

Chapter 2

Balance of Interest in Copyright Systems and Imbalances Under Digital Network Environments

2.1 Introduction

The development of copyright laws has often been affected by two divergent views, one that hold copyrights as private property and the other that consider them as a public policy issue. Scholars who subscribe to the former deem copyright as the natural property right of the author. Authors have a private proprietary interest in the works that they have originally created, which are the fruits of their efforts. Once creation is completed, they have exclusive rights in controlling the use and exploitation of the works so that they can gain from potential markets. A user who intends to use a copyright work must first obtain authorization from the author and pay the appropriate remunerations. The notion of copyright works as private property puts more emphasis on the acknowledgment of the intelligence and talent of the author with the purpose of encouraging further efforts and contributions from him/her and applying them to the original creation.

Scholars who support copyrights as a public policy issue, on the contrary, highlight the importance of public welfare in the accessing and using of copyright work. The supporters of a public policy notion consider that works are not created out of thin air and most of them are actualized by borrowing from former works and materials. Absolute monopolization is not a good way to encourage authors, but rather, it suffocates the sources of creative inspiration. Copyright systems were developed and designed as a balancing act in that the interests of authors to gain commercial benefits are weighed against the welfare of the public in accessing and using copyright works. The public policy stance advocates that only a limited monopoly should be granted to authors for a certain period of time so that works that fall within exceptions and the public domain will be free for public use. The foremost purpose of copyright systems under a public policy stance is to promote the progress of culture and useful arts.

These two divergent views have coexisted throughout the development of copyright laws. Copyright laws have developed in such a way that they adapt to the

changes brought on by the advancement of technologies. Copyright reforms are initiated by the lobbying of the relevant industries and concerns of governments with regard to serious economic and social problems caused by piracy. Governments are continually changing copyright laws to comply with industrial requirements for strengthening the protection of intellectual property on the one hand and carefully maintaining public interests in accessing knowledge and enjoying freedom of speech by including limited exceptions on the other hand. The digital network technologies make reproducing and disseminating information much more convenient and almost costless. In the meanwhile, copyright protection is strengthened due to the pressure imposed by copyright industries and the determination of governments to resolve rampant piracy. The strengthening of copyright protection has been supported by advocates who deem copyright works as private property and anticipate that digital network technologies would help copyright holders and relevant industries collect royalties and control the access and use of copyright works. The supporters of copyright work as a public policy issue are concerned that more and stronger protection for copyright work will threaten the free flow of information and freedom of speech. In their view, digital network technologies should promote knowledge and information sharing as well as cultural diversity rather than impede transformative borrowing and competitive innovation.

The conflicting views of copyright work as private property or a public policy issue have often been the driving force of copyright reform. The balancing of the interests that are in conflict is always the goal of legislators and copyright scholars, but this is difficult to achieve. Each time that this subtle balance of interest is violated, there would be advocates who would call for copyright reforms and revision of the law. The two conflicting views have intensified in the digital network age. An overview of the international intellectual property treaties and the tendencies of domestic copyright legislations worldwide indicate that the notion of copyright works as private property currently prevails in many aspects such as denouncing temporary reproduction as infringement, protecting the DRM and TPMs that control access and use of copyright works, curtailing copyright limitations and exceptions of DRM-protected works, increasing the liability of ISPs, and criminalizing end users who violate copyright laws. In light of the continual trends in strengthening copyright protection, many scholars have pointed out that current copyright systems should be reformed to counterattack the restrictive protectionism of copyright works as private property and restore and maintain a subtle balance of interest that existed in the predigital age.

This chapter intends to analyze the current state of imbalance in copyright legislations and the protection and reconstruction of a balance of interest in copyright under the digital network environment. The second part of the chapter will explore the interplay between copyright as private property and a public policy issue, and the balance of interest analyzed under several different perspectives, including a philosophical and economic analysis of intellectual property systems, the origin and development of copyright systems and the dual-goals of copyright protection. A historical and theoretical analysis from different angles will clearly demonstrate the design of intellectual property in general and copyright in particular and provide

interpretation of the social and economic importance of maintaining a balance of interest in the intellectual property regime. The third part of the chapter will analyze the justification for copyright expansion, determine the key aspects for maintaining a balance of interest and explain the current situations of imbalance caused by continual strengthening of copyright protection and increased sanctions against digital copyright infringement. The continued strengthening of copyright protection is principally reflected in these following aspects: an extended duration of protection, expanded scope of protection, restrictive copyright limitations, protection of technological measures, aggravated liability of ISPs, and expanding monopolization of copyright industries. These hinder appropriate access and dissemination of copyright works. The final part of the chapter will suggest the restoration of the balance of interest by reforming copyright laws, including the redefining of the scope of copyright limitations and exceptions, reutilizing moderate protection on technological measures, establishing safe harbors for ISPs, mitigating the liability of end users, and introducing alternative schemes, such as open source software and the Creative Commons. These problems and proposals will be further examined and elaborated in the subsequent chapters.

2.2 Balance of Interest in Copyright Systems

The balance of interest scheme is the fundamental basis of copyright law and the driving power of copyright development and reform. The balancing game can be reflected by many aspects, such as the philosophical and economic analyses of intellectual property systems, including copyright, the origin and growth of copyright law as well as the dual goals of copyright protection systems.

2.2.1 Philosophical Analysis of Intellectual Property Systems

Intellectual property is not merely a simple legal issue based on industrial designs and norms, but also a theoretical issue that requires the examining and analysis of philosophical components. Philosophers and intellectual property scholars have contributed with their theoretical views on the right of property which could work as the fundamental basis for the notion and system of intellectual property.

Jean Jacques Rousseau, a famous Enlightenment thinker in the eighteenth century, provided his view of property in his book, *The Social Contract*. The right of property is built on social contracts and the social general will. Rousseau described the property system in a civil society as a social contract in which there are losses and gains; to gain something, one must lose something else: “what man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses” [1]. Here, Rousseau differentiated natural freedom and rights with

civil liberty and rights. The former is naturally given and the latter is protected by law. To own a property right that is protected by law, one must submit to the general will; therefore, the loss of natural freedom is in exchange for civil rights. Therefore, one “must clearly distinguish natural liberty, which is bounded only by the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is merely the effect of force or the right of the first occupier, from property, which can be founded only on a positive title” [1].

In addition to the advocating adherence to the general will, Rousseau also proposed a theory with regard to the justice of property rights. First, Rousseau advocated the reciprocity of property rights and obligations. The effort of connecting justice with property rights aimed to establish a norm in that every individual in society respects the property rights of others. As Rousseau said, “every man has naturally a right to everything he needs; but the positive act which makes him proprietor of one thing excludes him from everything else. Having his share, he ought to keep to it, and can have no further right against the community” [2]. In Rousseau’s philosophy on justice, social order means property rights which command respect and are protected in compliance with justice. Secondly, Rousseau advocated for the equality of rights. The equality does not mean that “the degrees of power and riches are to be absolutely identical for everybody” [3]. By equality, Rousseau meant limitations on individual ownership in order to subject to the general will. He pointed out that the system of property rights was based on a social contract which “sets up among the citizens an equality of such a kind, that they all bind themselves to observe the same conditions and should therefore all enjoy the same rights. Every authentic act of the general will, binds or favors all the citizens equally” [4]. In *The Social Contract*, Rousseau repeatedly favored the use of particular phrases that have a communal nature, such as “common interest”, “general good” and “general will”. The driving force for the communal nature of ownership is that, “what makes the will general is less the number of voters than the common interest uniting them; for, under this system, each necessarily submits to the conditions he imposes on others”. Rousseau hence concluded that “the general will, to be really such, must be general in its object as well as its essence; that it must both come from all and apply to all; and that it loses its natural rectitude when it is directed to some particular and determinate object” [4].

Although Rousseau’s philosophy on property rights primarily deals with tangible assets such as land, it could also be used to explain systems that regulate intangible assets. The philosophy of the social contract has greatly influenced the contract theory of patents in modern society with which patent scholars explain the relationship between information publication and exclusive proprietary rights as consideration or contract. Rousseau’s analysis of the connection of general will, property rights and justice can theoretically support many balance of interest issues in intellectual property systems, including the protection and constraint of rights, dissemination of knowledge information and exploitation of exclusive rights, and public interest in intellectual property.

