

Chapter 2

The Rise of Fan Activities and the Tension with Copyright Protection in the Digital Environment

Man, the living creature, the creating individual, is always more important than any established style or system.

—Bruce Lee

As this research is aimed at solving the problem of fan creations in China, it is necessary to first have a deeper understanding of fans and their behavior in the digital era, the opportunities and challenges thereof. For that purpose, the historical and functional aspects of the fan movement and the interconnections between them, and the major changes to the legal system brought by the Internet and digital technologies are examined. Studying these topics allows us to have a clear understanding of the true cause behind the copyright problems of fan creations.

This chapter takes the recent development and origin of fan activities in different countries as a basis, to explain the legal problems of fan activities and whether the corresponding solutions are sufficient. It first explores the development of several important fan activities and its correlations with new media (Sect. 2.1). Further, it examines the challenges of the digital technologies that the copyright system is facing (Sect. 2.2), and draws several conclusions regarding the impasse that copyright owners face when trying to enforce their copyright against fan creations in the digital era (Sect. 2.3).

2.1 The New Media and Fan Activities

Generally speaking, typical fan works include *fansubs*, *fanfics*, *doujinshi* (同人誌), *scanlations*, *fanvids*, *AMVs*, and *Video Parodies*. The glossary (Table 2.1) gives an overview of these fan works.

This section examines fansubs (Sect. 2.1.1); fanfics, doujinshis, and scanlations (Sect. 2.1.2); and fanvids, anime music videos (AMVs), and video parodies (Sect. 2.1.3) in turn.

Table 2.1 Glossary of fan works

| Term | Definition | Example |
|----------------|---|--|
| Fansubs | A term used to describe the activities in which people translate and share the subtitles of a certain audiovisual work (sometimes the subtitles are encoded into the video file) from one language into another | Japanese Anime fansubs (such as Naruto, One Piece) and fansubs of TV series from US, Japan and South Korea |
| Fanfics | A broadly defined term used to describe the unauthorized sequel of existing works using its milieus and characters, written by a fan rather than the original author | Spockanalia, a fanfic of the famous Star Trek |
| Doujinshi | A Japanese term for amateur manga publications, featuring either a cast of original characters and plot or characters from another manga or an anime | Doraemon final episode, a fan made doujinshi by Yasue T. Tajima |
| Scanlation | A coined word, for the purpose of describing the activities in which people scan, translate and edit a manga or comic from one language into another | Japanese mangas such as Naruto and One Piece |
| Fanvids | A term used to describe the practice in which people create music videos using one or more copyrighted visual media sources without permission | Ranging from the Star Trek to the Sherlock fanvids |
| AMVs | A term used to describe the fan-made music videos, which consist of clips from one or more animation shows or movies set to an audio track | Ranging from AMVs of the Melancholy of Haruhi Suzumiya to Naruto |
| Video parodies | parody expressed in video forms | The Bloody Case That Started from a Steamed Bun |

2.1.1 Fansubs

Fansub is the most prominent example. It is a coined word short for fan subtitling or fan-subtitled works. It is used to describe a certain activity in which groups of media fans translate the subtitles of their favorite foreign audiovisual works into their home language.¹ In terms of audiovisual outputs, Japan is most famous for its manga and anime products,² as well as other products such as drama and feature films. The so-called “fansubbing” activities can be traced back to the Japanese

¹Except for some domestic productions that use local dialogues, fansubbers are mainly focused on foreign works that use a foreign language.

²“Manga” are comics created in Japan. The term “anime,” from the Japanese abbreviation for “animation,” refers to a style of animation originating in Japan.



Fig. 2.1 A snapshot of a fansub of *the Big Bang Theory*. Snapshot by the author

anime production explosion in the 80s. During that period, a significant number of anime works were produced in Japan, but only a few of them were able to enter into foreign markets. First gaining prominence in the U.S., anime fans there formed in groups to translate anime works into English. Within two decades, Fansub groups grew enormously around the world with the help of digital technologies (Fig. 2.1).

The term “fansub” was initially used to describe the fan-translated Japanese animes that were disseminated among other fans in the U.S., but now it has extended to all types of audiovisual works. In order to present a full view of fansubbing, the following topics are explored: the various motivations for fan-subbing (Sect. 2.1.1.1); the unique development trajectory of fansub (Sect. 2.1.1.2); and the endeavors of fansub groups to build community norms (Sect. 2.1.1.3).

2.1.1.1 Motivations

In order to have an idea about why people do fansub in the first place, it is necessary to know their motivations. Jenkins has elaborated on the concept of fandom in the following five levels:

- a. It involves a particular mode of reception;
- b. It involves a particular set of critical and interpretive practices;
- c. It constitutes a base for consumer activism;
- d. It possesses particular forms of cultural production, aesthetic traditions and practices;

e. And, it functions as an alternative social community.³

From this definition we can see that, first fans are closely related to consumers, and second, the activities which are carried out by a fan community are multilayered and diversified as the community develops, so their motivations could vary a lot over time.

For instance, fansubbing first emerged as a pure fandom activity. Accordingly, the most common motivation of fansubbing at the beginning is to help promoting certain Japanese anime. Study shows that, in order to promote anime more effectively, many international fan clubs of Japanese anime were established in the U.S. between the late 1970s to the end of the 1980s.⁴ Fansubs (in the form of videotapes) were first shared among fan groups, with limited members and distribution methods. This has been changed after entering the digital age: the coverage of fansubs was extended from merely Japanese animes to almost all kinds of audiovisual works. Accordingly, the motivation of fansub groups to share anime works among fans was transformed into the motivation to share their favorite audiovisual works online with everyone.⁵ More specifically, to practice English and video production, and to have a sense of belonging and community were considered as the dominant motivations of most Chinese fansubbers.⁶ Furthermore, fame and unlimited access to firsthand pirated digital copies of audiovisual works were considered as the motivation of some fansubbers.⁷ In addition, fans of the translations themselves had also emerged. These enthusiasts of translations share their works to improve their translation skills by soliciting feedback from others.⁸

One of the subsidiary motives for fansubbing is that, in the case that a foreign audiovisual work is not officially available in the local market, fansubs enable people to get easy access to that title.⁹ This lack of availability may be caused by

³Jenkins, *supra* note 2 in Chap. 1, at 284–286.

⁴Leonard, *supra* note 28 in Chap. 1, at 204.

⁵Mikhail Koulikov, *Fighting the Fan Sub War: Conflicts between Media Rights Holders and Unauthorized Creator/Distributor Networks*, 5 *Transformative Works and Cultures* (2010), at <http://journal.transformativeworks.org/index.php/twc/article/view/115/171> (“Nearly all fan subs are now shared digitally, with little or no ties to any established communities... Thus, tightly knit fan subbing groups defined by geography could evolve into essentially global virtual teams defined by working on tasks.”).

⁶Donna S.C. Chu, *Fanatical Labor and Serious Leisure: A Case of Fansubbing in China*, in *Frontiers in New Media Research* 271 (Francis L.F. Lee ed. Routledge. 2012).

⁷Duo Hao (郝多) & Yingfei Wang (王颖菲) & Lei Jia (贾磊), *Zimuzu (字幕组) [Fansub Groups]*, *Xiandai Kuai Bao (现代快报)* [Modern Express], Mar. 2, 2014, at http://dz.xdkb.net/html/2014-03/02/content_326140.htm (China).

⁸This is evident as the disclaimer of “for translation practice purposes” is commonly seen at the beginning of many fansub videos.

⁹Koulikov, *supra* note 5 (“... one of the reasons for the existence of fan subs: the lag between a title’s release in Japan and its availability overseas.”). See also B. Dong & S. Pocock, *Chicks on Anime Copyright Enforcement*, *Anime News Network*, May 5, 2009, <http://www.animenewsnetwork.com/chicks-on-anime/2009-05-05> (“...an overwhelming majority of users said that they’d watch the simulcast if it was available in their country.”).

market withdrawal or market entry problems. Take as an example foreign audiovisual works that were already out of production, it is very hard to urge film companies who own the copyright of these titles to re-issue them in China, if the cost-benefit analysis of doing so does not look good enough. As for new products, to enter the Chinese market will require dealing with lots of restrictions.¹⁰ Besides waiting for an unpredictable future introduction of those works, fansubs appeared to be an alternative choice for consumers for the time being.

Moreover, some fans did create and distribute fansubs with the motivation of keeping the integrity of the originals. Previous studies showed that, the integrity of many imported audiovisual works is at risk in different countries. For instance, Japanese animations in the U.S. market are subject to severe censorship, the reason for that being to filter violence and sexual content and to adapt them to the local language environment.¹¹ The most notorious case of that will be the rewriting of Hayao Miyazaki's *Nausicaä of the Valley of the Wind* (1984), which was adapted in 1986 and proved to be a commercial and artistic failure. Isao Takahata, the producer of the original work said: "Censoring them is worse than betraying them" in an open interview.¹² Moreover, in the U.S., even some of the local cartoons are sanitized for television broadcasting.¹³ Foreign audiovisual works in China are facing the same problem: an interview conducted by the China Central Television (CCTV) shows that imported animation works were under multiple levels of censorship, for the purpose of catering for the works for children.¹⁴ Some legislation and regulations also indicate that topics such as sensitive political content, obscenity, and violent content are prohibited by the censors too.¹⁵ The outcome of these policies is that most foreign audiovisual works were sterilized and thus could vary much from their original versions. Some adaptation changed the content to a great extent, leaving the audiences with a vague and misleading version. In this case, neither the copyright owners nor the fans were delighted. In a sense, it is

¹⁰E.g., barrier to trade, screen quota, censorship, government policies, market analysis and company choice, etc. See generally, Priest, *supra* note 5 in Chap. 1.

¹¹Sean Leonard, *Progress Against the Law: Anime and Fandom, with the Key to the Globalization of Culture*, 8 Int'l J. of Cultural Stud. 281, 285 (2005).

¹²Interview with Isao Takahata, Hayao Miyazaki Web, Oct. 1993, at http://www.nausicaa.net/miyazaki/interviews/t_corbeil.html#fn4.

¹³Jason Mittell, *Genre and Television: From Cop Shows to Cartoons in American Culture* 64 (Routledge, 2004).

¹⁴*Guowai Donghua Pian Dui Zhongguo Ertong Jiazhi Guan de Yingxiang* (国外动画片对中国儿童价值观的影响) [*Imported Anime's Influences on the Values of Chinese Children*], Zhongyang Dianshi Tai (中央电视台) [CCTV], Oct. 12, 2004, http://www.cctv.com/tvguide/tvcomment/special/C11876/20041012/101985_4.shtml.

