 1988 entitled 'Right to object to derogatory treatment of work'.

⁹⁵⁸ Article 14 of the German Copyright Act provides that "the author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work." (Translated by Ute Reusch at <http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html>).

6.2.5 Compliance with International Standard

In regard to the international obligation under the Berne Convention, TRIPS Agreement, WCT and WPPT Treaties particularly the three-step test, the right to re-create conforms to the international standard. The requirements for any limitations or exceptions to copyright are that (i) the limitations must be certain special cases (ii) which do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the right holder.⁹⁵⁹ The right to re-create can be considered as a limitation to the exclusive rights granted under copyright law, thus should be in compliance with the three-step test.

The first condition imposes that any limitations to copyright must be “certain special cases”. The essence of this requirement is that the limitation be clearly defined and narrow in scope.⁹⁶⁰ According to the WTO’s interpretation, “there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.”⁹⁶¹ Although the right to re-create encompasses various types of re-creations on any platform and in any medium, its scope is limited and its provision is clearly defined. It should therefore be treated as a certain special case. Certainly, this positive right is more limited in scope than the US fair use defence.⁹⁶² Besides, the first requirement of the three-step test needs to be interpreted solely to mean that the exception or limitation is clearly defined and narrow in its scope and reach, otherwise the human rights and public interest elements are not respected particularly in the age of the internet where digital content can be created and re-created in various nature.

⁹⁵⁹ Article 13 of the TRIPS Agreement.

⁹⁶⁰ WTO Panel decision (2000), case WT/DS160 paragraphs 6.102-6.113.

⁹⁶¹ WTO Panel decision (2000), case WT/DS160 paragraph 6.108.

⁹⁶² There is a concern that the US fair use law is not compliant with the first condition of the three-step test mandated by the international treaties. See e.g., Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005) 270-273; Barry Sookman and Dan Glover, ‘Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations’ (2009) 22 I.P.J. 29, 43-46; Margot Patterson, ‘The Copyright Modernization Act and UGC’ (2012) 21(3) Entertainment, Media & Communications 1.

The following two conditions of the three-step test (i.e. the limitations do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder) aim to protect the rights and interests of the copyright owner. As discussed above in chapter 6.2.3.2, the new right to re-create should be in accordance with the two criteria. Under the re-creation right, a re-creator who is entitled of the right can use existing copyright protected works to make new creation without authorisation and without remuneration to the right holder. The positive right does not unreasonably prejudice the legitimate interests of the author since the original creator's interests are sufficiently and reasonably safeguarded by the criteria to obtain the right and the limits of the exploitation of the right (i.e. the online re-creation must be a new work which involves creativity on the part of the re-creator, not pure copying of the protected work; the existing work used in re-creation must be acquired lawfully; the source and the name of the originator of the existing work are reasonably acknowledged; the re-creation does not harm the market of the original work; and the exploitation of the re-creation is not for direct monetary gain). This is a better balance between the rights of the re-creators, the public interests particularly social and individuals' benefits of human creativity and the fundamental right to freedom of speech, and the interest of the copyright holders and/or original creators of works.

6.3 Conclusion

As a result of the balance between the interests of the original authors and copyright owners, the rights of the creative re-users and the public interest, the notion of the right to re-create is that:

1. Everyone has the right to make his re-creation using existing protected materials without infringing copyright of the incorporated works provided that the re-creation has creativity input and the existing work used is legally acquired.

2. This right allows the re-creator to exploit his re-creation under the following conditions:
 - a. the source and the name of the originator of the existing work are reasonably acknowledged;
 - b. the re-creation does not harm the market of the original work; and
 - c. the exploitation of the re-creation is not for direct financial gain. Making money directly from the re-creation therefore means possible copyright infringement of the underlying original work.

The right to re-create reasonably recognises the interests of the copyright holders and original creators of the underlying work. This is consistent with the social norm regarding online re-creations concluded in chapter 5.