In addition to philosophical influence on the notions and functions of intangible property provided by the early modern philosophers, modern intellectual property

scholars also contribute with their own philosophical opinions. Professor Peter Drahos proposed the theory of abstract objects for intellectual assets in his book, *A Philosophy of Intellectual Property*, based on a discussion of the origin and development of property systems and analytic property theory. According to Drahos, “intellectual property law posits rights in abstract objects” [5, p. 1]. The word “abstract objects” that Drahos uses in his philosophical analysis of intellectual property originates from the term “incorporeal things” in classical Roman law. Roman law divided everything into corporeal and incorporeal; the former is related to tangible things such as land, a slave, a garment, gold, silver and countless other things, and the latter is related to intangible things that only exist in law, such as an inheritance, a usufruct, or obligations contracted [5, p. 16]. The Roman law of incorporeal things was heavily influenced by Stoicism. In the Stoic notion of incorporeality, four things, namely, time, space, the void and *lekta* (the meaning of words or sentences) are incorporeal. “Incorporeal things were not existent, but rather subsistent. They subsisted by virtue of human mental life. They were things superimposed by the mind onto the corporeal world” [5, p. 17]. Incorporeal rights are related abstract objects; these also form the relations between individual actors [5, p. 153]. Before property rights are attached to an abstract object, some sort of “corporealization” of the abstract object is required [5, p. 153]. The process of corporealization can be formal, such as registration for patent protection, or informal, such as creating information subjected to protection by copyrighting or as a trade secret [5, p. 17]. Corporealization generates “the physical representations” and “an entity with specific meaning which amounts to the creation of an expressible” [5, pp. 17–18]. “Once the abstract object attains corporeality by becoming embodied belief, it can play a causal role in the social and productive relations of people” [5, p. 18].

In Drahos’ philosophical analysis of intellectual property, abstract objects are a form of capital which has controlling power over both the product and productive means [5, p. 157]. Drahos argued that “abstract objects function as gateways to valuable physical objects. These physical objects may be the capital items important in the processes of production, or they may be the end result of such processes” [5, p. 157]. Once abstract objects control the access of valuable resources, “a formal, legally constituted person-dependent relationship” is established in addition to the resource-dependent relationship [5, p. 159]. According to Drahos, not all abstract objects have a power-creating effect and thus create a resource-dependent relationship [5, p. 158]. The creation of literary and artistic works protected by copyright will hardly increase the power base of the author [5, p. 158]. Resources such as “genes, seeds, chemical compounds or forms of medical treatment” protected by patents or new forms of legislatively created abstract objects like plant variety right are more likely to increase the power effect of the right holder and strengthen the collective dependence. However, to my understanding, copyright not only protects literary and artistic works, but also scientific works which are the key resources for the means and processes of production. In addition, the establishment of private ownership on resources of literary and artistic objects could also affect future authors who would like to borrow and create based on existing resources. Thus, the power-creating effect and a person-dependent relationship exist among all abstract

objects, although different forms of abstract objects may generate different levels of personal dependence.

Drahos used an example to explain the person-dependent relationship generated by abstract objects. A farmer who wants to plant crops depends on having seeds to plant. This is an object-dependent relationship. If the seeds are protected by a patent or plant variety right, the farmer requires permission from the right holder to obtain access to the seeds. A person-dependent relationship is thus added to the object-dependent relationship [5, p. 159]. Once a dependent relationship exists between two persons, one person may face a coercion claim from the other. The theories of coercion agree that threats are coercive [5, p. 159]. Drahos made a plausible claim that “relationships of dependence create the conditions necessary for the making of credible threats”, thus, making “coercion claims feasible” [5, p. 159].

Drahos then concluded on two consequences in the distribution of power. First, where abstract objects are related to resources that many people are dependent upon, the scope of the threat power of these abstract objects will be extensive and the range of power will be potentially global [5, p. 160]. Secondly, the extensive amount of power is likely to be unevenly distributed within social systems and will become increasingly so [5, p. 160]. Newly generated technology requires a large amount of investment which is costly and capital flows to high-tech production which attracts investment. In important and promising areas of science, ownership of relevant abstract objects may be controlled by a small number of well-resourced people [5, p. 161]. These individuals have significant threat power if the abstract objects are related to significant resources. That is to say in Drahos’ words: “extensive, possibly global, power will probably be concentrated in the hands of those who, through their scientific/technological capabilities and superior capital resources, are able to capture, through the property mechanism for abstract objects, resources upon which there is a universal reliance” [5, p. 161].

The philosophical analysis of abstract objects and intellectual property by Drahos provides a new perspective to realize the social function and effect of intellectual property systems. Although Drahos did not deny the necessity of the existence of intellectual property systems, he placed more emphasis on the dangers of potential threat power and uneven distribution of power generated by intellectual property. The possible danger foreseen by Drahos helps us to reconsider the situation of intellectual property protection and reestablish a balanced approach, as well as readdress public interest in the intellectual property system.

One of the important purposes of intellectual property systems is to address public interest and welfare. Yet this should not deny the proprietary rights of intangible property, but rather emphasize the importance of a balance between individual exclusive rights and social public interest. Philosophers have provided different explanations and justifications which support public interest. Rousseau embodied justice into his philosophy on property. In his point of view, acknowledgement of property rights is founded on the establishment of social order which respects and protects property. Property systems should have a fair social contract that satisfies the general will so as to maintain justice in the system. Drahos analyzed the threat that intellectual property systems posed to the distribution of resources. Although

Drahos acknowledged that there is justification for the existence of intellectual property, he was concerned that the establishment of such a system in an imperfect society would enhance person-dependent relationships and powerful person-dependent relationships would create an imbalance in the distribution of resources, thus enriching a small group of people and impoverishing the majority. The warning given by Drahos undoubtedly embodies the maintaining of a balance with the public interest kept in mind in intellectual property systems.

2.2.2 *Economical Analysis of Intellectual Property Systems*

The economic philosophy of intellectual property systems is primarily based on guaranteeing the economic gains of creators and in turn, advancing public welfare, as the United States Supreme court clarified in the *Mazer v. Stein* case, “the economic philosophy behind the clause empowering congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gains is the best way to advance public welfare”.¹ As aforementioned, the private property and the public policy views have different perspectives as to the scope and strength of intellectual property protection. The supporters of the former claim that creators should collect all economic gains from potential markets of intellectual products, while the advocates of the latter argue that the exclusive ownership of creators should be limited to a certain degree so that public welfare will not be diminished due to the high cost of obtaining intellectual products.

Intellectual products have features that are different from tangible property. Paul Samuelson differentiated private and public goods in an economic sense by taking apples and street lamps as examples [6, p. 171]. According to Samuelson, private goods refer to goods in which the use by one person precludes that of another [7, p. 100]. For example, “when one person eats an apple, others cannot eat it; a pair of pants can be worn only by one person at a time; a car cannot go two different directions simultaneously, and so forth” [7, p. 100]. These examples illustrate that “there is rivalry in the consumption of private goods” [7, p. 100]. On the contrary, there is no rivalry in the consumption of public goods. In the use of public goods, the use by one person does not exclude that of another. For example, a street lamp can simultaneously illuminate onto different pedestrians, and a bus can take many passengers.

Economists consider that intellectual products are a special type of goods, which share common characteristics with public goods. First, the consumption of intellectual goods is nonexclusive. Authors cannot exclude others from accessing and using their intellectual achievements unless their works are kept as a secret. However, if authors keep the works to themselves, their creation will not be known and acknowledged by society. Secondly, the consumption of intellectual goods is non-rivaling, because one person’s use of a work does not affect another’s use of the

¹*Mazer v Stein*, 347 U.S. 201 (1954).

same work. Numerous people can simultaneously consume one single intellectual good. Thirdly, intellectual goods are non-exhaustive. In contrast to tangible public goods, intellectual goods cannot be depleted by use. On the contrary, the use of intellectual goods is more likely to increase the volume of intangible sources and generate social benefits because of the sharing and borrowing of information. This phenomenon may mean that authors will find it difficult to be adequately compensated. Thus, legislations that address the unauthorized use of intellectual goods need to be promulgated. Fourthly, intellectual goods are expensive to create, but cheap to reproduce. The development of technology makes reproduction much cheaper and easier. The emergence of printing and photocopying machines, videocassette recorders, computers and the Internet has largely decreased the cost and time that are required to reproduce a work. Once an author sells the intellectual good to a certain consumer, the consumer will become a potential competitor with the original author, or other consumers will become free riders without paying any remuneration. Therefore, protection of intellectual goods against piracy is necessary especially under the digital network environment.