¹⁵See Examination Standards Concerning Imported Foreign Television Dramas, art. 4. See also, e.g., Foreign Television Program Import and Broadcast Management Regulations, art. 15; Television Drama Examination Management Regulations, art. 20; Dianshiju Neirong Guanli Guiding (电视剧内容管理规定) [Television Drama Content Management Regulations] (promulgated by SARFT, May 14, 2010, effective July 1, 2010, by SARFT Decree No. 63) art. 5 (China).

reasonable to say fansubs are a direct result of censorship: fans create and distribute fansubs because they believe that the licensed version may not reflect, and sometimes may even distort, the original expression of the foreign audiovisual works. Fansubs are indeed offering fans who had watched the licensed but censored version and still want to find a way to access the originals. Interestingly, a report shows that some Chinese fansub groups are under the surveillance of SARFT. Every two or three months, the SARFT will send letters to famous fansub groups, telling them to make sure their fansubs avoid certain works with obscene and sensitive contents.¹⁶

2.1.1.2 Development of Fansubs

It is clear from above that the various motivations for fansubbing have changed over time. This may be due to the worldwide development of fansubs.

With unique style and content, the Japanese animes found their way into the U.S. market around 1975. Although they have to compete with a well-established American cartoon industry and have to live with certain degrees of adaptation, these Japanese animes turned out to be a real success in the American market.¹⁷ Compared with the co-existent American cartoons, audiences in the U.S. were amazed by the contents and depth of the Japanese animes. Out of their adoration of certain Japanese anime titles, fans started to form groups in which they could translate and distribute their favorite works among other fans.

The emergence of the initial fansub could be traced back to 1986. It was in the late 80s when fansubbing as a collective action surfaced in America. It is also believed that the video-recordable tapes or cassettes like VHS and Betamax are the first carriers of Fansubs.¹⁸ During that period, fans first needed to purchase the original copies from Japan, and then use special equipment (which is a heavy investment on fixed assets) to overlay the translated subtitles with the video and record it with tapes. These final products were then circulated within the fan community by post. Due to prohibitively high cost and time investments in producing and sending the fan-made tapes, fansubbed works only reached a limited number of people.¹⁹ This model of fansub production lasted till the mid 90s, when the personal computer became a mass-consumption item and the Internet became

¹⁶Lele (乐乐), *Bufen Zimuzu Shouru Da Baiwan Yuan Yingshi Wangluo Fanyi Quzhi Youdao* (部分字幕组收入达百万元 影视网络翻译取之有道) [Some Fansub Groups Make Millions a Year: Internet Visual Translation Reap with Their Way], *Laodong Bao* (劳动报) [Labour Daily], Aug. 6, 2009, <http://ld.eastday.com/1/20090806/u1a610796.html> (China).

¹⁷See Trish Ledoux, et al., *The Complete Anime Guide: Japanese Animation Video Directory & Resource Guide 175* (Tiger Mountain Press 1st ed. 1995).

¹⁸Leonard, *supra* note 28 in Chap. 1, at 192.

¹⁹Jordan Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, 2 Script-ED 551 (2005).

publicly accessible. With costs of fansubbing decreasing, fansubbers in less-developed countries such as China emerged.

In China, audiovisual production went through a unique path when compared to most western countries after the establishment of the People's Republic of China in 1949. Audiovisual production, especially the introduction of foreign titles for the purpose of broadcasting has long been a privilege of the upper class and was firmly controlled by the government. Furthermore, Chinese history has had an effect with regard to how fansub activity is treated. After 1949, the new Chinese government introduced an "Independence and Self-reliance" (独立自主, 自力更生) policy in the early period of socialist development. The government thus blocked most foreign audiovisual works at certain time periods such as during the Great Proletarian Cultural Revolution.²⁰ In other words, China was intent on establishing its own film industry without help, or interference, from Western countries. Of course, there were various reasons for prohibition at that time, such as concerns about the potential problems caused by what was considered by the then Chinese government to be the "bourgeois ideology" in foreign movies,²¹ and the political concern about the influence of the Cold War. It was only after the Chinese Economic Reform, which started from the end of 1978, that a limited number of so-called Western "capitalist" audiovisual works were allowed to enter the Chinese market. However, before the mid 1990s, "entering the market" at that time only meant television broadcasting.²² A 2005 report conducted by the China Audio & Video Association found that the price of VCRs and videotapes was comparatively high for Chinese consumers at that time, and thus the rate of ownership was relatively low as well.²³ Furthermore, in 1997 the number of authentic titles was 5137 with a circulation of 3.8 million countrywide.²⁴ The report also revealed that there was no importation of licensed foreign audiovisual works in tape form in China that year.²⁵

²⁰Gary Xu, *Edification Through Affection: The Cultural Revolution Films, 1974–1976*, in *The Oxford handbook of Chinese cinemas* 271 (Carlos Rojas & Eileen Cheng-yin Chow eds., 2013) ("As soon as the Cultural Revolution began, all the...foreign imports were sealed off...").

²¹It must be noted that, as a convenient term for propaganda slogans, the "bourgeois ideology" notion mentioned here was only used for a short period of time before the open-up period.

²²According to a 1995 study of the Chinese videotape market, some 20 million Chinese families then owned a videocassette recorder (VCR) nationwide, and the number of videotape theaters and rental shops in China was only around 120,000. See Jianshe Tang (唐建设), *Rang Gao Pinwei Di Jiawei De Luxiangdai Jinru Jiating* (让高品位低价位的录像带进入家庭) (*Let the Videotape with Higher Quality and Lower Price into Our Family*), Chuban Guangjiao (出版广角) [View on Publishing], no. 2, 1995.

²³Ju Wang (王炬), *Zhongguo Yinxiao Ye De Fazhan Xianzhuang* (中国音像业的发展现状) [*Status Quo of the Chinese Audiovisual Industry Development*], in *Zhongguo Wenhua Chanye Fazhan Baogao* (中国文化产业发展改革报告) [Report on Development of China's Cultural Industry] 151, 151–62 (Xiaoming Zhang (张晓明) et al. eds., 2005).

²⁴*Id.*

²⁵*Id.*

The fact is, without any official channel through which to obtain genuine tapes of foreign audiovisual works, the only possible way for Chinese citizens to get access to foreign audiovisual works was through pirated videocassette copies of works officially licensed for Taiwan and Hong Kong. The reason that the pirates could source genuine audiovisual products from there was because the markets in Taiwan and Hong Kong were more open, they faced fewer restrictions and, therefore, many foreign audiovisual works had already been introduced there; another reason that made these products attractive to the pirates was that mainland China shares the same language background as Taiwan and Hong Kong, and those non-Chinese titles which had been officially introduced there already had professionally translated Chinese subtitles.²⁶ Given the language barrier in China, it is therefore quite understandable that piracy dealers would prefer to sell copies of foreign audiovisual works with officially well-translated subtitles.

Officially introduced titles could only be found on state-owned television networks in Mainland China.²⁷ However, even though increasing numbers of foreign audiovisual works were subsequently introduced into government-controlled television stations, that amount remained rather limited, and they were all dubbed after going through severe censorship, without exception. It was also true, then, that Chinese fans of certain foreign audiovisual works did not possess the necessary equipment, knowledge, sources, and funding to make fansub copies on videotapes as their counterparts in the U.S. were doing; what they did only concerned the distribution of the original copy.

It was only after the mid 1990s that people had access to the Internet which thereby gave them a new means of communication. The Internet has had a tremendous impact on culture and commerce in China. Around the same time, large corporations, such as Sony, Philips, Matsushita, and JVC, developed the Video Compact Disc (VCD) technology,²⁸ and established the VCD standard in 1993.²⁹ In the U.S., VCDs were not as popular as they were in China from the late 1990s to the early 2000s, with only a few major feature films being released on that format. The invention of the rewritable CD drive and the CD-R (Compact Disc-Recordable), the CD-RW (Compact Disc Re-Writable) standards, and especially the development of the DVD format explain the reason for the short life of VCDs.³⁰ The industry believed that the DVD format was a better choice in terms of protecting their copyrighted content from unauthorized copying, and it replaced VHS tapes as the

²⁶Although there are differences between simplified Chinese and traditional Chinese, they do not cause problems in understanding.

²⁷For example, the famous Japanese anime *Tetsuwan Atomu* (also known as *Astro Boy* in Western countries) was the first officially introduced title, appearing on China Central Television (CCTV) in December 1980.

²⁸VCD is a standard digital format for storing video on a compact disc.

²⁹Philips System Standards and Licensing, *Super Video Compact Disc, A Technical Explanation*, 1998, at 2, at http://www.datv.de/technische_Infos/SVCD.pdf.

³⁰Scot Meyer, *Versatile Video CD's Get a Foothold in US*, N.Y. Times, Apr. 26, 2001, at <http://www.nytimes.com/2001/04/26/technology/versatile-video-cd-s-get-a-foothold-in-us.html>.

dominant method of distribution after 2000.³¹ It has been noted that the price of a CD-R recorder (4020i half-height 2x recorder manufactured by Philips) in late 1995 was \$995, but that price had dropped to as low as \$99 by 2000.³² Using these new formats, fansub groups in the U.S. started to distribute CD-Rs via mail in the late 1990s and early 2000s.³³ However, online distribution quickly supplanted the above-mentioned media as the dominant distribution method by 2002 in the U.S.³⁴ It is also believed that most fansubs had turned to digital distribution channels by 2006.³⁵

In China, though, fansubs in VCD and DVD forms were never as popular as VHS tapes had become in the U.S. Different types of fan activity took place in China before 2002. The first spate of fansubbers had emerged in China in the late 1990s with the exponential expansion of broadband Internet services.³⁶ Before that, due to the natural limits of bandwidth, families in China could only use Internet services with a dial-up modem to handle e-mail, web browsing, and instant chat related issues. Piracy activities were still in their infancy around 2000. What is worth noting is that, in China, because the VCD had quickly become the dominant distribution channel of officially imported foreign titles after 1999,³⁷ the circulation of videotapes dropped dramatically from 3.8 to 0.16 million after 1997, with the number of official titles falling from 5137 to 296, in 2003. According to a 2003 survey of the genuine VCD market in China, the total number of foreign audio-visual works in circulation in VCD forms was nearly 100 million.³⁸ The VCD standard managed to survive longer in China than it did in the U.S., and this was most probably because the costs of producing pirate VCD copies in China were much lower than VHS tapes. Furthermore, for customers VCDs required less storage space and were cheaper to buy. Considering the general levels of economic development in China in 2002, the late market acceptance of DVDs in comparison with the U.S. is understandable.

Fansub activities using digital technology (Digisubbing) in the U.S. had started early: the cable modem as the signifier of the first broadband opportunity was

³¹Anna Bakalis, *It's Unreel: DVD Rentals Overtake Videocassettes*, Washington Times, Jun. 21, 2003, at <http://www.washingtontimes.com/news/2003/jun/20/20030620-113258-1104r>.

³²Bob Starrett, *The History of CD-R*, Roxio Newsletters, Jan. 17, 2000, at <http://mediajet.ru/history-cd-r/>.

³³*Fansub*, Bloomsburg University Manga and Anime Club (BUMAC), at <http://www.bumac.org/index.php?page=fansub>.

³⁴Zac Bertschy, *2002—Fansubs in review*, Anime News Network, Jan. 14, 2003, at <http://www.animenewsnetwork.com/feature/2003-01-27/7>.

³⁵BUMAC, *supra* note 33

³⁶Shule Zhang (张书乐), *Zumu Zu de Huise Jianghu* (字幕组的灰色江湖) [*The Grey Coterie of Fansub Groups*], Tai Mei Ti (钛媒体) [Tmtpost.com], Dec. 9, 2013, <http://www.tmtpost.com/82623.html> (China).