Establishing the new right will achieve a better balance⁹⁶³ than improving existing copyright exceptions or implementing a new exception for online re-creation. The current copyright regime operates with a copyright-centric view and to achieve a better and more reasonable balance between the conflicting rights and interests, we need to shift the focus on copyright owners to a more consideration on creative subsequent creators. The right to re-create is not a balancing exercise: to obtain the right, all conditions must be satisfied in order to be entitled to the right. A clear re-creation right can avoid the uncertainty problem as found in some copyright exceptions.⁹⁶⁴

⁹⁶³ In regard to the Canadian copyright law, Reynolds proposes that “the fair dealing defence should be amended to incorporate a right to engage in transformative use of copyright-protected expression. Such an amendment would give individuals the right to use a substantial amount of copyright-protected expression for the purpose of engaging in transformative use, provided certain attribution requirements are satisfied and that the copyright-protected work is dealt with fairly.” (Graham Reynolds, ‘Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”*: *Canadian Copyright and the Digital Agenda* (Irwin Law 2010) 398).

⁹⁶⁴ In this regard, Vaver suggested: “Clearly expressed user rights that avoid the fussy detail in which current rights are expressed and instead match the simplicity of owner rights would be easier to disseminate and understand than a doctrine of fair use, however expanded or labelled, could ever be.” (David Vaver, ‘Harmless Copying’ (2012) 25 I.P.J. 19, 22).

Copyright and the right of re-creation stimulate creativity and support the human creative process of using pre-existing works.⁹⁶⁵ Both rights encourage free expression of ideas and self-fulfilment.⁹⁶⁶ They both support incentives to make a new work: copyright provides monetary incentive, while re-creation right protects non-monetary incentive.⁹⁶⁷ In summary, they are both in the public interest.⁹⁶⁸ It is reasonable and acceptable to give limited protection to online re-creations when they are creative and beneficial to our society provided that the rights and interests of the original owners are reasonably safeguarded. The positive right to re-create as proposed in this thesis is therefore the best approach to achieve the balance between the conflicting rights and interests.

⁹⁶⁵ See chapter 3.1.

⁹⁶⁶ See chapter 3.2.

⁹⁶⁷ See chapter 3.3.3.1.

⁹⁶⁸ See chapter 3.3.

Annex I – Interview Questions Guide

The interview participants are categorised into two groups: (A) original creators and (B) online re-creators. Some questions asked in the interviews for both groups are of the same issues while other questions are different so as to obtain data from specific groups as necessary for this research.

Interview Questions – (A) original creators

- Ask participants whether they think it is sometimes OK for someone to make use of their works and which ways are they happy for their work to be used and what they are not happy about.
- Ask participants for their opinions whether they should be acknowledged by name as an original creator when their work is used for online re-creation.
- Ask participants for their opinions whether an online re-creator should ask for permission from them before using their original work. Also, ask them whether they would grant permission and on what conditions.
- Ask participants for their opinions if an online re-creator gains money from re-creation (using elements of their original work) in three means: by selling the re-creation, by advertising and by donation.
- Ask participants for their opinions whether an online re-creator have to pay for using parts of their work in an online re-creation (a) by copying it directly and (b) without copying it directly.

Interview Questions – (B) online re-creators

- Ask participants whether they make and share a work that involves materials from a popular work or an existing work and what kind of work they re-create.
- Ask participants why they re-create.
- Ask participants whether they gain anything from making that re-creation.
- Ask participants whether they have asked permission from copyright owner of the original work for the re-creations and if no, why not.
- Ask participants what they would do if the original creator requests them to delete or stop sharing their re-creation due to a copyright claim.
- Ask participants for their opinions whether they think that an original creator should be acknowledged by name when his or her work is used for online re-creation.
- Ask participants for their opinions whether an online re-creator should ask for permission from an original creator before using the original work.
- Ask participants for their opinions if an online re-creator gains money from re-creation (using elements of their original work) in three means: by selling the re-creation, by advertising and by donation.
- Ask participants for their opinions whether an online re-creator have to pay for using parts of their work in an online re-creation (a) by copying it directly and (b) without copying it directly.

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