As for the strength of intellectual property protection, there are discrepancies among the advocates of the private property and public policy views. The supporters of the former regard the property rights of authors of intellectual goods to be similar as tangible property rights. The establishment of private ownership over intellectual goods is important to guarantee the benefits and incentives for creations and avoid the “tragedy of the commons” in tangible goods. The “tragedy of the commons” refers to the overuse and underinvestment of property caused by public ownership [8]. Strong private property rights could provide incentives for large-scale investments, allow control over exploitation and ensure that resources are put to their most efficient use [9, p. 35]. The private property view advocates that strong property rights should also be put into place in the protection of intangible property.

On the contrary, supporters of the public policy view argue that the economic benefits of authors should be weighed against the access costs of users so as to better the entire society. William Landes and Richard Posner proposed an access-incentive paradigm in which the incentive to create justifies the legal protection of works against unauthorized reproduction [10]. Nevertheless, legal protection for the purpose of encouraging incentive to create in turn will increase the access costs of potential authors in their use and exploitation of earlier copyright works, because these authors often need to pay to access preexisting works and reasonably borrow from original works so as to avoid the expense of potential infringement litigation caused by substantial similarities. In economic analysis, producers of intellectual goods have endowment of creativity. They are likely to use their monopoly generated from their strong property rights to acquire different kinds of economic rent, especially under the circumstances where spiritual products are in shortage. Producers of intellectual goods who aim to maximize their benefits may ignore the needs of society as a whole for proper culture and advanced technology development. On the other hand, consumers of information and intellectual goods may maximize their utilization of those products based on their personal needs, thus negatively affecting the economic gains of information producers. Advocates of the

public policy view continuously endeavor to find the optimal point which balances the interests of the producers of intellectual goods and public consumers.

The establishment of an intellectual property system means that the producers of intellectual goods publish their works or inventions to inform and educate the public in exchange for public acknowledgement that these producers have a monopoly over the use and exploitation of their own intellectual goods for a limited period of time. Intellectual goods are public, but intellectual property is monopolistic. Economists indicate that once property owners realize that there is scale economy in property, different interest parties will attempt to reach an agreement on establishing a government which acknowledges and protects property rights [6, p. 176]. The principle purposes of intellectual property systems are to define property rights, protect the intellectual achievements of creators, regulate property transactions and promote the dissemination of information. On the one hand, it is difficult for a new creator to recover the expenses of creation and production in an unregulated market. Monopolization is the driving power for creators to produce new works or inventions. On the other hand, the establishment of high prices by monopolists will impede the use of intellectual products. If consumers cannot afford the high costs of acquiring products, the optimum beneficial gains of resource deployment cannot be achieved. In this dilemma, inadequate intellectual goods will be produced without legal monopolies, but with monopolies, little information can be found for consumption. The solution to the dilemma is to establish reasonable restrictions on monopolistic rights to ensure that the public will find it convenient enough to use information in compliance with different rules and regulations.

The realm of intellectual property rights is generally divided into exclusive rights and free use, with a small amount of intellectual assets that fall between the two. Most intellectual goods have exclusive rights in which the use of intellectual goods must be authorized by the creator and compensation must be paid. The existence of exclusive rights compensates creators and maintains their passion and creativity. Some intellectual goods are recognized as having free use where neither consent nor compensation is required. Free use promotes information dissemination and encourages creative activity from the public. In a society where all information and intellectual goods fall within exclusive ownership rights, consumers will either refuse to use information because they cannot attain authorization by paying the monopolistic price, or will spend large amounts of money to search for information, conduct negotiations and implement transactions. This will be an inefficient and defeated society. The establishment of intellectual property systems should not only guarantee a just allocation of resources, benefits, rights, and liability, but also increase the total amount of spiritual wealth in society and strengthen the efficiency of resource exploitation.

In the realm of copyrights, Richard Posner explained in his economic analysis the reason that the scope and duration of “intellectual property rights represents the striking of a balance between the interests of the creators and of the users of intellectual property” is because “the creators themselves may benefit from the limiting of those rights” [11, p. 47]. He supposed that most of the literary and artistic works build heavily on earlier creative works. The large scope of copyright protection of

earlier works will increase the costs of making subsequent works. Although an increase in the scope of copyright protection enhances the expected revenues of the authors from the sale or licensing of his/her own copyrights, it will also increase his/her costs of creating the works that s/he has copyrighted [11, p. 47]. Perpetual or unlimited copyrights will further increase the costs of the author because under such circumstances, “no earlier works were in the public domain and thus available to be used in the creation of new works without copyright expense” [11, p. 47]. Posner further argued that if the subsequent work is complementary rather than replace the earlier work, the author of the earlier work will even gain from the limitations on the scope of copyright protection. According to economists, there is a distinction between complements and substitutes, “a product is a complement of another product if a fall in its price will cause the quantity demanded of the other product to rise, and the product is a substitute if a fall in its price will cause the quantity demanded of the other product to fall” [11, p. 49]. For example, a book review may be the complement of a book so that readers of the book review may wish to buy the book; a public performance may be the complement of a song so that the audience in the performance may wish to purchase a phonographic copy of the song.

2.2.3 Origin and Development of Copyright Laws

The nascent concept of modern copyright existed in ancient Greek and Jewish laws, and in the Roman publishing system [12]. The early literary and artistic works in Greece were oral and anonymous. Due to the nature of spoken dialogue and limitations in human memory, few works were able to be recorded and preserved. In addition, authors in ancient Greece regarded their creation as collective achievements and indivisible possession of a school or group rather than personal work which could be exclusively owned by the creator [13]. The earliest concept of intellectual property emerged when individual creation began to appear in all cultural fields in sixth century B.C. Athens [13]. Ancient Jewish law linked with modern universal copyright when those who contributed with new principles to civil and religious laws were required to be identified [12]. The effort in recognizing contributions to oral cultures pushed forward the preservation of authorship and formation of the concept of nascent copyright, although the recognition of authorship was concerned more about the accurate recording of oral cultures rather than the introduction of private property rights. Ancient Roman law did not contain copyright laws either, but evidence indicates that some authors reached publishing contracts with book traders [12]. The book trade in Rome created the conditions for the birth of the notion of copyright. Although there were book sales in ancient Rome, most of the literary and artistic creative practices were controlled by the Roman Catholic Church through centralized production and dissemination. Monasteries established libraries that loaned manuscripts in exchange for land, cattle or money [14]. Although the practice of loaning did not have any connections with individual author ownership rights, it was the one of the earliest attempt to make the copying

of literary works available in exchange for some sort of remuneration. However, the concept of authorship and intellectual property did not formally emerge until the religious structure and cultural unity in the Middle Ages disintegrated, as people in medieval societies saw their intellectual achievements as collective endeavors, not individual efforts.

The emergence of printing technology and capitalism spurred the birth of modern copyright laws. In the Middle Ages, the secular trade of books was initiated in European cities by stationers. Stationers organized the reproduction of texts by hand and provided copies upon the request of buyers who asked for certain titles. After printing technology was invented, these stationers invested their accumulated capital in developing the technology and transformed their book business into a capitalistic mass production. In Venice of Italy, which was regarded as the origin of capitalism according to Marxist political economists, the Venetian Collegio granted John of Speyer, who brought the printing press to Venice in the fifteenth century, exclusive printing privileges for 5 years [14], because the government intended to encourage the importation of new technology and advancement of relevant industries by granting such exclusive privileges. Similar laws with regard to printing privileges spread to many European countries at the beginning of the sixteenth century. In Germany, both imperial and municipal privileges for property rights were granted to publishers in order to encourage the growth of the book publishing industry [14]. Besides governmental granted privileges, the leading publishers also adopted noninterference agreements to protect their businesses against piracy and competition [14]. A similar situation also emerged in the Netherlands where publishers reached agreements among themselves to protect the commercial investment of their literary property interests [15]. When international book trades became more frequent and domestic publishing industries turned international, the industry agreements and state-authorized publishing privileges were gradually replaced by national and international copyright laws. The United Kingdom was deemed by copyright historians as the first country to promulgate the modern copyright law. The evolution of the copyright regime in the United Kingdom was precipitated by both the cooperation of publishers and governmental intervention [14].