³⁷Wang, *supra* note 23, at 151-62.

³⁸*Id.*

available in the U.S. in the late 1990s,³⁹ but only after 2001 did the number of subscribers really take off.⁴⁰ In the late 1990s, the early fansubs being shared through the Internet were merely transformations of earlier VHS fansubs using video capture technologies.⁴¹ The earliest digisubbing activities in which broadband Internet connection, personal computer (PC), and computer-based software were employed to create and disseminate fansubs were recorded around year 2000.⁴² In China, broadband Internet technology ignited the digisubbing movement from around 2002. By comparison, fansubbers in China started using similar features one year later.⁴³ This massive online sharing of fansubs was made possible by the introduction of Peer-to-Peer (P2P) file sharing software such as Napster, Gnutella, Kazaa, Bittorrent, and eMule. In the digital age, raw materials (video files without subtitles) ripped from television recordings, DVDs, even digitalized contents from the earliest Laserdiscs (LDs) and VHS tapes could be shared on the Internet across continents. Fansubbers could locate and download the raw materials, and then use them to produce and distribute fansubs within a very short time. Most of the early fansubbers emerged from certain pre-established BBSs (Bulletin Board Systems), websites, chat rooms, and forums.

The reasons for the fansubbers' switch are apparent: not only do digisubs have better quality pictures and with lower production costs, but also they are much faster distribution channels. They initially started to make fansubs individually, but later several groups were formed, and thereafter fansubbing gradually became a collaborative work. The whole process of creating a fansub then was divided into certain tasks, and different members were assigned to each.⁴⁴ In the late 1990s, media such as CD-Rs and DVD-Rs were used in fansub distributions. Initially there were several file compression standards relating to the sizes of the fansub files, but for the purpose of maximizing the utility of the carrying media, the most common standard was 700 MB, just enough to burn the content onto a typical CD-R disk. With the enormous increase in Internet bandwidth, better optional storage mediums became available, meaning the particular file size for certain media became less important for fansubbers.

³⁹*History of Cable Modems*, InformIT, at http://www.informit.com/library/content.aspx?b=Planet_Broadband&seqNum=17.

⁴⁰Andrew B. Winston, *IT Policies and Issues: US and the Americas*, in *Information Technology Policy and the Digital Divide: Lessons for Developing Countries* 66 (Mitsuhiro Kagami, et al. eds., 2004).

⁴¹BUMAC, *supra* note 33.

⁴²*Ask John: What Are Fansubs?* Animation News Blog, Dec. 27, 2001, at <http://www.animation.net/blog/2001/12/27/ask-john-what-are-fansubs/>.

⁴³Yizhen Hu (胡绮珍), *Zhongguo Zimu Zu yu Xin Ziyou Zhuyi de Gongzuo Lunli* (中国字幕组与新自由主义的工作伦理) (*Chinese Fansub Groups and the Neoliberal Work Ethic*), *Xinwen Xue Yanjiu* (新闻学研究) [Mass Communication Research], no. 101, 2009, at 177, 181 (Taiwan).

⁴⁴Jorge Díaz Cintas & Pablo Muñoz Sánchez, *Fansubs: Audiovisual Translation in an Amateur Environment*, *The Journal of Specialised Translation* 37, 37 (2006).

Apparently, fansub activities were accelerated by the broadband Internet technology. For instance, whereas previously fansubs had only been circulated within small fan groups with a limited and recordable distribution figure, after entering the digital age, fansub activities were solidified and increased greatly with the help of modern digital technologies. Consequently, fansubs in the digital age could theoretically be shared with countless people, so it is extremely hard to control and monitor the figures related to distribution. Furthermore, we can no longer portray nascent digisubbing activity as merely a fan activity that focuses on Japanese anime. The image of the small coterie has gone, now the word fansub is being used to illustrate fan translation works of all kinds of audiovisual works. Fansubber has thus become a word to characterize those people who translate foreign audiovisual works into their own languages and disseminate them online. Consequently, fan creations in the digital age can theoretically be shared with countless people and, hence, it is impossible to control and monitor the figures related to fan distribution.

According to a previous study, generally a fansubbing process involves 6 participants: raw providers provide the source material; translators are in charge of translation; timers are responsible for fitting the subtitles with the exact dialogues; typesetters decide the font styles and colors of the subtitles; editors and proof-readers take charge of the revision of the translation; encoders use encoding software to produce the final product by combining the subtitles with the raw files. Generally, these tasks are completed by different fansub group members, but practices with fewer people are common as well.⁴⁵ Generally speaking, raw sources are ripped from certain mediums (TVRips, DVD Rips, BDRips, etc.) by specific equipment like analog capture cards and transformed into machine-readable video format. Translators then translate the dialogues with original subtitles and send it to timers and typesetters.⁴⁶ They use software like Sub Station Alpha (SSA) and Virtual Dub to produce subtitle files.⁴⁷ After revision by the editors, the encoders use a set of software packages, including a video codec, to compress the subtitle file and the raw video file into one, and afterwards the group distributes the final product with P2P software. However, it is also a common practice for fansubbers to avoid the encoding part and only upload the subtitle files to subtitle sharing sites. By doing that fansubbers will receive less pressure from the related industry, as the end-users will do the final compression of the subtitle files with the video file, and boost the transfer speed by reducing the file size tremendously.⁴⁸

⁴⁵*Id.* at 38–39.

⁴⁶Traditionally, fan translation is usually done via listening, but with the ending of the analog broadcasting and the switchover to digital broadcasting in many countries, many of their channels are now offering extractable subtitles as an option with broadcasting. This will no doubt speed up the translation process.

⁴⁷Existing subtitle formats including *.srt*, *.ssa*, *.ass*, etc.

⁴⁸Normally a DVD-rip movie file will occupy 700 megabytes (MB) storage space or more, a BD-rip movie file will take even more than 1 gigabyte (GB) storage space, but a subtitle file only takes less than 1 MB storage space.

At the beginning, digital fansubs were done on an individual basis. It is competition that made fansubbing a group work. Fansubbers realized that by working in groups they could accelerate the process, and thereby snatch the very first flow of audience by fast delivery. For that reason, fansubbers formed different fansub groups to create fansubs of their favorite audiovisual works. At first, the fan community established some rules to allocate different types of work to different groups, according to their preferences. But as more and more fansubbers joined, problems of how to allocate the popular titles popped up. Some fansub groups were not so happy with the assignment of the popular titles, so they started to compete with each other by making fansubs on the same title. As a matter of fact, the enlargement of the fan community and the competition between fansub groups provided better fansubs in terms of quality and variety.

Besides, now fansub groups are not only focused on Japanese animes as they were when VHS tapes were the major carrier of fansubs. With the help of the Internet, fansub groups nowadays on the one hand are having a new member explosion; on the other hand, these new comers inevitably have different aims and preferences. Together they challenged the weak concept of fansub and broadened it out from mere Japanese animes into all audiovisual forms. Diversification leads to competition, as members in the same camp began to gather, numerous new fansub groups emerged. Those groups who focus on same genre start to compete with each other in fansubbing by offering faster and higher quality fansubs to the public.

Generally speaking, there are four divisions of fansub groups in China if divided by preferences: The first category is the anime and cartoon fansub group,⁴⁹ which mainly focus on American and Japanese titles. This form of fansub group is most similar to what people called “fansubs” in the U.S. The second type is movie fansub group. They focus on foreign especially English-speaking movies, although anime films are within their category, but movie fansub groups usually maintain a delicate distance with that and leave it to anime fansub groups. Most of their movie resources are with various formats, mostly from the so-called “Warez Scene” releases.⁵⁰ The movie fansub group has a close connection with the TV series fansub group—which is the third type that has been continually fansubbing foreign TV series and shows in China.⁵¹ The U.S productions occupied the biggest part of all the movie and TV series fansubs that were distributed online in China. For instance, *Prison Break*, an American TV series with a low audience rate initially in its home country, surprisingly gained extremely high popularity in China, and its

⁴⁹Although some scholars have understandably claimed that “animation is a medium, not a genre”, here Chinese fansub groups are divided by their preferences, but not for the purpose of definition, see e.g., Leonard, *supra* note 28 in Chap. 1.

⁵⁰The word “warez” is a leetspeak plural form of the word “ware”, coined by underground circles of online unauthorized distributions to describe the copyrighted works distributed online without authorization. Warez Scene is used to depict the underground community that specializes in that act.

⁵¹Most of these TV series and shows are from Japan, Korea, and the U.S.

fansub distribution was deemed as one of the most important factors for that.⁵² The last type of fansub groups that can be distinguished is the free source fansub group. Their fansubbing objectives are works with free use licenses like open course videos⁵³ and open conference such as TED conferences.⁵⁴

The fansub distribution today can be roughly divided into two categories: sole distribution and package distribution. Sole distribution means subtitles are distributed separately from raw video files, while in package distribution subtitles and video files are merged into one. Nonetheless, the separable subtitles are often called the “soft” subtitles or soft subs, and they can be easily found in all sole distributions and in some package distributions. In sole distribution, subtitles are separated from video content and uploaded as an individual file, taking the filename extensions of SRT, IDX, and SUB, etc. However, new open standard free container formats such as Matroska can pack multiple files such as subtitle files and video files into a single file, using filename extensions like *mkv* and *ogm*, etc. The indivisible subtitles in a fansub are often called the “hard” subtitles or hard subs, which are encoded into the footage. The difference between hard subs and free container soft subs is that hard subs cannot be detached from fansubs without losing video quality, while soft subs could be easily extracted from container files like Matroska without quality degradation.

2.1.1.3 Self-rule

Although with all kinds of good faith and motivations, fansubs are often criticized for their potential copyright infringing nature. Regarding the fact that commercial pirates are taking advantage of fansubs, seizing the fan-translated subtitles, and even the video files, and sell them directly, and with the concern that they may get into copyright trouble in the future, fansub groups started to put certain warnings and disclaimers into their fansubs,⁵⁵ for the purpose of self-regulation and community norm setting.

One part of these notices concerns non-commercial claims such as “Not for Sale or Rent” and “Translation Studies Only, Not for Any Commercial Uses”. The non-commercial claims were commonly seen in the preliminary stage of the whole fansub movement. The initial purpose of these is to maintain a pure community of anime sharing for true fans. The fansub groups believe that the existence of a

⁵²Sai Chen (陈赛) & Yu Liu (刘宇), Yueyu de Zhongguo Yinmi Liuxing (《越狱》的中国隐秘流行)[*Prison Break's Hidden Popularity in China*], Sanlian Shenghuo Zhoukan (三联生活周刊) [Lifeweek], no. 413, Dec. 21, 2006, at <http://www.lifeweek.com.cn/2006/1221/17226.shtml>.

⁵³Most open course videos are offered by famous universities such as Harvard and Cambridge.

⁵⁴Technology, Entertainment and Design conferences are formed to disseminate “ideas worth sharing”. The free videos of TED conferences have been offered online in their official site since 2006.