At the beginning of the importation of the printing press, the British government gave book publishers who organized the Stationers' Company the exclusive right to control the reproduction and copying of books through censorship laws, such as the Licensing Act of 1662 [16]. The right to control book reproduction was once perpetual, but ended due to the expiration of the Licensing Act of 1662 in 1694. Stationers attempted to restore censorship laws at first, but when their attempts failed, they transformed their lobbying from guaranteeing the monopolization of the market for themselves to protecting the legal rights of authors. The industry lobbying led to the passing of the Statute of Anne which was proclaimed as "An 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" in April 1710 [14]. Under the statute, copyright protection for existing works in the Stationers Register was 21 years and the protection term for new works finished after the statute became effective was 14 years upon expiration with another 14 years of

protection granted afterwards. The Statute of Anne focused only on property rights, and did not mention the moral right of authors. To fully enjoy the rewards of having property rights, an author had to assign his/her copyright to the stationers.

The history of the preconditions and development of copyright shows that copyright principally emerged for the economic benefits of publishers who monopolistically controlled the printing and distribution of individual or classes of works. Before the release of the Statute of Anne, only the economic rights of stationers could be protected and economic remunerations generated by book production and sales all went to the publishers, printers and booksellers. Nothing in the law catered to the protection of the rights of the authors for their original creations. The legislators of the Statute of Anne took on a public policy view to restrict the market monopolization on commoditization of literature by granting authors with a limited time of exclusive rights with the purpose of encouraging learning. In the face of the loss of market monopolization, the stationers attempted to regain their perpetual right on printing and publishing. They took on a private property stance by claiming that the authors should deserve a common law copyright in their original works and stationers could own a common law copyright through transfers by the authors [16]. By proposing a common law copyright, the stationers aimed to restore their perpetual control on publishing outside the scope of the Statute of Anne.

The supporters of the private property view used John Locke's labor theory of property as justification. Locke indicated that people had the natural right to owning their bodies [16]. Since every individual owned his/her own body, "the labor of his body and the work of his hands, are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property" [17, p. 134]. Locke justified the private appropriation of the common wealth of nature [14]. However, Locke obviously did not extend this private appropriation and labor theory of property to the area of intangible assets, such as literary and artistic works. Supporters of the private property view have thus used Locke's labor theory of property and extended the notions in the realm of tangible goods to intangible goods.

Based on the notion of natural property rights, stationers insisted on pursuing for exclusive rights on publishing through lawsuits for nearly 40 years. The judicial efforts made by the stationers were known as the "battle of the booksellers." The first case in which the publishers sought to regain their infinite monopoly was *Millar v. Taylor*.² Andrew Millar was a bookseller who purchased the copyright of a popular epic poem, *The Seasons*, from its author, James Thomson. Upon the expiration of the statutory copyright of the poem, another bookseller, Robert Taylor, who did not belong to the Stationer's Company, published a competing and less expensive edition. Millar sued Taylor by alleging that the defendant committed infringement against the perpetual common law copyright transferred from the author. The Court of King's Bench confirmed the existence of a common law copyright and concluded that the Statute of Anne provided additional protection after the publication of a work. The statute did not substitute the common law right or limit its term. The decision affirmed the

²*Millar v Taylor* (1769) 98 Eng. Rep. 201.

author's right to reap pecuniary profits from his/her own ingenuity and labor as well as supported the infinite copyright held by the publishers. However, Justice Joseph Yates dissented with the opinion that the authors should be rewarded for their labor but the reward should not be infinite.³ When the case was appealed to the House of Lords, the booksellers reached a settlement. This case could be seen as a victory of the publishers and supporters of the private property view.

The same issue was brought up again in the second case, *Donaldson v. Beckett*,⁴ in which the legitimate publisher of *The Seasons*, Thomas Beckett, sued an unauthorized rival bookseller, Alexander Donaldson, for copyright infringement. The injunction was at first granted against Donaldson by the Chancery, but in an appeal later, the House of Lords overturned the injunction. Although the final decision recognized the common law copyright, it concluded that the Statute of Anne had a supplement with a statutory right. Once a work was published, its copyright protection was limited by the statutory term. The decision of *Donaldson v. Beckett* again abolished the market monopolization of publishers and booksellers, and returned to support a public policy stance. Sir John Dalrymple once questioned: "what property can a man have in ideas? While he keeps them to himself they are his own, when he publishes them they are his no longer" [18, p. 39]. Lord Camden also pointed out that "knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. What situations would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth? All our learning will be locked upon in the hands of the Tonsons and the Lintons⁵ of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are".⁶

Although the private property and public policy views coexisted in the early development of copyrights with constant conflict between the two of them, the public policy stance prevailed after *Donaldson v. Beckett*. Influenced by the United Kingdom, copyright origination and development in the United States modeled the copyright history in the United Kingdom. The first recorded copyright was initiated by a bookseller, John Usher, in the Massachusetts Bay Colony to protect his exclusive right to publish a revised edition of *The General Laws and Liberties of the Massachusetts Colony*. Between 1783 and 1786, 12 original states issued copyright laws with language and form modeled after the Statute of Anne [14]. The goals of these copyright statutes were to protect the rights of the authors, encourage learning, establish order in book sales and restrict market monopolization [12].

Due to the separate state registries for copyright works and weak enforcement of state copyright statutes, a uniform national copyright system was essential for regulating national publishing and book trade. The Constitution of the United States first put into place, a copyright and patent clause which stated that "the Congress shall

³ Ibid.

⁴ *Donaldson v Beckett* (1774) 1 Eng. Rep. 837.

⁵ Tonsons and Lintons were the names of two large London booksellers and publishers in the seventeenth and eighteenth centuries.

⁶ *Donaldson v Beckett* (1813) 17 Cobbett's Parl. Hist. 953.

have the 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".⁷ Following the constitutional copyright clause, Congress then passed the first federal copyright law in 1790. The Copyright Act of 1790 granted copyright protection to American authors for a statutory term of 14 years which could be renewed once. During this term of protection, authors enjoyed exclusive rights to print, reprint, publish and sell their works. However, the Copyright Act did not mention whether the common law copyright was substituted by the statutory right after the passing of the act.

Similar to the publishers who sought a common law copyright in the United Kingdom, authors in the United States also attempted to acquire infinite copyright protection in common law through lawsuits. In *Wheaton v. Peters*,⁸ Richard Peters, the fourth Reporter of Decisions of the Supreme Court, published an abridged six-volume edition based on a 24 volume version of his predecessors', in which 75 % was from that of Henry Wheaton, the third Reporter of Decisions. Wheaton sued Peters for copyright infringement under both the Copyright Act and common law, by asserting that common law copyright shall not be supplanted by the federal statute. Heavily influenced by *Donaldson v. Beckett*, the Supreme Court rejected Wheaton's argument and concluded that copyright was a statutory right granted by Congress and secured by the formalities of registration, notice and deposit.⁹ Justice John McLean refused to recognize the common law copyright by opining that when a work became the subject of controversy, it was decided by the highest judicial court in England, and that the right of the authors could not be asserted as common law, but under the Statute of Anne.¹⁰ An author only remains under common law copyright when his/her work was not published. Once published, the work was protected by the statute. Upon the expiration of the term of protection, the work would enter into the public domain. By making this decision, the court avoided the issue of an infinite monopoly supported by the natural common law right and protected the public welfare in obtaining access to literary and artistic works.

Although the private property stance still exists based on the Lockean idea that individuals have natural rights to the achievements of their labor, it is the public policy view that determined the theme and tendency of future copyright legislation and development. The importance of the *Donaldson* and *Wheaton* case not only impelled lawmakers in the United Kingdom and the United States to be more concerned about public welfare but encouraged a worldwide trend in establishing a copyright system that focused more on granting a limited monopoly to authors and securing access by the public rather than merely focusing on copyright protection as an infinite right in natural law.

The concept of intellectual property was introduced into South and East Asian societies much later behind the emergence of copyright in the United States. China

⁷The United States Constitution, Art 1, s 8, Clause 8.

⁸*Wheaton v Peters* 33 U.S. 591 (1834).

⁹*Ibid.*

¹⁰*Wheaton* (n 8 above).

did not pass its copyright law until 1991. By enacting the first copyright law of the People's Republic of China, lawmakers obviously incorporated a balanced approach and the primary purpose of public welfare and cultural prosperity in Article 1 of the law: "this law is enacted for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of socialist culture and science".

2.2.4 *Dual Goals of Copyright Systems*

The onset and development of copyright laws clearly illustrates the dual goals embodied in the copyright system, namely, protecting creations and intellectual labor on the one hand and promoting advancement of knowledge, learning, culture and art on the other hand.

One of the foremost purposes of establishing copyright systems was to holistically protect the interest of the authors. According to Locke, "people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry" [19]. The original author should be entitled to a series of exclusive rights to control the use and distribution of his/her work which has been concocted by his/her own mental labor and sweat, and represents his/her personality. Without adequate protection and reward for the intellectual effort, the incentive to create will be hampered. Monetary remunerations not only acknowledge the endeavors and contribution to society, but also guarantee that material needs are met for subsequent creations. Although some, especially scholars in the academia, do not expect monetary rewards, and rather prefer a wide distribution of their works to establish their reputations, it should be noted that copyrights not only protect the economic rights of their authors, but also moral rights, such as the right of attribution and the right of integrity to the work against any unauthorized alterations, mutilations and distortions. Regardless whether the purpose of the author is to earn remuneration or not, s/he does not hope that others will take advantage of his/her skills, labor and money spent by tampering with the expression of his/her written product and authorship. Judicial decisions in copyright disputes also confirm that one of the purposes of copyrighting is to reward the author for his/her creation. In *Harper & Row v. Nation Enterprises*,¹¹ the Supreme Court of the United States reinforced that the function of the scheme established by the Copyright Act is to promote the original works that provide the seed and substance to the harvest of knowledge. "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors".¹²

¹¹ *Harper & Row v Nation Enterprises* 471 U.S. 539 (1985).

¹² *Ibid.*

However, the protection of the interests of the authors is not the sole purpose of establishing copyright systems. More importantly, copyright laws should be made to safeguard public interest by promoting advancement of knowledge and learning, preserving public domain and forming a democratic civil society. First, copyright systems should serve to promote the advancement of knowledge and learning and the development of science and culture. These goals have been clearly stipulated in constitutions and copyright laws. The Constitution of the United States empowers Congress 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”.¹³ The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law also explained that the ultimate purpose of copyright is to “foster the growth of learning and culture for the public welfare”. The Copyright Law of China underlines the ultimate purpose of making this law in its Article 1 as promoting the development and prosperity of socialist culture and science. In order to achieve this final end, the Copyright Law shall protect the copyright of authors in their works and encourage the creation and dissemination of works. The ultimate purpose of copyright systems is also illustrated by court decisions. In *Mazer v. Stein*,¹⁴ the court stated that “the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’”. In *Twentieth Century Music Corp. v. Aiken*,¹⁵ the court again stated that “the immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The sole interest of the United States and the primary object in conferring the monopoly lie(s) in the general benefits derived by the public from the labors of authors”.

Secondly, copyright systems should serve to preserve the public domain. Preservation of the public domain means that the protection of copyrights is restricted to a certain period of time and within a certain scope. In doing so, the owners are able to fully enforce their exclusive rights. However, outside the scope, public users are allowed to use the works for free. The designing of a limited term for copyright protection, the idea-expression dichotomy, and fair use/fair dealing are major principles that limit copyright monopolization and preserve the public domain. In preserving the interest of the public domain, this provides the source for future creations and promotes storage of knowledge and learning.

Thirdly, copyright systems should have a role in the formation of a democratic civil society. Copyright functions as an engine for creative and free expression. The stimulation of expressions on various topics including political, economic, cultural, and recreational issues lays the foundation for the establishment of a democratic civil society. Moreover, the creative activity supported by copyright systems not

¹³ See n 7 above.

¹⁴ *Mazer* (n 1 above).

¹⁵ *Twentieth Century Music Corp. v Aiken* 422 U.S. 151 (1975).

only relies on national and governmental subsidies and patronage [20], but prospers because of commercial benefit, personal desire to expand reputation, personal interests, and educational purposes. Moving away from governmental support would further encourage free expression, thus, moving society toward having a democratic and civic culture.

2.3 Current Imbalance of Interest in Copyright Systems

2.3.1 *Borderline of Balance of Interests: Accessibility of Copyright Works*

In order to fulfill the dual purposes of copyright systems, which are to encourage creations on the one hand and to advance knowledge and learning on the other hand, the design of copyright systems must guarantee public accessibility to copyright works. Accessibility plays a central role in copyright systems to achieve the ultimate goal and create balance between copyright holders and public users. Without appropriate accessibility, copyright works cannot be reproduced and disseminated. Thus, the goal of promoting knowledge and learning cannot be well achieved.

Accessibility to copyright works could be explained in two ways: First, the public must be able to access copyright works so as to access the ideas of the works [21]. Under the idea-expression dichotomy, the use and borrowing of ideas are free from copyright infringement as long as the user does not copy the expressions without the authorization of the owner. Second, the public who has accessibility comprises two groups of people [21]. There are the users, such as readers who cannot learn and absorb knowledge without access to different works. Then there are the potential authors who cannot create new works without access to previous works and borrowing ideas from them. Although the works created by these potential authors may compete with the original works, the competing works provide different means for the public to learn and appreciate, thus enriching cultural and social life. Access to copyright works is important to realize the purposes of copyright systems and achieve a balance of interests, because the development of culture and science is based on the fact that ideas and knowledge act as gateways for others [5]. Ideas and creations are inspired and generated from previous existing ideas. Every piece of work, in some sense, can be regarded as the “joint product of human intellectual history” [19, p. 34]. In addition, permission to access different works promptly guarantees the distribution of ideas and expressions, thus avoiding the waste of the social value of information, because certain ideas, expressions and informative knowledge are most valuable when they are communicated, disseminated and absorbed in time.

The core of copyright systems is *quid pro quo* [21]. An author gains through commercializing his/her work, while the public benefits by accessing the work. If access to commercialized work is not available, the author unfairly receives

monetary rewards without contributing to society. The ultimate goal of advancing knowledge and learning will not be well served either. Under the balanced notion of *quid pro quo*, an author obtains economic gains by commercializing the work and allowing appropriate public access to the work. If the author does not permit any access to his/her work, such as restricting access through diaries, letters, and unpublished work, s/he cannot acquire any economic rewards for his/her efforts to create the work. Consequently, the *quid pro quo* notion becomes imbalanced. In the situation that the author gains, but refuses to allow public access to the work, limitations and exceptions such as fair use/fair dealing and compulsory licensing should be introduced into copyright systems so as to maintain a balance. In cases where access to the work is available to the public but the author does not gain anything, s/he can control and decide whether s/he would like to commercialize the work so as to restore a balance [21]. The interests of copyright owners and the public cannot always peacefully coincide together in copyright systems. When they conflict, balance should be sought and restored by amendment and revision of laws.

2.3.2 *Justification of Expanding Copyrights*

The expansion of copyright systems has been influenced by technology development. New technology induces new kinds of works based on new media and significantly decreases the cost of reproducing and disseminating works. Such technological advancement changes the interests of copyright owners and public users. The users are exposed to more opportunities brought on by digital network technology to obtain access and exploit copyrightable works. For example, a user who surfs the Internet can easily listen to a song online, download the file and transmit the clip to his/her friends through email, online instant messaging or by uploading onto other websites. Furthermore, the user can produce a derivative song based on the tune of the original song by using arrangement software. If copyright laws do not expand the protected subject matters and categories of exclusive rights, the authors cannot be adequately compensated under the digital network environment. Copyright laws can no longer function as incentive for creation, if there is a lack of revision and appropriate expansion. Hence, copyright laws have extended protection to new subject matters, such as computer programs and databases, granted right holders new kinds of rights, such as right of rental and right to network dissemination of information, established indirect infringement liability of ISPs and expanded protection to technological measures. These measures are adopted to mitigate the threats posed by the increasing opportunities of users to access and exploit works. When the growing benefits of users outweigh the compensation for the intellectual endeavors of authors, certain weight shall be added to the side of the authors and copyright owners in the event that this balance of interest is affected.