⁵⁵In most cases, it contains warnings such as “not for commercial purposes”. See e.g., The Term of Use, Fansub-share.org, <http://fansub-share.org/tou/>.

commercial element will breach that purpose, and will lead fansub groups to an unpredictable future.⁵⁶ These non-commercial notices are still a common practice in today's fansub groups. After entering the digital age, some new disclaimers such as "Translation Studies Only" appeared in China, simultaneously with the practice of distributing the subtitles and raw audiovisual files separately.⁵⁷ Other disclaimers such as "For Internet Services Test Only" and "For Evaluation Purposes Only" were also commonly used by Chinese fansubbers.⁵⁸ The rest of the notices mainly concern the duration of fansubs. The purpose of putting notices like "Cease Distribution When Licensed" and "Please Delete Within 24 h" is to avoid direct conflict with the copyright owners' economic interests. According to previous studies, it is evident that in the early days most fansub groups did cease the release of fansubs after the original foreign works were officially launched there.⁵⁹

Fansub groups in China have different perspectives. Most of them put the "Please Delete Within 24 h, Please Purchase Licensed Product If You Like It" warning on their fansubs instead of the "Cease Distribution When Licensed" warning. Some fansub groups have continued fansubbing famous titles for the reason of integrity of works, even after those works have been officially licensed in China.⁶⁰

In the era in which the VHS tapes were the main carrier of fansubs, fansub groups that charged for tapes or postages costs are treated as pirates or bootleggers among the fan community.⁶¹ It also reflects fansub groups' concern about operating costs. Fansub groups nowadays still face the same problem. An estimate shows that the costs of running a fansub site (including the costs of server, bandwidth, and maintenance) in China will take around 60,000 RMB (approximately 8800 euros)

⁵⁶Dichen Yang (杨涤尘) and Jiayi Wang (王加喜), *Meiju Hanju yu Riju You Yiqun Zhuijuren Jiao Zimuzu* (美剧韩剧与日剧有一群追剧人叫字幕组) [*There are a group of people who chase American, Korean, and Japanese dramas called fansub groups*], *Jing Bao* (晶报) [Daily Sunshine], Aug. 14, 2013, at http://jb.sznews.com/html/2013-08/14/content_2587842.htm.

⁵⁷An argument for copyright infringement exemption like "for translation studies" is only possible, if the subtitle file and audiovisual file are detached.

⁵⁸The original Chinese words will be "仅供网络测试用" and "仅供学习和试看用".

⁵⁹For instance, the Kiotsukete fansub group in distributing the title "Koko wa Greenwood", and William Chow of the Vancouver Japanese Animation Society in distributing Japanese Animes are following that rule. See Leonard, *supra* note 28 in Chap. 1, at 217.

⁶⁰For instance, Toei Animation licensed the famous Japanese Anime *One Piece*, to Star Group Limited China. But Maplesnow Fansub group (枫雪), which is well known for its fansubs of *One Piece*, continued their distribution after Star Group started broadcasting the dubbed version of *One Piece* in mainland China in 2008. The distribution of *One Piece* fansubs has been parallel with the Star Group broadcast till now. But obviously, in keeping the pace with the original broadcast, fansubs did a better job than Star Group.

⁶¹Generally, fans used the SASE (self-addressed, stamped envelope) method to deliver fansub copies among fans. See *Fansub*, Anime News Network, <http://www.animenewsnetwork.com/encyclopedia/lexicon.php?id=63>. See also Leonard, *supra* note 28 in Chap. 1, at 218–19 (Leonard picked William Chow of the Vancouver Japanese Animation Society as the example).

per year.⁶² Fansub groups will have to rely on advertising revenues to cover those expenses. However, the legal boundary between just making enough money to keep their sites or forums running and making a profit is quite vague. Although most fansub groups do claim that the advertising incomes are only for maintenance purposes and will be kept in that level, some fansub groups did cross the line evidently.⁶³ In addition, a 2009 report illustrated that some of the most popular Chinese fansub groups with a huge member base in hand could earn millions of RMB per year from advertising revenues, sponsors are willing to pay because these big sites could bring in considerable clicks. But only the administrative members could lay their hands on that money,⁶⁴ and apparently the profitability of fansub groups varies a lot. Researchers have also indicated that what constitutes commercialization under the U.S. law is vague and it is hotly debated among fans.⁶⁵

To sum up, fansub groups have adopted multiple rules to regulate their behavior. These rules together formed their community norms.⁶⁶ These norms refer to three major rules: “non-commercial”, “cease distribution when licensed”, and “continue distribution if licensed products are heavily censored”.⁶⁷ For most fansub groups, “non-commercial use” remains the basic principle,⁶⁸ but evidently some fansub

⁶²Lei Wang (王磊), *Wangluo Zimu Zu Huoli Qudao Fenxi* (网络视频字幕组获利渠道分析) (*Analysis of Profit Channels of Internet Video Fansub Groups*), *Dianying Xinzuo* (电影新作) [New Films], no. 2, 2012, at 10.

⁶³For example, Btpig, a Chinese fansub group that is famous for fansubbing Japanese TV series and animes such as *Naruto*, broke down into two groups in 2006 due to differences in the understanding of the fansubbing ethos. The Subpig fansub group (猪猪乐园) now focus on fansubs of Japanese TV series; The Zmpig, later the Jumpcn fansub group (猪猪字幕组) inherited the anime line. When Subpig still adheres to its fansubbing ethos, Jumpcn now had crossed the border of non-commercial use by merging advertising clips of sponsors and their online accessory shop into their fansubs. Moreover, most of the accessories they are selling, such as T-shirts with printed copyrighted anime characters on, are not licensed. However, their “betrayal” triggered discontent among fan communities and audiences. Jumpcn was boycotted and alienated by other anime fansub groups, as they believe Jumpcn’s action will draw too much attention of the copyright owners; audiences dislike Jumpcn’s choice because the quality of fansub has deteriorated, as low-quality advertising clips were added. Consequently, the fans turned to other fansub groups that were working on the same title, but still Jumpcn has its loyal followers.

⁶⁴Lele, *supra* note 16.

⁶⁵Joshua Preston, *Georgia Tech Study Reveals Copyright Complexities, Social Norms in Online Media Creation*, Georgia Tech News Center, Feb. 19, 2014, at <http://www.news.gatech.edu/2014/02/18/georgia-tech-study-reveals-copyright-complexities-social-norms-online-media-creation>.

⁶⁶Some call these fansubbing ethos. See Rembert-Lang, *supra* note 24 in Chap. 1, at 22–3.

⁶⁷*Id.*

⁶⁸Most famous Chinese fansub groups like TLF (The Last Fantasy) and Maplesnow all have similar warnings. See, e.g., TLF History—the Memoirist of the TLF Fansub Group, The TLF Fansub Group Official Site, <http://sub.eastgame.org/wp-content/uploads/2011/03/%E4%BA%86%E8%A7%A3TLF%E5%AD%97%E5%B9%95%E7%BB%84-TLF%E5%85%83%E8%80%81%E5%9B%9E%E5%BF%86%E5%BD%95.pdf>; see also Disclaimer of Maplesnow Fansub Group, The Maplesnow Official Site, <http://bbs.fxdm.net/disclaim.htm>.

groups had already crossed that line.⁶⁹ Fansub groups in China are still evolving but clearly lack proper guidance.

2.1.2 *Fanfics, Doujinshis, and Scanlations*

The term Fanfics is used to describe the unauthorized fan-made sequel of existing works using their milieus and characters. Fan fiction writers take plots, characters and settings mostly from copyrighted books, TV series, and even films, to create their own stories.⁷⁰ Although it is argued that fanfics emerged in the U.S. in the late 1960s,⁷¹ scholar has claimed that fanfics has existed for thousands of years.⁷²

The Japanese term *Doujinshi* is the most well-known and interesting analog to fanfics. The initial *doujinshi* pointed to literal works such as novels, rather than to merely comics and mangas today.⁷³ As a phenomenon, *doujinshi* took off during the 1970s, as low cost self-publication was enabled by the new printing technologies.⁷⁴ Today's *doujinshi* authors take characters and background elements mainly from pre-existing manga, anime (TV series and movies), or video game sources and develop them with a different story line, and then sell these fan comics for a profit.⁷⁵ "Scanlation" is a portmanteau word for scan and translation, it is a word coined to describe activities in which people scan, translate, and edit a manga or comic (Fig. 2.2).

Since these three types of fan works are all taking the form of books, they are discussed jointly under this subsection. Fanfics and *doujinshis* are exactly the same thing but with different expressions. Fanfics are literary works whereas *doujinshis* are generally pictorial. Furthermore, *doujinshi* authors can sell their works for profit in conventions in Japan whereas fanfic authors cannot. The rationale behind scanlations is similar to fansubs: scanlators merely translated the dialogues and the contents of the manga remain untouched, and they also scan and translate *doujinshis* as well.

According to Lankshear and Knobel, fanfics today have taken on different forms. The most common ones are in-canon writing, alternative universe stories,

⁶⁹Koulikov, *supra* note 5 ("...the ethical component of the earlier stage of group-controlled fan subbing began to fray as the scene itself grew.").

⁷⁰Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 Loy. LA Ent. LJ 651 (1997).

⁷¹*Id.* at 655.

⁷²Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 S.M.U. L. Rev. 1551, 1552 (2005).

⁷³Sharon Kinsella, *Japanese Subculture in the 1990 s: Otaku and the Amateur Manga Movement*, 24 J. Jap. Stud. 289, 295 (1998).

⁷⁴Sharon Kinsella, *Adult Manga: Culture and Power in Contemporary Japanese Society* 104–5 (University of Hawaii Press. 2000).

⁷⁵Noda, *supra* note 28 in Chap. 1, at 65.



Fig. 2.2 A Comparison between an Original Version and Scanlation of a manga. Chris Kincaid, *Are Fansubs and Scanlations Piracy?* Japan Powered, Oct. 27, 2013, at <http://www.japanpowered.com/anime-articles/are-fansubs-and-scanlations-piracy>

cross-overs, relationshipper (or shipper) narratives, and self-insert fanfic.⁷⁶ They summarized these as follow:

- a. “In-canon writing maintains the settings, characters and types of plotlines found in the original media text as far as is possible, and simply adds new “episodes” or events to the original text. Pre-sequels and sequels are popular versions of in-canon writing.
- b. In alternative universe stories, characters from an original media text are transposed into an entirely new or different “world”.
- c. Cross-overs bring characters from two different original media texts together in a new story.
- d. Relationshipper (or “shipper”) narratives focus on establishing an intimate relationship between two (often minor) characters where none existed or was downplayed in the original text. These texts can focus on heterosexual relations,

⁷⁶Colin Lankshear & Michele Knobel, *Digital Remix: The Art and Craft of Endless Hybridization*, Keynote presented to the International Reading Association Pre-Conference Institute “Using Technology to Develop and Extend the Boundaries of Literacy”, Toronto, 13 May 2007, 6–7, at <http://extendboundariesofliteracy.pbworks.com/f/remix.pdf>.

or homoerotic/homosexual relations between characters. The latter kind of fanfics is also referred to as “slash fiction.”

- e. In self-insert fanfic writers insert themselves as recognizable characters directly into a narrative.”⁷⁷

Theoretically, fanfics and *doujinshis* do share the same characteristics. Therefore, the forms listed above are also reflected in most *doujinshis*. For both fanfics and *doujinshis*, they were only circulated among coteries before the digital age.⁷⁸ However, with the advancement of digital technology, they were digitalized and distributed online, with the help from fans such as scanlators. As fansubs, scanlations are the outgrowth of globalization as well. Just like anime and cartoons, for international audiences comics and mangas are equally attractive. Moreover, the translation of dialogues is a much less burdensome work than translating a whole novel.

2.1.3 *Fanvids, AMVs, and Video Parodies*

Fanvidders create music videos with clips from one or more audiovisual sources, and some of these contents may be copyrighted. They use their fanvid works to express their views on the original work. Some believe that fanvids evolved from fanfics,⁷⁹ Leaving aside the question of whether it is true or not, at least one can infer from the above that fanfics do share similar characteristics with fanvids. Hence the copyright concerns they raise are parallel too. Just as Trombley put it, although most of these fanvids are amateur works, some of these fanvids “display remarkable technical prowess, and aesthetic sophistication”.⁸⁰ AMVs are fan-made music videos using anime footages, but the distinction between AMVs and fanvids is only of limited significance with respect to this book. Video parody, as the name suggests, is parody expressed in video form. In a wide sense of the word, video parody includes officially released films such as Charlie Chaplin’s *The Great Dictator*. However, for the purpose of this research, the book only focuses on amateur non-commercial video parodies. Fisher’s definition of “digital mash-ups” apparently convers all three fan creations listed above,⁸¹ since these three types of fan

⁷⁷*Id.*

⁷⁸For *doujinshis*, they were sold through regular doujinshi conventions such as the Comiket. For a more detailed discussion on this, see *infra* Chapter 2.1.2 Fanfics, Doujinshis, and Scanlations.

⁷⁹Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. Pa. L. Rev. 1869, 1870 (2009).

⁸⁰Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 Cardozo Arts & Ent. J. 647 (2008).

⁸¹Fisher, *supra* note 23 in Chap. 1, at 1418 (“Digital mash-ups are created by combining audio, video, graphical, or textual material from pre-existing works into new digital works... Some mash-ups are parodies...”).

creations are similar in nature as they all build on video segments of pre-existing works. Thus they are examined together under this subsection.

Fanvids are fan created music videos using multiple copyrighted audio and visual snippets from other copyrighted works. In China, most fanvids were created on an individual basis. Comparatively speaking, fanvids, along with AMVs, are less influential and attract less academic attention in China than they do in the U.S. at present. Since many foreign audiovisual titles are being massively and directly infringed upon in China, it is understandable why subtler and more complicated activities, such as fanvids and video parodies, are being ignored to some extent. In short, although theoretically speaking the fanvid is an interesting phenomenon that is worth studying, it has not made much of an impact on the Chinese market yet.

Video parodies are more problematic as most of these videos are of a critical nature and, strictly speaking, authors of these works are not merely fans but also critics. The very first well-known case of video parody in China is *The Bloody Case That Started from a Steamed Bun* (一个馒头引发的血案, hereinafter, “*The Steamed Bun*”), a 2006 video parody created by the Chinese video blogger Ge Hu (胡戈).⁸² The author satirized the famous director Kaige Chen’s (陈凯歌) epic film *The Promise* (无极) with a 20-min video parody which is full of segments of the former. Chen threatened to sue but eventually dropped the idea.⁸³ In the wake of *The Steamed Bun*, numerous forms of video parody have arisen, and some of these have taken the form of both music video and parody. For instance, the famous music video of the South Korean song *Gangnam Style* inspired countless copycat videos, some of which are only for fun, but some of which utilized the song and its style to satirize what is happening in China.⁸⁴

2.2 Behind the Fans Activities: Challenges of the Digital Revolution

As a product closely related to digital technologies, fan activities are actually one of the side effects of globalization and digital evolution. As a matter of fact, without the help of new digital technologies, the problems raised by fans would never catch the attention of academia, and fan activities would probably remain in small-scale private form. However, digital developments did change the fan activities and made them a global phenomenon.

In order to clarify the current status of the fandom development, the challenges of the digital evolution behind the law and the fan activities should be further

⁸²See generally, Rogoyski & Basin, *supra* note 6 in Chap. 1

⁸³Seio Nakajima, *Film as Cultural Politics*, in *Reclaiming Chinese Society: The New Social Activism* 178 (You-tien Hsing & Ching Kwan Lee eds., 2010).

⁸⁴See e.g., SFTHQ, *Tibetans vs China's Xi Jinping: Gangnam Style*, YouTube, Nov. 7, 2012, at https://www.youtube.com/watch?v=NxxEo6lEC_U.

examined. The legal problems of fan activities are rooted in the challenges that our copyright system is currently facing, which are also brought about by advancements in digital technology (Sect. 2.2.1). Furthermore, the implications of these advancements on the regulation of the fan problems by law are explored (Sect. 2.2.2).

2.2.1 *Challenges to the Copyright System*

The existing copyright law regimes are encountering challenges in the face of new advancements in digital technologies. More importantly, the law responded in a way that greatly affected the legal determination of fan activities. This subsection first explores the threatened content industry and its response (Sect. 2.2.1.1), then the corresponding reflections on copyright laws (Sect. 2.2.1.2).

2.2.1.1 **Response from a Threatened Industry**

“We are in the middle of a war. A copyright war.”⁸⁵ This aphorism is a good description of the situation we are facing now in the copyright field. The “war”, as Jack Valenti has suggested, is a “terrorist war” raised by large copyright conglomerates against the invisible individual users, namely the “terrorists.”⁸⁶ This battle started simultaneously with the emergence of digital technologies at the end of the 1990s. Although copyright protection standards were rising steadily not long before then, never before had copyright owners so earnestly sought the total enforcement of their rights than they did after entering the digital era. This is because the content industries are facing critical challenges brought by the Internet. However, their responses were so traditional and powerless in the face of unauthorized online distributions. Every now and then new campaigns led by Chinese government agencies have appeared and cleaned up some of the illicit copies online. Since these campaigns are just temporary moves and with mixed motives rather than just anti-piracy, and since new methods of file transfer emerge in an endless stream, it is foreseeable that the frequent downloaders and uploaders will keep on distributing as long as the related technologies exist. So this “cat and mouse game” will probably be a story that never ends.

Generally speaking, most of the commercially valuable copyrighted works are controlled by the content industries nowadays. Although most people believe authors of these works should be the major beneficiaries of the related copyright

⁸⁵Lawrence Lessig, *The Creative Commons*, 65 Mont. L. Rev. 1, 4 (2004).

⁸⁶Amy Harmon, *Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net into an Illicit Video Club*, N.Y. Times, Jan. 17, 2002, at G1, at <http://www.nytimes.com/2002/01/17/technology/black-hawk-download-moving-beyond-music-pirates-use-new-tools-turn-net-into.html?src=pm&pagewanted=2>.

revenues, it is however not the case. Furthermore, economic research had shown that, for the majority of the creators rather than copyright owners, copyright protection is not a guarantee of future profit.⁸⁷ It is more or less a winner-takes-all game which prevails in most cultural industries.⁸⁸ Moreover, the concentration process of the content market enhanced the control power of the industry. For instance, it is noted that five companies control 85% of the U.S. media sources; five big recording labels control 84.8% of the U.S. music market; and five cable companies broadcast to 74% of the U.S. cable subscribers.⁸⁹ Compared to its U.S counterpart, the Chinese market is still in its preliminary stage. However, in most of the cases the copyright of a certain work will be transferred to content conglomerates if it is to be commercially exploited.

These content conglomerates own vast amount of works that fansub groups are interest in. Although fans also appropriate segments from pre-existing works to build their own, fan works in general only take up a small portion of the total amount of all the unauthorized utilizations online. Many practitioners in both academia and the audiovisual industry claim that the online unauthorized distribution of copyright contents is a disaster to the copyright owners, which will not only take away a large proportion of revenue from them but also decrease their incentive to produce.⁹⁰ But at the same time, different voices arose from different areas, claiming that the current situation represents a turning point to a new form of copyright protection, and the unauthorized distribution of copyright contents are harmless, if not beneficial to the copyright owners.⁹¹ That is to say, whether the unauthorized online distribution of copyright contents is detrimental or not is controversial in both theory and practice. However, the content industry believed that the growing number of online infringements in China is posing a threat to the legitimate market.⁹² Considering both piracy and fan creations are all unstable factors and the copyright owners lack a proper way to distinguish between the two,

⁸⁷Martin Kretschmer & Friedemann Kewhol, *Chapter 2: The History and Philosophy of Copyright*, in Music and Copyright 43–44 (Simon Frith & Lee Marshall eds., Edinburgh University Press. 2004).

⁸⁸*Id.*

⁸⁹Lessig, *supra* note 42 in Chap. 1, at 162.

⁹⁰For example, the Motion Picture Association of America (MPAA) in their 2011 report claimed that the U.S. economy lost \$58 billion per year in profits due to content theft. See *MPAA Statement on Strong Showing of Support for Stop Online Piracy Act*, MPAA, Dec. 16, 2011, at <http://www.mi2n.com/print.php3?id=149522>.

⁹¹For instance, author Rob Reid questioned MPAA's \$58 billion number in the recent TED event, and he further indicated that the overall movie revenues are not down but on the contrary, increasing. See Rob Reid, *The \$8 billion iPod*, Ted Conversations, Mar. 2012, at http://www.ted.com/talks/rob_reid_the_8_billion_ipod.html.

⁹²See *China (PRC), 2014 Special 301 Report on Copyright Protection and Enforcement*, IIPA, Feb. 7, 2014, at 24, at <http://www.iipa.com/rbc/2014/2014SPEC301CHINA.PDF> ("...China is fast becoming the largest potential market in the world, and while some progress has been made to license services in China, the challenge of online infringement and illegal web and mobile services harming right holders in (and outside) China has grown faster than the legitimate market.").

the profit-driven conglomerates will try to eliminate them both to the best of their abilities and regain control over their works. To that end, copyright owners believe law revision is the perfect solution.

However, in terms of transnational unauthorized distributions, it is the local law and enforcement that really matters. Therefore, much of the efforts have been made to harmonize national copyright laws with international standards. In terms of China, the attitude of the Chinese government towards harmonization is that they will follow suit based on its own needs.⁹³ Nevertheless, how to evaluate the copyright law enforcement in different countries is a difficult question. In terms of China, it is believed that it “has a relatively sophisticated legal infrastructure for the grant and enforcement of copyright rights”.⁹⁴ Most copyright owners resort to courts in response to copyright infringements,⁹⁵ so in that sense China is very active in enforcing copyrights. However, in terms of online infringements, things have not changed very much. But it does not necessarily mean that the Chinese government and the industry are vulnerable in this part. Actually, the Chinese government uses certain national campaigns to fight unauthorized online distribution. Interestingly, it is usually the political considerations rather than economical incentives that are the driving force behind these campaigns.⁹⁶ Notwithstanding the fact that these actions were mostly for purposes of regulating the market and political considerations, they had effectively limited local piracy to a degree. Moreover, CCL was revised frequently and is now undergoing its third major revision.⁹⁷ However, it is also notable

⁹³Peter K. Yu, *Still Dissatisfied after all These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 Ga. J. Int'l & Comp. L. 143, 153 (2005).