However, copyright expansion should not be unlimited and should cease when appropriate access to work and future creations is at risk. The expansion of copyright protection is only justified when access and use of works from the public

threaten the incentive for creation and recovery of economic rewards. Overexpansion of copyright protection would again disrupt the balance of interests if access to works is narrowly restricted. Overprotection of copyrights will not only negatively affect access to the original works but will also impede future creations that are based on the originals. Therefore, limitations and exceptions on copyright systems should also be developed to respond to copyright expansion so that the ultimate goal of copyright systems will not be neglected. If users are not taken into consideration in the progress of copyright expansion in the digital network era, overly strong protection given to the work of authors and copyright owners will result in monopolization of existing works and be detrimental to the advancement of knowledge and learning.

2.3.3 Current Imbalance of Interests in Copyright Systems

The conflict between the private property and the public policy stances has reached a climax under the digital network environment, as technologies and the Internet facilitate the reproduction and dissemination of copyright works. Copies have almost the same quality as the originals. Authors face a situation in which the works that they have spent months or years to create are reproduced without their authorization by a mere simple click of the computer mouse in seconds by someone else. Thus, the supporters of the private property stance have called in favor of the widening of the scope of copyrights and strengthening of copyright protection to the copyright industries. Otherwise, these authors will suffer serious financial loss and the copyright industries will perish.

Some scholars support that the strong protection bestowed to private property of tangible goods should also be used for intangible goods in cyberspace, as there is no difference between the property rights of intangible goods under the digital network environment and the property rights of traditional intangible or tangible goods [22, 23]. Some scholars advocate for the application of digital technology to supervise the use of copyright works and collect royalties. Copyright owners and industries are concerned about the serious problem of the unauthorized use of their copyright works and online piracy. According to the Recording Industry Association of America (RIAA), revenues from the album sales of the music industry have declined from 1999 to 2002 because of peer-to-peer file sharing [24]. The RIAA has filed litigations against individuals who were engaged in directly downloading MP3 files, manufacturers of the machines used to play MP3 files, operators of websites that upload pirated works, and intermediaries which facilitate users to locate and download MP3 files, such as Napster [24]. Requests for stronger copyright protection and penalizations on infringement are also invoked by other industries, such as the motion picture industry. Besides pursuing legal remedies, copyright industries universally adopt software or digital technology to control the access and copying of their copyright works.

Governments in many countries tend to promulgate new legislations and regulations that deal with piracy issues under the digital network environment. Influenced by the lobbying of copyright owners and industries, these legislations adopt the private property stance and strong protection of copyrights. Such legislative tendencies appeared in the Copyright Term Extension Act (CTEA) and the DMCA of the United States, Information Society Directive of the European Union, Communication and the Green Paper on Copyright in the Knowledge Economy and the Digital Economy Act of the United Kingdom, graduated response scheme of France, and the 2006 Regulation of China. These laws and regulations extend the duration of copyright protection, expand the scope of copyright protection to include databases and TPMs, aggravate the infringement liability of technological intermediaries and potentially restrict the limitations that are possible under traditional copyright regimes. The expansion of copyright protection safeguards the interests of copyright owners, but to a certain degree, restricts the privacy and freedom of consumers.

The advocates of the public policy view have called for a restoring of the balance of interest between copyright owners and public users. They regard digital technology and the Internet as exceptional means to facilitate the exchange of knowledge and freedom of expression. In their points of view, technologies should enrich individual creativity, global communication and the public domain rather than hinder access to information. The Internet has changed the way that information is published and disseminated by decentralizing production and distribution which are traditionally under the centralized control of large publishing companies. Thanks to the Internet, individuals and small enterprises can also participate by forming their own cultural communities and environments. The supporters of the public policy stance fear that strong copyright protection could suffocate innovation and creativity because of the following problems.

2.3.3.1 Extended Duration of Copyright Protection

At the beginning of the promulgation of copyright laws, the duration of protection was 14 years which could be renewed by the copyright owner for an additional 14 years. The original protection time period was included in the United States Copyright Act of 1790. In 1831, Congress extended the initial term of 14 years to 28 years. In 1909, the Copyright Act again added another 28 years upon renewal, reaching a maximum of 56 years. The Copyright Act of 1976 again made revisions and changed the duration of the copyright protection to the author's life plus 50 years. The duration of copyright protection complies with the requirement in international conventions and copyright laws of most countries. However, the United States has not ceased the extension of the term for copyright protection. Following the Information Society Directive of the European Union which extended the duration of copyright protection of literary and artistic works to the author's life plus 70 years, the United States enacted the CTEA in 1998, also

extending the copyright protection period by another 20 years and applying the revision retrospectively to existing works.

To sum up the continuous trend in extending the duration of copyrights, Professor Lawrence Lessig commented that “the average term of copyrights was just 32.2 years in 1973, because copyrights had to be renewed after twenty-eight years and eighty-five percent of copyrighted works were never renewed” [25]. The Copyright Act of 1976 and the CTEA largely increased the average term, as “the average term for corporate works such as Disney movies has tripled in the last thirty years” [25]. Professor Neil W. Netanel indicated that the two decades that the CTEA added onto the already lengthy copyright term did not provide additional economic incentives for authors to make new creations [26, p. 58], nor did the extension enhance the continued dissemination and availability of old works [26, p. 58]. Due to the 20-year extension, “much of the literature, art, film, and music that serves as the wellspring for further creative expression, is subject to copyright holders’ proprietary control” [26, p. 58]. Although the extension of the duration of copyrights does not specifically respond to the challenges brought upon by digital network technology, it in fact postpones the time for a large number of copyright works to enter the public domain. These copyright works comprise works based on both traditional media and digital technology media.

2.3.3.2 Expansive Scope of Copyright Protection and Restricted Copyright Limitations

The history of the continuous revisions of the Berne Conventions witnessed the expansion of subject matters that have copyright protection. The Berne Convention of 1886 only included half of the current types of works, such as “books, pamphlets and other writings; dramatic or dramatic-musical works; musical compositions with or without words; works of drawing, painting, sculpture, engraving and lithography; illustrations, plans, sketches relative to geography, topography, architecture or science; and translations” [27, p. 125]. The 1908 Berlin Act added other categories, such as “choreographic works and pantomime, works of architecture, photographic works and works of applied art”; the 1928 Rome Act included “lectures and other oral works,” and the 1948 Brussels Act added “cinematographic works” [27, p. 125]. The TRIPS Agreement and WIPO Internet Treaties followed this trend in widening the scope of protection to include computer programs and databases,¹⁶ especially in the face of drastic changes brought on by technology development and strong lobbying from technology-related industries.

Similar to the increase of subject matters that fall under copyright protection, the scope of the exclusive rights enjoyed by copyright owners is also under expansion to deal with the challenges brought on by the digital network technology. Some of the exclusive rights originally existed in the Berne Convention, but were increased to cover more situations outlined in the TRIPS Agreement and the WIPO Internet

¹⁶TRIPS Agreement, Art 10; WIPO Copyright Treaty, Arts 4–5.

Treaties, such as reproduction and distribution rights.¹⁷ Some exclusive rights were later acknowledged and introduced into international treaties because copyright industries advocated for them, such as the right of rental and the right of communication to the public.¹⁸

At the national level, the first copyright act of the United States, the Copyright Act of 1790, only protected the reproduction and distribution rights of copyright owners over maps, charts, and books. It did not prohibit users from making derivative works or translations based on the original work. Even in the nineteenth century, authors were free to publish their new works by borrowing from earlier works as long as the new works did not take the place of the original work in the market and had substantial contributions. In the landmark case, *Stowe v. Thomas*,¹⁹ Harriet Beecher Stowe, the writer of *Uncle Tom's Cabin*, claimed that there was a copyright infringement by a German translator who made an unauthorized translation of the novel. The court ruled in favor of the defendant by concluding that translation is a new work and does not infringe on the original author's copyright. Subsequent copyright statutes gradually expanded the scope of copyright protection and diversity of exclusive rights. In the Copyright Act of 1976, copyright owners have a broad exclusive right to prepare derivative works based on the original work, including translations, arrangements, versions in other media forms and any other form in which a work may be recast, transformed, or adapted.²⁰

However, all creations are based on preexisting works. Authors borrow from plots, stories, scenes, tunes, and characters in earlier works to write new novels, plays, songs and works in the form of motion pictures. Digital and network technology exacerbates the phenomenon of borrowing and recreation, especially in the making of audio-visual works, as technology facilitates reproduction, editing, synthesis and publication. Although there are doctrines such as the idea-expression dichotomy and fair use/fair dealing in the traditional copyright regime to ameliorate the tension between the exclusive rights of authors and free speech, the intensified protection of the interests of copyright owners restores the tension by latently narrowing down the scope of copyright limitations and judicially supporting infringement lawsuits against similarities in ideas.