⁹⁴Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High Piracy Environment?* 27 Harv. J.L. & Tech. 467, 473 (2014).

⁹⁵51,351 civil copyright cases were litigated in China in 2013. Supreme People's Court (最高人民法院), Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang 2013 (中国法院知识产权司法保护状况2013) [*Intellectual Property Protection by Chinese Courts in 2013*], in Renmin Fayuan Bao (人民法院报) [People's Court Daily], Apr. 26, 2014, available at http://rmfyb.chinacourt.org/paper/html/2014-04/26/content_81363.htm?div=-1.

⁹⁶For instance, in 2004 SARFT had issued a regulation that required every participant who engaged in information network dissemination of audiovisual works to obtain a “License for Publication of Audiovisual Programs through Information Network”. See Measures for the Administration of the Publication of Audiovisual Programs through the Internet or Other Information Network, art. 6. For years online content distributors that have been engaging in unauthorized distributions chose to ignore this clause, simply because no specific enforcement measures were taken after that regulation entered into force. However, at the beginning of 2008, SARFT and Ministry of Information Industry together released a more detailed regulation, which states clearly that Internet content providers without obtaining the above-mentioned “License” cannot engage in any Internet audiovisual program service. See Administrative Provisions on Internet Audiovisual Program Service, art. 7. Actions were taken soon after the release: without obtaining the “License”, famous BT sharing sites like BT China, which is an important platform for the distribution of fansubs, were shut down for that reason.

⁹⁷Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*, Infojustice.org, Apr. 25, 2012, <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf>.

that article 46 from the first draft of the recent amendment of CCL⁹⁸ triggered anger and resistance in the music industry and was removed from the next version.⁹⁹

2.2.1.2 Reflections in the Copyright Laws

The discussion above illustrates that the challenges that the content industry is facing have forced them to push for law reform. However, as its requests are not in accordance with the purpose of copyright, till now the results are far from satisfactory.

The main purpose of copyright law is about maintaining the ‘delicate balance’ between the interests of the authors or copyright holders and the interests of the public.¹⁰⁰ That ‘delicate balance’ was maintained for many years in the pre-digital age, because producing physical copies was costly and time-consuming then.¹⁰¹ It is recognized that the legal concept of copyright is firmly connected with technologies, and it is also well known that the concept of copyright was invented after the rapid spread of printing technology.¹⁰² If we count year 1710, in which the *Statute of Anne* was passed, as the beginning of the concept of copyright,¹⁰³ then during the intervening three hundred year period, the balance between the interests of the author and the interests of the public in the copyright law regime was roughly maintained. During that period, copyright owners generally kept most private copying activities under control, since their profit-oriented nature and desire for a steady source of income compelled them to eliminate every possible ‘threat’ they could locate. Besides, many fan activities at that time were not deemed a threat at

⁹⁸2010 Copyright Law of the People’s Republic of China, art. 4.

⁹⁹Leslie Pappas, *China Hears Music, Issues Second Draft of Copyright Law*, Bloomberg BNA, Jul. 12, 2012, at <http://www.bna.com/china-hears-music-n12884910625/>.

¹⁰⁰Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* 176–77 (Stanford University Press, 2003) (noted that “since copyright allows creators and publishers of literary and artistic works to charge a price for gaining access to these works, the inescapable effect is to withhold the work from people who will not or cannot pay that price, even though giving them free access would harm no one else,” but “if society withholds property rights from creative work, the price that its producers can charge for access to it will begin to approach zero; their revenues will diminish and, with them, their incentives to produce more.”).

¹⁰¹Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent, in Privilege and Property: Essays on the History of Copyright* 31 (Ronan Deazley & Martin Kretschmer & Lionel Bently eds., 2010).

¹⁰²Mark Rose, *Authors and Owners: The Invention of Copyright* 142 (Harvard University Press, 1993) (“copyright is...a specifically modern formation produced by printing technology...”).

¹⁰³The beginning of copyright protection is debatable. Most Chinese intellectual property scholars believed that it starts from the Great Song Dynasty (a piece of a document about copy license in 1190–1194 was found in China), but William Alford in his book *to Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* claimed that it could not be considered as the start because it is merely a proof of government control over publication. See generally Alford, *supra* note 5 in Chap. 1.

all, considering the size and number of them. That of course was before the digital age.

However, advancements in technologies will cause new problems in copyright law. Digital technologies today have enabled the digitization and high-speed online dissemination of copyright contents. Our copyright system is being challenged severely, considering the marginal costs of producing and distributing digital copies are almost zero.¹⁰⁴ Therefore, it is understandable that many copyright owners, most of which are large production companies and media conglomerates, choose to push for stricter copyright protection standards. During this process, many efforts in copyright law have been made. Nevertheless, it seems these efforts are more of a result of global political compromise rather than a considered end product. For example, the U.S. copyright owners have invested a lot on lobbying to get favorable legislation in order to regain control.¹⁰⁵ Copyright owners have put their lobbying efforts on extending the copyright terms of works in order to prolong the business life of their products.¹⁰⁶ The copyright protection term in U.S has expanded dramatically since the 1790 Copyright Act, from a maximum of 28 years of protection to more than 100 years of protection.¹⁰⁷ In China, the situation is more or less similar. For the purpose of joining the Berne Convention, China had enacted its first Copyright Law in 1991, in which the general copyright protection term is 50 years after the author's death. Before that, the general copyright protection term was 30 years after the author's death.¹⁰⁸ If we trace back to the very first legislation draft of China in 1957, the term was 20 years after the author's death.¹⁰⁹ Skeptics who believe that most of these changes are biased towards the copyright owners are resurfacing, claiming that the situation is lurching from one extreme to another—

¹⁰⁴Martin Peitz & Patrick Waelbroeck, *Piracy of Digital Products: A Critical Review of the Theoretical Literature*, 18 Information Economics and Policy 449, 468 (2006).

¹⁰⁵Lessig, *supra* note 42 in Chap. 1, at 218–20.

¹⁰⁶In the U.S., The 1998 Sonny Bono Copyright Term Extension Act is deemed as the result of the extensive lobbying from the Walt Disney Company, which is the largest media conglomerate in the world in terms of revenue. See Richard Siklos, *Why Disney wants DreamWorks*, CNN/Money, Feb. 09, 2009. http://money.cnn.com/2009/02/09/news/companies/disney_dreamworks.fortune/?postversion=2009020914. As a result, the Act is also known as the “Mickey Mouse Protection Act”. See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. Rev. 1057, 1065 (2001).

¹⁰⁷Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. Cin. L. Rev. 741, 783 (2001).

¹⁰⁸Xinming Cao (曹新明), *Guanyu Zhuzuo Quan Baohu Qixian De Tanta* (关于著作权保护期限的探讨) [*On the Copyright Protection Term*], Faxue (法学) [Law Science] no. 4, 1991, at 22.

¹⁰⁹Baozhang Chuban Wu Zhuzuo Quan Zanzing Guiding Caoan (保障出版物著作权暂行规定草案) [Provisional Rules on Protection of the Copyrights of Published Works (Draft)] (PRC Ministry of Culture, 1957) (China); *accord* Wenwei Guan, *Intellectual Property Theory and Practice: A critical Examination of China's Trips Compliance and Beyond* 55 (Springer. 2014).

from anarchy to total control.¹¹⁰ Considering the purpose of copyright law, certainly any copyright legislation and reform in this area will have to run the risk of being criticized severely. Almost every new legislature and trade agreement related to copyright will have to go through slings and arrows, because the critical voices believe that it is the economic factors rather than factors related to public interest that are the driving force behind these laws, and hence they are biased towards copyright owners,¹¹¹ and the standards they set do not provide a clear guidance.¹¹²

Generally speaking, the main problem we are facing now is public anarchy in utilizing copyrighted materials enabled by the new technologies. Theoretically speaking, the function of copyright is to control the copy and distribution of the copyrighted works and make sure the rightholders could benefit from those exclusive rights.¹¹³ Before entering the digital age, works could only be conveyed to the public through tangible media, thus the ability to copy and disseminate was highly limited and was largely in the hands of professionals.¹¹⁴ However, digital technologies have lowered the barriers to copy, remix and distribute with the help of the Internet.¹¹⁵ Once it is possible for everyone to copy and spread the copyrighted contents at a negligible cost, the copyright owners somehow lost their control over the seemingly infinite amount of private copy and distribution actions against their copyrighted contents. In other words, they are now unable to locate every infringer if the number of them becomes infinite, and if we consider the economic costs of doing that, this is even more so.¹¹⁶ Therefore, the copyright owners are not only pushing for a higher standard of copyright protection in law globally, but also employing new technologies to set the fence. However, On the other hand, these endeavors are facing a backlash from the public for reasons like possible fundamental rights violation.¹¹⁷ The high level of protection the copyright owners advocate, and the Digital Rights Management (DRM) technologies and license terms they use tend to trigger a backlash from consumers and countless

¹¹⁰Lessig, *supra* note 42 in Chap. 1, at 173; Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. Rev. 975, 1015 (2002); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Va. L. Rev. 813, 844 (2001); see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 294–297 (1996).

¹¹¹Martin F. Halstead, *The Regulated Become the Regulators-Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 Tulsa L. Rev. 195, 228–229 (2002).

¹¹²Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 Nw. J. Tech. & Intell. Prop. 21, 30 (2013).

¹¹³The function of copyright is believed to be “the marketing of works”, and “to protect the materials disseminated”. L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory Of Copyright* (Craig Joyce ed., 2009), printed in 46 Hous. L. Rev. 215, 286, 310 (2009).

¹¹⁴Lunney, *supra* note 110, at 819.

¹¹⁵Mathias Klang & Jan Nolin, *Tolerance Is Law: Remixing Homage, Parodying Plagiarism*, 9 Script-ED 172 (2012).

¹¹⁶See Wu, *supra* note 42 in Chap. 1, at 617–18.

¹¹⁷See e.g., Julie E. Cohen, *DRM and Privacy*, 46 Communications of the ACM 47 (2003).

copyright litigations.¹¹⁸ Yet the limited judicial resources each country possesses means the law cannot respond adequately.¹¹⁹ It is also noted that, in the U.S., only a small number of copyright litigations regarding fair use issues have been brought to court, and even fewer resulted in a judgment.¹²⁰ In fact, copyright owners are now mainly focusing on large ISPs such as YouTube, while the massive user groups that have committed copyright infringements have been ignored in general.¹²¹ The problem which copyright systems are facing now, is that an increasing number of people are ignoring the existing legal norms of copyright and turning themselves into outlaws, even though we do have a valid copyright system.¹²² In that sense, the ‘delicate balance’ in copyright law has been disrupted.