Copyright systems allow authors to create based on ideas and information conveyed by former works. Copyright infringement only exists when the expression of the subsequent work is substantially similar to that of the earlier work. In addition, upon complying with certain conditions, authors are privileged to criticize, comment, translate, or research on previous works, which would otherwise be an infringement of copyright. The conditions are four factors that are dependent on case-by-case analysis in the United States or a list of detailed situations in common law jurisdictions such as the United Kingdom and Canada, and civil law jurisdictions such as Germany and China. However, the trend of imposing strong

¹⁷WIPO Copyright Treaty, Art 6.

¹⁸TRIPS Agreement, Art 11; WIPO Copyright Treaty, Arts 7–8.

¹⁹*Stowe v Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

²⁰The United States Copyright Act of 1976, Art 106 (2).

copyright protection based on substantial similarities is more likely to make the once permissible remix and reformulation of ideas or fair use become copyright infringements. In a series of cases, courts have restricted fair use to instances that would not negatively affect the potential market of the copyrighted work [26, p. 64]. Furthermore, courts have determined fair use as an affirmative defense, thus placing the burden of proof on the party who claimed fair use [26]. Thus, users in litigation must prove that the use in question will not damage the potential market of the copyrighted work, even the potential market of derivative works that copyright owners may not wish to exploit [26]. In the opinions of the courts, not only will evidence of potential market harm deny a fair use defense, lack of evidence that proves fair use could also result in the decision of copyright infringement. As Lawrence Lessig commented, the privilege of fair use has become the right to hire a lawyer to defend the right to free speech of users in costly and time-consuming litigations [26, p. 66].

In addition, restrictions on copyright limitations have been settled by laws by protecting technological measures that control access and copying of copyright works. As there are no general exceptions for permitted use under the protection of technological measures, users who circumvent technological measures to make permissible use are likely to commit copyright infringement. By benefiting from legislative protection, copyright industries have widely adopted technological measures such as digital encryption to impede unauthorized access and reproduction. Besides technological measures, the terms of use on websites and online standard contracts are also adopted by industries to further supervise the access and use of copyright works and contents. Due to the extensive adoption of technological measures and compulsory contracts, the exclusive rights of copyright owners have expanded to the right of access which is not traditionally included in copyright systems. The DMCA 2005 Supplement calls these controls a “paracopyright” regime which is already recognized by the law.²¹

2.3.3.3 Newly Added Protection on Technological Measures

The development of digital network technology expedites the reproduction, distribution, and making available of works by public users. In order to reduce the unauthorized use of works, copyright owners employ technological measures such as encryption or other similar means that block unauthorized access and reproduction of copyright works. However, technology alone cannot effectively guarantee protection of works, as users who master decryption skills and technology such as hackers may easily circumvent technological measures and make use of the works. Therefore, copyright holders and industries advocate the introducing of an additional layer of protection on technological measures and prohibiting circumvention acts. The rationale of the anti-circumvention of technological measures is as such: copyright and neighboring rights provide the first layer of

²¹ The Digital Millennium Copyright Act: 2005 Supplement, p. 91.

protection to copyright works from a legal aspect; technological measures work as a second layer of protection from a technical aspect; and the anti-circumvention rules offer the third layer of protection which introduces legal remedies against circumventing acts of technological measures that protect copyright and neighboring rights [27].

The WIPO Internet Treaties for the first time granted protection to technological measures and rights management information at a multinational level. Although some countries have adopted legislations that prohibit the unauthorized decoding of technological protections before the reach of the WIPO Internet Treaties, their scope of protection was quite limited. The WIPO Internet Treaties widened the scope to protect all effective measures that are used to control the access and copying of copyright works. They do not enforce contracting parties to mandatorily adopt the technological measures and rights management information, but rather create a leeway for contracting members to decide whether to use such digital measures and the situations to use them.

Rights management information is defined by the WCT and WPPT as information that identifies subject matters under copyright and neighboring right protection, the right holders, terms and conditions of the use, and any numbers or codes that represent such information.²² Such information is protected when it is attached to copies of works, fixed performance, or phonograms or appears in connection with communication or making available to the public.²³ The WIPO Internet Treaties provide legal remedies against two kinds of acts that will “induce, enable, facilitate or conceal an infringement” of copyright or neighbouring rights²⁴: alteration or removal of rights management information without authorization, and distribution or communication to the public of protected subject matters or their copies with the knowledge that the rights management information attached to these subject matters or copies has been altered or removed. In order to stem direct and indirect infringements on rights management information, the WCT and the WPPT have urged member countries to enforce adequate and effective legal remedies against any person who has conducted the aforementioned wrongful alterations or distribution subject to different knowledge requirement.²⁵

The DMCA of the United States includes provisions that protect technological measures that control access and use of copyrighted works.²⁶ Unauthorized circumvention of technological measures is deemed as infringement under the law. Furthermore, the DMCA also prohibits the manufacture and dissemination of devices which facilitate the circumvention of access and copying controls.²⁷ The legislative model of the United States has influenced many jurisdictions to establish a technological measure protection system. The European Union, Australia, and

²²WIPO Copyright Treaty, Art 12(2); WIPO Performances and Phonograms Treaty, Art 19(2).

²³Ibid.

²⁴WIPO Copyright Treaty, Art 12(1); WIPO Performances and Phonograms Treaty, Art 19(1).

²⁵Ibid. Von Lewinski [27].

²⁶The United States Copyright Act of 1976, s 1201.

²⁷Ibid.

Asian countries such as Japan and China, all have laws and regulations with regard to the anti-circumvention of technological measures. As scholars have commented, nowadays, it is not the court that enforces copyright laws and determines whether the use is fair. It is the technology, software, and digital codes that control how users can access and use the protected works. Even if the technology is not powerful enough, legislatures have passed laws that support any technology that effectively controls copyrighted content [25].

The anticircumvention rules expand copyright protection by providing copyright owners with the exclusive right of controlling access to their works. Traditional copyright concerns only the use of copyright works, leaving access issues to be regulated by other laws, such as contract, tort or criminal law. For example, one can freely read a book without the author's permission when s/he finds the book in a public library, buys the book at a bookstore, or even steals the book from someone else. As long as the person does not reproduce, modify, translate, or prepare derivatives based on the work, s/he has not committed infringement of copyright, although s/he may be punished by tort or criminal law due to the act of theft. However, under the situation where there is wide deployment of technological measures by industries and anti-circumvention rules imposed by the DMCA and laws in other jurisdictions, users no longer have the same freedom to read a book, listen to music or watch a video as in the traditional copyright regime. More seriously, the tendency that industries use technology to control access to non-copyrighted material expands the industrial monopolization to the public domain and further hinders the freedom of the public in knowledge exchange and speech.

2.3.3.4 Aggravated Liability on Internet Service Providers

The emergence of digital technology and new media changes the traditional model of the distribution of works into a more convenient, costless, and efficient way. Prior to the ubiquitous availability of computers and the Internet, the production and distribution of popular creative works were funded and monopolized only by media conglomerates. The Internet has given the public the capability to create their popular and core value cultures. Today, works distributed through the Internet reach mass audiences to an unexpected degree. As a result, copyright industries which own a large number of copyrights find it hard to control the distribution by intermediaries of their copyright works or derivatives based on their works. These intermediaries range from music file-sharing and downloading technology and websites such as Napster, Grokster, and Baidu to audio-visual webcasters such as YouTube and Youku. In the face of numerous unauthorized distributions via new media, copyright owners and industries have launched a series of litigations against ISPs for indirect liability of the copyright infringement acts of their online users.