The abovementioned cases indicate only one thing: existing legal responses in relation to copyright are problematic. Although endeavors have been made to restore the ‘delicate balance’ in the copyright law, the legal response in relation to copyright is far from satisfactory.¹²³ For example, the revision of the *Japanese Copyright Law* (hereinafter, JCL) that entered into force on 2012 penalizes even first-time unauthorized downloaders with a maximum of two years’ imprisonment or fines of up to ¥2 million (approximately 15,400 euros).¹²⁴ The secretive nature of the revision’s legislative history, where the bill had gone through a comparatively brief and aberrant discussion in the Diet of Japan, has set off a wide range of

¹¹⁸See *supra* note 14 in Chap. 1 and accompanying text.

¹¹⁹For example, the U.S. courts were found overloaded in handling civil cases, including copyright infringement cases. See *Overloaded Courts, Not Enough Judges: The Impact on Real People*, PFAW, July 21, 2014, at http://www.pfaw.org/sites/default/files/lower_federal_courts.pdf.

¹²⁰Lee, *supra* note 16 in Chap. 1, at 1476–79.

¹²¹Just like the Supreme Court has indicated in the *Grokster* case that, “[w]hen a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device’s distributor for secondary liability on a theory of contributory or vicarious infringement.” See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005). See also Anselm Kamperman Sanders, *Intellectual Property Liability of Consumers, Facilitators and Intermediaries: Comparative Concepts*, in *Intellectual Property Liability of Consumers, Facilitators and Intermediaries* 15 (Christopher Heath & Anselm Kamperman Sanders ed. 2012).

¹²²Lessig, *supra* note 39 in Chap. 1, at 111.

¹²³See Tianxiang He, *What Can We Learn from Industries? The Differences Between the Domestic and Oversea Copyright Protection Strategies towards Fan Activities*, 62 Am. J. Comp. L. 1009, 1010–2 (2014); See also Robert C. Piasentin, *Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 Int. J. Law Info. Tech. 195, 220–23 (2006).

¹²⁴*Chosakukenho* (著作権法) [Japanese Copyright Law], Law No. 48 of 1970, amended by Law No. 43 of 2012, art. 119(3) (2012), translated at Copyright Research and Information Center, Copyright Law of Japan 79 (Yukifusa Oyama et al. trans., 2013), http://www.cric.or.jp/english/clj/doc/20130819_July,2013_Copyright_Law_of_Japan.pdf (hereinafter Japanese Copyright Law). See also *Japan Introduces Piracy Penalties for Illegal Downloads*, BBC News, Sept. 30, 2012, <http://www.bbc.co.uk/news/technology-19767970>.

resistance at the grassroots level.¹²⁵ The current CCL has been considered outdated as well, with legislators now drafting the third amendment to it. Meanwhile, fans in China frequently participate in the unauthorized utilization and distribution of copyrighted contents, and they are deemed as outlaws in general. But copyright owners in China are dissatisfied with the current level of protection that the CCL affords and are pushing for higher protection levels. Local courts are doing their best to control the situation, but the copyright litigation is seemingly endless. Evidently in China, the balance in copyright law needs to be restored.

Although controversy is unavoidable when new legislation is promulgated, the global backlash suggests that these end results are not good enough. Nevertheless, as long as the purpose of copyright law is to balance public interest with the rights of the individual author or creator, copyright protection should never be a zero-sum game.

2.2.2 Behind the Challenges: Technology Developments

It is clear from the above discussion that it is the new technology advancements that are threatening the content industry, changing our copyright law, and pushing and converting fan activities into a world-class phenomenon. Likewise, it is the changing law that makes fan activities a copyright problem. Before digging into the problems of fan creations, it is necessary to check the new technologies that are most responsible for the copyright dilemma and the subsequent fan problems, to see how they function and whether they could be modified in a way which is well harmonized with the current copyright regime. The digitization of copyright contents (Sect. 2.2.2.1), the P2P technologies (Sect. 2.2.2.2), and the development of other online distribution channels (Sect. 2.2.2.3) are examined in turn under this subsection.

2.2.2.1 The Digitization of Copyright Contents

The first challenge encountered is the digitization of copyright protected contents. The process of digitization is to convert copyright contents such as audiovisual works, literature, pictorial and audio objects into a digital format, with the help of certain electronic devices. That process, according to McQuail, “allows information of all kinds in all formats to be carried with the same efficiency and also intermingled.”¹²⁶ However, it also raises critical questions to the existing commercial model of the content industry and the copyright system. First, digitization involves

¹²⁵See Kazuaki Nagata, *Copyright Law with Teeth Leaves Download Masses Puzzled*, Japan Times, Jul. 11, 2012, at <http://callcenterinfo.tmcnet.com/news/2012/07/11/6430387.htm>.

¹²⁶Denis McQuail, *Mcquail's Mass Communication Theory* 39 (Sage Publications 6th ed. 2010).

copy, and copy is restricted under the notion of copyright; second, once a digital copy has been made, making a copy and the distribution of it are both fast (one click plus waiting time) and cheap (almost zero cost); third, pirate copies, genuine digital copies and tangible copies are actually competing with each other in the market.¹²⁷ It comes as no surprise, then, that the Google Book Project, which involves the digitization of a massive amount of existing books, drew immediate fire from copyright owners.¹²⁸ Moreover, the technologies that were employed to distribute the copies were attacked as well.

2.2.2.2 Peer-to-Peer Technologies

It is believed that peer-to-peer (P2P) is one of the technologies that will change the future of the Internet,¹²⁹ which scholars such as Lawrence Lessig called the “next great thing for the Internet”.¹³⁰ It is no exaggeration to say that the P2P technologies are most responsible for the fast development of fan groups: without the help of this participatory, anonymous, and untraceable file sharing network setting, works of fan labor would never become a global phenomenon. That is to say, P2P technologies are crucial to the distribution of fansubs, and whether these technologies will be accepted by law or not is one of the main concerns especially for fansub groups.

The P2P network is an internet-related concept opposite to client-server network. Technically speaking, a network is considered to be P2P if the elements (peers) that form the system both provide services to other elements (peers) and request services from them.¹³¹ Unlike the server based client-server network, P2P technologies are decentralized and thus can lower the costs of the first distributor largely by partitioning tasks among peers. As more peers join the swarm, the available capacities of P2P network and the stabilities of resources also increase proportionally, while in a client-server network the situation is the other way round. To put it simply, these traits of P2P networks changed the cultural landscape of file sharing entirely, by

¹²⁷Motoko Rich & Brad Stone, *E-Book Price Increase May Stir Readers' Passions*, N.Y. Times, Feb. 10, 2010, http://www.nytimes.com/2010/02/11/technology/11reader.html?_r=0 (reported the battle over the pricing of digital copies of books between the consumers and the copyright owners.).

¹²⁸For a general discussion about the dispute of the Google Book Project, please see Kate M. Manuel, *The Google Library Project: Is Digitization for Purposes of Online Indexing Fair Use Under Copyright Law?*, CRS Report for Congress, Nov. 27, 2009, at <http://www.dtic.mil/dtic/tr/fulltext/u2/a511070.pdf>.

¹²⁹Erick Schonfeld, *Post-Napster, Peer-to-Peer Computing Gets Ready for Prime Time*, Fortune, Oct. 25, 2001.

¹³⁰Lee Bruno, *Rights Fielder: Lawrence Lessig on Intellectual Property Rights and Cyberspace*, Red Herring, Dec. 4, 2000.

¹³¹Gonzalo Camarillo, Ed, *Peer-to-Peer (P2P) Architecture: Definition, Taxonomies, Examples, and Applicability*, RFC 5694, IETF Networking Group, Nov. 2009, <http://tools.ietf.org/pdf/rfc5694.pdf>.

putting the privilege of content distribution from recognizable distributors to anonymous individuals.

As a matter of fact, although distribution methods like Internet Relay Chat (IRC) channels, File Transfer Protocol (FTP) servers, and file hosting services are also widely adopted by fan groups, P2P tools such as BitTorrent and eMule are still their dominant distribution tools. Unlike a centralized network, a P2P network usually does not have a system administrator. The participatory nature that “everyone is a distributor” makes it more complicated when connected with copyright related issues. A 2005 study on P2P file sharing done by CacheLogic¹³² shows that nearly 73% of the overall P2P traffic worldwide was video and audio file sharing,¹³³ and most of these flows were copyright-protected contents.¹³⁴

For a long period of time, P2P technologies have been accused as the promoter of unauthorized online copyrighted content exchanges, including fan distributions. Many copyright owners claimed that the P2P technologies threaten the stability of the current copyright protection regime and endangered the public interest. As a result, copyright litigations against P2P service providers have emerged constantly as well.¹³⁵ However, both sides in the copyright debate over P2P technologies in the existing U.S. case laws have strong arguments to support their positions.

A recent report from IPOQUE shows that P2P file sharing generated the most Internet traffic in 8 major regions they had monitored, ranging from 43% in Northern Africa to 70% in Eastern Europe.¹³⁶ However, content distribution is only one of the four major services provided by P2P applications.¹³⁷ P2P technologies are widely applied in many other areas,¹³⁸ and it can be used as a channel to distribute licit works (e.g. works in the public domain and licensed works) as well.

¹³²CacheLogic is a British P2P traffic management and network intelligence solution company.

¹³³ZDNet Research for IT Facts, *61.44% of P2P traffic is video, 11.34% is audio*, ZDNet, <http://www.zdnet.com/blog/itfacts/61-44-of-p2p-traffic-is-video-11-34-is-audio/8641>.

¹³⁴*Report: Movie piracy nearing music levels*, Media Life Magazine, Jul. 14, 2004, http://www.medialifemagazine.com:8080/news2004/Jul04/Jul12/3_wed/news8wednesday.html.

¹³⁵See e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004,1029 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161–62 (9th Cir. 2004).

¹³⁶Hendrik Schulze & K. Mochalski, *Internet Study 2008/2009*, Ipoque, at <https://www.christopher-parsons.com/Main/wp-content/uploads/2009/04/ipoque-internet-study-08-09.pdf>.

¹³⁷Camarillo, *supra* note 131.

¹³⁸For example, P2P technologies nowadays are firmly connected with lots of mainstream commercial software like Skype and video streaming services and online audiovisual sharing platforms as Joost. Moreover, official authorities like the U.S. Department of Defense launched its modern network warfare strategy research on P2P networks in 2001. See Leslie Walker, *Uncle Sam Wants Napster!* The Washington Post, Dec. 8, 2001, at <http://pqasb.pqarchiver.com/washingtonpost/doc/409185410.html?FMT=ABS&FMTS=ABS:FT&date=Nov+8%2C+2001&author=Walker%2C+Leslie&desc=Uncle+Sam+Wants+Napster%21>. The European Union (EU) has also invested 14 million euros in a P2P based Internet television research project, aiming to provide video-on-demand functionality and community features for a range of devices. Janko Roettgers, *EU Sponsors P2P TV with 14 M Euros*, Gigaom, Feb. 9, 2008, at <http://gigaom.com/video/eu-sponsors-p2p-tv-with-19m-euros/>.

It is fair to say that P2P technologies have many disadvantages, but just as many scholars have noted, we must not turn a blind eye to the endless possibilities of the P2P technologies.¹³⁹ In short, the concern from fan groups that the P2P technologies will be terminated for legal reasons is unnecessary.