In these litigations, the courts have explained the indirect copyright liability of the intermediaries as one that distributes the product with the objective of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, and should be liable for the resulting acts of

infringement by third parties.²⁸ The claim of indirect copyright liability had been used by copyright industries especially the music and motion picture industries to prohibit the distribution of unauthorized online copyright files facilitated by many of the large ISPs, such as Napster, MP3.com, and Grokster. The industries are concerned about the threat that technology and intermediaries has imposed on facilitating copyright infringement, arguing that copyrights are not designed for consumer convenience but rather to cater to the property interests of the copyright owners.²⁹

The continuing lawsuits against new media and strategic lobbying of the copyright industries have prompted governments to regulate the copyright infringement liability of ISPs. The ISP liability laws range from the DMCA of the United States, Digital Economic Act of the United Kingdom, graduated response policy of France, and the 2006 Regulation of China. Such laws respond to the calling and lobbying by copyright industries for expansive copyright protection in order to maintain their market dominance. Although the granting of intermediaries with freedom to distribute copyright works regardless whether they have authorization or not may affect the incentive of authors in producing new expressions, strict restraints on access and distribution of current works by new media will suffocate the investments on new digital technologies and promotion of such, and stifle new ways of propagating expressions.

In recognizing that the support for copyright industries to deter the development of new content distribution technology will indulge industrial monopolization over the market, lawmakers and courts have resorted to safe harbors that limit the indirect copyright liability of ISPs or compulsory licenses which require new media to pay reasonable fees in turn for the privilege of using copyright works so as to ameliorate the conflict between content providers and distribution intermediaries. In the *Sony* case of 1984, the United States Supreme Court provided safe harbors for new technology by guaranteeing that suppliers of staple articles of commerce shall not be liable for the copyright infringement of third parties even though they know users are likely to use the articles for infringement, as long as the article is produced for the purpose of substantial non-infringing use.³⁰ The judicial decision in the *Sony* case aimed to achieve a balance of the interests between technology developers and industries, fostering research and development in digital technologies on the one hand, and stimulating incentives for creations on the other hand. The DMCA included safe harbors for the copyright liability of ISPs, establishing a list of disclaimer conditions such as the notice and takedown regime.

Nevertheless, the balance of interests has been recently disrupted due to the new legal trend and judicial practices on implementing severe punishment over the indirect copyright liability of ISPs. Several influential cases, such as Napster, MP3.com, and Grokster, have witnessed this trend of stifling technology. Technological intermediaries were all held liable for actively inducing Internet users to commit copyright infringement, if they had knowledge of the direct infringement, obtained direct

²⁸ *Metro-Goldwyn-Mayer Studios Inc. v Grokster Ltd.* 545 U.S. 913 (2005).

²⁹ *UMG Recording Inc. v MP3.com Inc.* 92 F. Supp. 2nd 349 (S.D.N.Y. 2000).

³⁰ Netanel [26, p. 78]. Also see *Sony Corp. v University City Studios Inc.* 464 U.S. 417 (1984).

financial benefits from the infringer, or had the ability to control the infringement activity.³¹ These judicial decisions gave copyright industries the support to address any new media that facilitated Internet users to reproduce and disseminate copyright works. In addition, the graduated response policy issued by the French government exacerbates the weak position of new media. Under the graduated response policy, the administrative authority can warn ISPs to stop the infringement activity of users in question after receiving complaints from copyright owners [28]. This policy has also spread to other jurisdictions, such as the United Kingdom, South Korea and Ireland. The adoption of the graduated response policy has aggravated ISP liability by increasing additional conditions in the safe harbors. Moreover, although the DMCA permits compulsory licensing for online transmissions, it replaces the new media's required payment based on fair return with the payment based on the market rate [26]. Without providing new media with reasonable and fair royalties, the market rate will reduce incentive and investment in new digital technology and media.

2.3.3.5 Media Concentration and Restricted Freedom of User-Generated Creations

Copyrights did not originally grant many monopolies, but nowadays, copyrights are controlled by a few entertainment conglomerates due to media concentration. As Professor Lawrence Lessig summarized, the concentration of media is drastically different from what it was 20 years ago [25]. Nowadays, “eighty percent of the music distributed in the world is distributed by five companies; seventy percent of the radio market is controlled by just four firms. Eighty percent of television and cable in the United States is controlled by six firms..... This is a concentrated form of control producing a kind of homogeneous culture, a culture which is increasingly tailored to this vision of a certain mainstream market and, therefore, protects that market against different kinds of creativity” [25].

The media concentration has constrained the creative freedom that people used to enjoy in life. Before copyright industries monopolized the market and endeavored to counter infringement, the public was free to view the existing information, borrow from existing material, create, and comment on works by others as they felt appropriate. The birth of the Internet has just enriched such personal freedom. Millions of individual Internet users have embraced the new ways of expression and communication by writing novels, blogging their ideas and daily experiences, composing songs, clipping and editing videos or producing short movies. People usually engage in these types of creative activities by working on their personal computers or accessing the Internet at home or in private places. As long as people do not use their creations based on copyright works for commercial purposes, their activities are like private or face-to-face communications in ordinary life, which impose no

³¹ Examples of legislations include the United States Copyright Act, s 512 and the Regulation on the Protection of the Right to Network Dissemination of Information of China, Arts 22–23.

harm on the interests of the copyright owners. Furthermore, such individual creativity forms part of the marginalized and mass culture. The imposing of excessive liability and restrictions on personal use will negatively affect privacy, personal freedom and free expression.

However, as Professor Jane Ginsburg commented, prior to the advent of digital technology, “video recorders and photocopiers, individuals’ practical ability to engage in personal copying was exceedingly limited and posed no threat to copyright markets or incentives” [29]. That digital technology and the Internet make reproduction and distribution much easier for users does not mean that copyright laws should step aside and not interfere with the potential negative effects brought on by infringement activities that erode incentives for creativity [26]. Similarly, that digital technology gives copyright industries the potential power to control access and copying of information does not mean that copyright laws should grant such access rights to industries by sacrificing user privacy and right of free speech. Therefore, as Professor Neil Netanel concluded, “adapting copyright doctrine to digital technology requires that we recalibrate copyright’s balance to reflect, not stifle, digital technology’s empowerment of individual speakers. Just as copyright need not countenance massive uncompensated copying of copyrighted works simply because file swappers perceive that activity to be a personal liberty, neither should we aim to give copyright holders the broad legal and technological control to re-create the predigital market structure and mass-media-to-passive-consumer model of public disclosure in the digital environment” [26, p. 75].

2.4 Conclusion

The establishment of intellectual property and copyright systems is not only for the protection of proprietary rights, but also to promote public interest and socioeconomic development as more important purposes. The philosophical and economic theories on intangible property illustrate the important function of intellectual property systems in meeting public interests and attaining social justice. Intellectual property systems should be well designed to balance the interests of right holders and public users of intellectual assets.

Copyright was developed under such ideals by granting authors with exclusive rights over their works on the one hand and setting limitations and exceptions on the other hand. However, the continuous expansion of copyright protection has disrupted the balance of interests that originally existed in the pre-digital copyright system by extending the duration of protection, expanding the subject matters and exclusive rights under protection, controlling copyright limitations, granting protection to technological measures which control access and copying of copyright works, aggravating indirect liability of technological intermediaries, and strengthening market monopolization of copyright industries. An imbalance of interests in copyright systems overprotects the exclusive rights of right owners by sacrificing the legitimate access and exploitation of the copyright works by public users and

information in the public domain. The impediments in using preexisting knowledge and information will in turn suffocate future creations and innovations. Therefore, it is time for policymakers to consider revising and amending their copyright systems to adapt to the new environment and restore a balance of interest.

The key to restoring balance is to guarantee necessary and appropriate access to copyright works. Proposals that will reestablish a balance of interest include readopting moderate protection on technological measures, establishing reasonable safe harbors for ISPs, redefining the scope of copyright limitations and exceptions, and introducing alternative schemes such as projects of digital commons as supplements to copyright reforms. Such proposals are intended to appropriately alleviate the protection of copyright owners, reasonably allocate the liability of intermediaries, and moderately enrich the privileges of end users. By gradually shifting the focus, the goal of copyright systems to promote social progress and justice will be achieved. The subsequent chapters will discuss each issue and proposal in detail.

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