2.2.2.3 Unstoppable Trend of Online File Sharing

The P2P distribution method is powerful for sure, but it is not alone, together with other Internet distribution methods, they have formed the new era of online file sharing. With the development of digital technologies, and as more new transmission methods are developed, private file sharing is becoming a seemingly unstoppable trend.¹⁴⁰ One of the reasons that these new technologies cannot be banned is that they can be used for other purposes than merely copyright infringement. For instance, In the U.S., the ruling of the Sony case made it clear that, as long as a technology has “significant non-infringing uses”, the law should not ban it.¹⁴¹ In China the courts hold the same opinion. For example, a study showed that no lawsuit directly concerning P2P technologies had ever been raised

¹³⁹See Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 Case W. Res. L. Rev. 815, 818 (2005) (mentioning the social benefits of the P2P technologies). See also Lessig, *supra* note 42 in Chap. 1, at 66 (mentioning p2p sharing is different from piracy, and the industry should find a way to protect artists while enabling p2p sharing to survive).

¹⁴⁰For example, study shows that, it is technically impossible to put a stop to BitTorrent ecosystem. See Prithula Dhungel, et al., *Is BitTorrent Unstoppable?* 2007, at 14, at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.414.971&rep=rep1&type=pdf>; Some also noted that it is destined for digital contents to be free, and no one can stop that process. See Anderson, *supra* note 5 in Chap. 1, at 191, 201–02.

¹⁴¹The evolutionary product in this case that challenged the copyright regime, was a home video recording machine that could be used to make copies of an entire copyrighted work that had been broadcast via television channels. According to the then contemporary U.S. copyright rules, this kind of time shifting technology created potential dangers for the beneficiaries of copyright: Media conglomerates, such as Universal and Disney, still relied heavily on theaters and television broadcastings at that time, and they feared that with this video recording machine they would lose control over their products and advertising revenues. Together they sued the Sony Corporation, alleging that their machine could potentially be used for copyright infringement activities and, thus, Sony should be held responsible for any further infringements. The rulings of the U.S. courts varied; the American judges knew that their decisions might determine whether the ‘delicate balance’ could be maintained in the future or not. At first, the District Court considered home use recording as fair use, but later the Court of Appeals for the Ninth Circuit held that Sony was liable for contributory infringement. This ruling was reversed afterwards by the Supreme Court, which considered that the new technology had significant non-infringing uses and, thus, it was indeed a fair use. The final decision of that established a general test to determine whether a new device with a copy or record function infringes copyright law or not. More importantly, the Sony case paved the way for a new market of home video products, and the world has benefited greatly from their sale and that of prerecorded movies. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

in China up to the present,¹⁴² and related rulings showed that, since the distribution technologies can be used in non-infringing ways, thus they were deemed legal.¹⁴³ Moreover, there are various online file-sharing methods nowadays. No doubt that the P2P distribution method is the most remarkable one in all online file sharing approaches. But the fact is, even if the P2P technologies were banned, fansub groups could find other alternatives easily. Compared with statistics from its previous study, a recent IPOQUE report indicates that, although P2P still produces most Internet traffic worldwide, its proportion has declined significantly across all monitored regions, while web traffic of file hosting sites and media streaming sites has risen.¹⁴⁴ The increasing popularity of file hosting and media streaming sites among unauthorized distributors can be attributed to bandwidth and data transfer speed upgrades. As for fan distributions, many Chinese fansub groups use file-hosting sites to distribute their fansubs because the services they provide are stable, and since these file-hosting sites are offering private storage spaces, the contents within can also be protected by privacy.

Moreover, once a sharing community is established, the members within will just simply upload the renamed fansub files to file hosting sites and share the download address with their followers, and they then use software to disguise the files in a way that the hosting sites cannot detect.¹⁴⁵ For example, the 2014 Cleanse the Internet Campaign has forced Chinese ISPs to self-censor their sites since April

¹⁴²Dufeng He (何笃丰), *Wo Guo Bu Cunzai Zhenzheng Yiyi Shang De P2P Qinquan An* (我国不存在真正意义上的P2P软件侵权案)[*There exist no P2P software infringement lawsuits in China*], *Dianzi Zhishi Chanquan* (电子知识产权) [Electronics Intellectual Property] no. 5, 2009, at 90.

¹⁴³Chinese courts have demonstrated in several cases that, defendants lost the case due to their contributory infringement actions, rather than the technologies they employed. See e.g., *Beijing Ciwen Yingshi Zhizuo Youxian Gongsi Su Beijing Zhengglejia Keji Youxian Gongsi Qinfan Zhuzuoquan Jiufen An* (北京慈文影视制作有限公司诉北京正乐佳科技有限公司侵犯著作权纠纷案) [Beijing Ciwen Video Production Co., Ltd. v. Beijing Zhengglejia Technology Co., Ltd.], (People's Ct. of Haidian District, Beijing, HMCZ.No.21822, Oct. 29, 2007) (北京市海淀区人民法院(2007)海民初字第21822号), at http://pkulaw.com/fulltext_form.aspx?Gid=117531737&Db=pfnl. See also *Huaxia Shilian Konggu Youxian Gongsi Su Kuaibo Gongsi Lijun Qinfan Zhuzuoquan Jiufen An* (华夏视联控股有限公司诉快播公司、李军侵犯著作权纠纷案) [Huaxia Video & Connection Holding Co., Ltd. v. Shenzhen Qvod Technology Co., Ltd.], (People's Ct. of Futian Dist., Shenzhen, SFFZCC.No.227, 2009)(深圳市福田区人民法院(2009)深福法知产初字第227号). *Guangdong Zhongkai Wenhua Fazhan Youxian Gongsi Su Guangzhou Shulian Ruanjian Jishu Youxian Gongsi An* (广东中凯文化发展有限公司诉广州数联软件技术有限公司案) [Zoke Culture Group, Limited. v. Poco Co., Ltd.], (Shanghai First Interim. People's Ct., IPF.No.384, Dec. 12, 2006) (上海市第一中级人民法院(2006)沪一中民五(知)初字第384号).

¹⁴⁴Schulze & Mochalski, *supra* note 136.

¹⁴⁵A BBC report shows that some distributors even used certain software to split the to-be-distributed content into multiple parts and upload them to different sites. Their followers will receive a list of address where the parts of the files can be downloaded. With common software like *WinRAR*, the original files could be restored if all the parts were successfully downloaded. Although file names and extensions could reveal some information about the file origin, but when the files are split into multiple parts, it is impossible for service providers to tell which file is

2014, and this campaign lasted until November 2014.¹⁴⁶ The ISPs are now forced to apply additional technical measures to their platforms and software so as to filter out illicit content within their system. However, the users within managed to find a similar way to bypass these technical measures.¹⁴⁷

The diversity in file sharing methods and the unstoppable trend brings opportunities: as more and more P2P downloaders were guided to manageable sources such as file hosting sites and legitimate media streaming platforms like YouTube, and P2P technologies are in fact widely used by online streaming platforms, the controversial issues caused by P2P distributions have tailed off to some extent. Nevertheless, challenges come subsequently: unauthorized distributors are merely moving from one network to another due to legal pressure from industry groups¹⁴⁸; new online distribution methods and related tools, such as MagNet URI scheme seemingly emerge in an endless stream nowadays; it is much harder for the content industry to protect their audiovisual works from unauthorized online distribution under the current copyright regime. Therefore, the content industry and the law have to respond to these technical facts.

2.3 Conclusion

As stated above, the fan activities are closely connected with the development of technologies. In the case of fansubs, the videocassettes as VHS and Betamax tapes were the selected media in the early stage of fansub activities. However, they were abandoned soon after the *digisubs* became available. The U.S. fansubbers switched to *digisub* production around year 2000 when the broadband Internet service became accessible. The Chinese fansub groups emerged around the same period in which the popularization of high-speed Internet connection began in China. The

(Footnote 145 continued)

unauthorized copyrighted content and which file is not. *File-sharers swap more than video*, BBC News, Aug. 11, 2005, at <http://news.bbc.co.uk/2/hi/technology/4139314.stm>.

¹⁴⁶Jiayi Liu, *No to Internet Piracy and Pornography, China Cracks Down on P2P Video Platform*, ZDnet, Apr. 24, 2014, at <http://www.zdnet.com/no-to-internet-piracy-and-pornography-china-cracks-down-on-p2p-video-platform-7000028693/>.

¹⁴⁷For instance, a popular download application in China, called Xunlei, is also the most common means of unauthorized distribution of copyright contents in China. During the campaign, Thunder had declared that they will be “fully cooperative and resolutely resist any content that involves pornography and copyright issues.” Since the downloading speed boost function is based on their cloud storage, they are actually censoring every file that goes through their cloud server. Any file with sensitive words will be marked and cannot enjoy their speed boost function. However, uploaders sensibly opted to split the original file or compress it before they upload it. In that case, the system is unable to identify whether the file contains illicit content or not. See Xunlei declaration, Xunlei.com, available at <http://act.vip.xunlei.com/vip/2014/report/>.

¹⁴⁸*File-sharers move from BitTorrent*, BBC News, Aug. 30, 2005, at <http://news.bbc.co.uk/2/hi/technology/4196642.stm>.

fansub production is more of a group activity than an individual practice in terms of *digisubs*. Initially the fansubs in the U.S. emerged as pure fandom activities of Japanese animes. Later with the development of digital technologies and the evolution of fansub groups, many more people with different motivations had joined the fansub campaign. On the other side, fan community norms were developed and ramified likewise. In order to avoid copyright infringement charges, the fansubbing ethos, which worked as the manifesto of fandom purity at the beginning, was turned into self-discipline after the fansub explosion in the late 1990s. Amongst fansub development in other countries, the fansub development in China is of the most significance. Fansub groups in China today are not working on merely Japanese animes but on almost all kinds of audiovisual works; accordingly, different fansub groups that focus on specific categories of audiovisual works can also be found there. In addition, fansubs have two distribution manners. The division of sole distribution and package distribution is crucial because it may affect the future recognition and judgment of fansubs.

To sum up, the fact that fan works caught the world attention is attributed to the digital revolution. As one of its well-known side effects, the explosion of fan works is tightly attached to new file sharing technologies such as Bittorrent and online streaming. All of these new technologies have advantages and disadvantages, but considering the opportunities they have offered, it is unwise and impossible to put a stop to these technologies. Thus it is the responsibility of the law and the market to consider what measures could be taken to solve the existing problem of fan creations. The law had already responded, but obviously those changes were mostly pushed by and in favor of the copyright owners. Moreover, they disrupted the “delicate balance” in copyright law, and the actions taken by the industries were largely ineffective, conservative, and sometimes problematic.

After exploring the fan phenomenon and its interaction with copyright law in the digital age in general, Chap. 3 then further uses China as an example to demonstrate how factors in macro-level such as political culture, laws and regulations concerning the market, pros and cons of law enforcement affect the performance of fan creations in the Chinese market. The findings of Chap. 3 can serve as the basis for determine the feasibility of solutions proposed in the subsequent chapters.

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